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Antitrust Risk Assessment of Net Zero Alliance Participation

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This alert addresses the antitrust risks associated with our bank clients' participation in Net Zero banking alliances, in light of recent litigation and a rapidly shifting political climate. Based on the pending *Texas v. BlackRock* case (No. 6:24-cv-437-JDK, E.D. Tex., filed Nov. 27, 2024) and changes to federal antitrust leadership, alliance members face a heightened risk of scrutiny and potential litigation. Nonetheless, banks that structure their climate efforts thoughtfully—and document legitimate business rationales—can significantly reduce exposure. Additionally, the First Amendment may consider refusals to deal as protected commercial speech rather than anticompetitive conduct. The memo concludes with concrete recommendations for how alliance participants can proactively mitigate risk under the current antitrust framework.

Political Hostility Toward Net Zero Alliances

The antitrust treatment of climate initiatives is undergoing a major shift. Net Zero banking alliances—such as NZBA and Climate Action 100+—involve industry-wide commitments to align financial activities with decarbonization goals. But the U.S. political landscape has become increasingly antagonistic to such efforts.

The conservative ascendance in the United States has manifested increasing hostility toward Net Zero alliances. For example, the Heritage Foundation's Project 2025 report, published in April 2022, recommended that the FTC set up an ESG/DEI collusion task force to investigate firms, particularly in private equity, to determine whether ESG is used to "meet targets, fix prices, . . . reduce output," or otherwise violate antitrust laws.

In June 2024, the House Judiciary Committee released an interim staff report describing a "climate cartel" of "left-wing activists and major financial institutions" that allegedly "collude to impose radical environmental, social and governance goals on American companies," including initiatives "to 'decarbonize' and reach 'net zero.'" Subsequently, House Judiciary Committee Chairman Jim Jordan (R-OH) and Antitrust Subcommittee Chairman Thomas Massie (R-KY) demanded information from more than 130 U.S. companies, retirement systems, and government pension programs about their involvement with Climate Action 100+. In December of that same year, the Committee sent information requests to 60 asset managers about their involvement in the Net Zero Asset Managers' initiative.

The re-election of Donald Trump has ratcheted up an even more antagonistic environment for Net Zero alliances, with the new administration signaling increased scrutiny of ESG and climate-related business coordination. The appointment of Andrew Ferguson as FTC Chair, who stated he might "investigate and prosecute collusion on DEI, ESG, and advertiser boycotts," has turned this political rhetoric into tangible regulatory risk. While Ferguson has promised to protect "freedom of speech" and avoid "politically motivated investigations," climate initiatives are more vulnerable than ever to antitrust challenges.

More State Enforcement?

This federal push is complemented by growing activism from conservative state attorneys general. In the past few years, they have sent several letters that signal an increased interest in enforcing state antitrust law.

- On March 30, 2023, the office of the Montana Attorney General, on behalf of the Montana Attorney General and 20 other Republican attorneys general, issued a letter to 53 of the largest asset managers in the United States, including BlackRock, State Street, and JPMorgan Chase. The letter asserted that the asset managers have disregarded their fiduciary duties to their clients by joining Net Zero alliances. The letter further asserted that the asset managers, after joining such initiatives, failed to advertise all of their funds as ESG despite the emissions commitments made; failed to adequately explain the risks of funds advertised as ESG; and failed to disclose conflicts of interest between climate and financial motives.

- On May 10, 2023, 17 Republican attorneys general filed a motion with the Federal Energy Regulatory Commission (FERC) seeking review of BlackRock's utilities holdings. In the motion, the attorneys general expressed concern over BlackRock using its voting stake to "pressure or force utility companies to phase out traditional energy investment."

- On May 15, 2023, 23 Republican state attorneys general sent a warning letter to a group of larger insurers that were members of the NZBA. In that letter, the AGs expressed "serious concern" that antitrust laws would be violated if the insurers used their market influence to pressure clients into adopting zero-carbon emissions practices.

The recently filed *Texas v. Blackrock* case, discussed below, may be the first of additional state enforcement actions in this area. While *Texas v. Blackrock* is the only litigation effort state attorneys general have launched so far, increased hostility signals that further enforcement actions may be forthcoming.

