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The Texas v. Blackrock ESG Case: The FTC and DOJ Have Entered the Chat

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By: David R. Pearl, Sam D. Sherman

On May 22nd, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") filed a joint Statement of Interest in a case against several prominent asset managers brought last year by the Texas Attorney General. In their brief, the DOJ and FTC argue—for the first time in a court filing to our knowledge—that public, industry-wide initiatives, such as Environmental, Social, and Governance ("ESG") measures, can violate the antitrust laws.

This does not come out of nowhere. In September 2019, the DOJ under President Trump launched an investigation into whether four major automakers had violated the antitrust laws by voluntarily agreeing with the California Air Resources Board to adhere to stricter fuel emissions standards. The investigation closed in February 2020 without a lawsuit. But after Donald Trump won the presidency for a second time last year, and in light of a number of comments made by the new FTC leadership, it was abundantly clear that ESG policies were in the crosshairs of federal antitrust enforcers.

State attorneys