Recent Test Case: *Texas v. Blackrock*

Texas v. Blackrock is a landmark antitrust lawsuit brought by eleven U.S. state attorneys general against BlackRock, State Street Corporation, and Vanguard Group. These firms are accused of collectively influencing coal companies to reduce coal production thereby violating antitrust laws through coordinated shareholder actions designed to address climate change. The case presents novel and significant legal challenges under U.S. antitrust frameworks, especially considering the sustainability-driven motivations behind the defendants' alleged actions. The states claim violations of Section 7 of the Clayton Act, asserting that collective shareholding by these asset managers represents a form of indirect horizontal consolidation, akin to a merger, substantially lessening market competition. Additionally, they claim under Section 1 of the Sherman Act that the defendants unlawfully agreed to constrain coal production.

In response, the defendants moved to dismiss, contending that their investments fall within the Clayton Act's safe harbor for passive holdings. They emphasized that their stakes are minority, typically between 1% and 15%, and part of diversified index strategies rather than efforts to control operations. Even if safe harbor doesn't apply, the defendants argue the complaint fails to show any use of their ownership to reduce competition, such as coordinated proxy voting or board actions.

Their motion also challenges the plausibility of any conspiracy under Section 1, pointing to inconsistent voting behavior among the firms and a lack of "plus factors" typically used to infer collusion. For example, Vanguard often abstained or voted independently, and the firms retained separate engagement strategies. The defendants argue that participation in investor coalitions like NZAM or Climate Action 100+ was voluntary, non-binding, and consistent with fiduciary obligations to clients. Importantly, the motion asserts that any alleged coordination must be evaluated under the rule of reason rather than treated as a per se violation.

A Rule of Reason Framework

While *Texas v. Blackrock* may be dismissed for failure to state a claim due to thin or speculative allegations – including the lack of allegations as to the existence of a conspiracy, no direct financial benefit to defendants, and more—the lawsuit may also fail due to its inability to meet the effects analysis of the rule of reason standard. Under the rule of reason, courts must evaluate whether an agreement's procompetitive benefits outweigh any anticompetitive harm, moving through a structured burden-shifting analysis. The *Texas v. Blackrock* plaintiffs may find it difficult to meet the rule of reason standard for several independent reasons:

1. **Plaintiff's Initial Burden:** Plaintiffs must show that the agreement had actual anticompetitive effects. In *Texas v. BlackRock*, the states allege that coordinated shareholder actions reduced coal production and raised energy prices. However, defendants argue that production declines predated the alleged conspiracy and were driven by market shifts, including COVID-19 and competition from renewables, casting doubt on whether plaintiffs can meet their burden.
2. **Defendants' Procompetitive Justifications:** If plaintiffs meet their burden, defendants can argue that the actions addressed market failures by mitigating environmental risks that threaten long-term portfolio value. Climate risk mitigation can be framed as consistent with fiduciary duties, aiming to preserve economic stability rather than reduce competition.
3. **Plaintiffs' Rebuttal:** Plaintiffs may respond by challenging the legitimacy of these justifications or proposing less restrictive alternatives. For instance, they could argue that firms could have achieved similar goals through independent action rather than coordination.
4. **Balancing Effects:** Defendants may urge courts to consider broader economic impacts, including the systemic risks of climate change. Courts will need to weigh the net effects of the agreement and decide whether sustainability benefits justify any short-term competitive harm.

Depending on what evidence the plaintiffs may put forth to support their claims, the court may have multiple paths to dismiss the case under the rule of reason. How the court approaches these issues will be an important predictor on how future litigation against Net Zero participants will fare.

A More Flexible Consumer Welfare Standard?

Despite the *Texas v. Blackrock* defendants' raising of the rule of reason, the most widely favored standard today in the U.S. is the consumer welfare standard. It is commonplace to speak of antitrust as focused on consumer welfare, and to require claimants to make a demonstration of consumer harm.

Consumer welfare standards have already been applied by certain European authorities, such as in the seminal *Chicken of Tomorrow* matter. The case involved the Netherlands Authority for Consumers and Markets (ACM), which found an industry-wide agreement to prioritize chicken welfare standards (e.g., more living space, more natural sunlight) restricted competition, as it led to the removal of regular chicken from supermarket shelves, and did not meet the requirements for an exemption. The agreement encompassed all retailers in the Netherlands, covering 95% of the Dutch chicken meat market, which had all agreed to take regular chicken meat off their shelves. The main issue facing the ACM was whether the "anticompetitive arrangement" was an improvement in the interest of the consumers and whether the arrangement was necessary and proportional for reaching the goals of the improvement. The ACM gauged consumer welfare through a willingness-to-pay (WTP) analysis and discovered consumers were prepared to pay up to €0.68 extra per kilo of humanely raised chicken meat, but the cost for these measures would amount to an additional €1.46 per kilo. The ACM decided there were no net benefits to consumer welfare and found the industry-wide standard illegal.

Net Zero participants may run into similar challenges in defending their alliances against a traditional consumer welfare standard. It may be that consumers do not sufficiently demand, or are not sufficiently willing to pay for, asset management services guided by climate-related investment principles. Consumers might have a poor understanding of the actual benefits to the environment, have concerns about immediate costs over long-term payoffs (or losses paid out over those avoided), or harbor cultural and political biases.

Yet, the consumer welfare standard has shown some flexibility surrounding green-related initiatives and Net Zero alliances may benefit from a broader definition of consumer welfare. Some commentators observe that "alleviating a negative externality can reduce output of a relevant product yet increase consumer welfare." For example, in 2019, some automakers agreed among themselves and the state of California to meet emissions-reduction targets across U.S.-sold vehicles. The automakers' agreement had the potential to reduce output, due to higher R&D or production costs, which might translate into higher prices and lower demand. Nevertheless, regulators seemed to acknowledge agreements can be welfare-enhancing: they can improve non-economic concerns for consumers (e.g., health and well-being) or, alternatively, improve the welfare of *future* car consumers by increasing future supply (averting climate change's risks to the economy through, for instance, supply chain disruption). While the Department of Justice Antitrust Division opened an investigation into the automakers' agreement, it was subsequently closed without any action being taken. It is unclear whether a DOJ under a Trump administration would be similarly inclined. While the *Chicken of Tomorrow* case demonstrated that the consumer welfare standard remains critical in the EU and U.K., those U.K. regulators have shown greater openness to adopting a broader view of consumer welfare, which in part is statutory, than those in the U.S.

First Amendment Considerations

Members of Net Zero alliances may also raise First Amendment considerations in their defense. Courts have held non-economic group boycotts aimed at political or moral goals do not constitute anticompetitive behavior. The Supreme Court recognizes exceptions to liability for noneconomic boycotts that are predicated on the First Amendment. The exception was first recognized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), concerning a NAACP-led boycott of white-owned and segregated Mississippi businesses. The Court held that the boycott did not raise antitrust concerns because its purpose "was not to destroy legitimate competition" but rather "to force governmental and economic change." The Court emphasized the boycotters' civil rights objectives and lack of economic self-interest, as well as the absence of competition between the boycotters and targeted businesses. As another example, in *Missouri v. NOW*, 620 F.2d 1301 (1980), the Eighth Circuit held a boycott organized by a feminist group against political conventions in states that did not ratify the proposed Equal Rights Amendment was immune from antitrust law. Similarly, Net Zero participants might defend themselves on free-speech grounds, arguing that collaborations to meet climate investment goals do not raise antitrust concerns because the asset managers are not in competition with the coal companies, nor do they benefit economically from harming the coal companies. However, pursuing this line of argument would require a full rule-of-reason analysis at a minimum, discussed *supra*, and a strong showing that the Net Zero participants were primarily motivated by political or moral concerns.

Mitigation Strategies

In defending themselves against the risk of antitrust legislation, in whatever context, Net Zero alliance members should consider doing some or all of the following.

- **Document business justifications for entering alliances.** Clearly document climate initiatives as risk management strategies focused on protecting shareholder value, not restricting competition.
- **Ensure independent decision-making.** Maintain independent decision-making on all lending and investment decisions despite alliance commitments. Know and document why any Net Zero or related decisions are taken irrespective of what rivals may decide.
- **Abide by general antitrust compliance protocols.** Conduct alliance meetings with robust protocols, including legal review of agendas, monitoring discussions, and maintaining minutes.
- **Deploy careful messaging.** Avoid language suggesting either collection action or any intent to reduce industry output or raise prices. Instead, focus on protecting long-term portfolio value.
- **Use voluntary standards.** Ensure climate commitments remain voluntary with flexibility in implementation approaches.
- **Consider jurisdictional variance.** If operating globally, leverage more permissive regimes (e.g., EU, U.K.) to pilot ESG alliances.
- **Conduct routine legal review.** Especially as the regulatory environment shifts under the second Trump administration, subject all alliance materials and commitments to thorough and regular legal review.

Participation in Net Zero alliances carries substantial antitrust risk given the current political and regulatory environment. However, banks that structure their client efforts thoughtfully – and create robust documentation of legitimate business justifications based on fiduciary duties and risk management – can significantly reduce their exposure.

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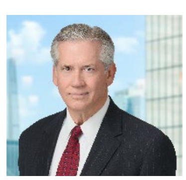

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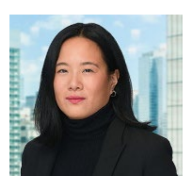

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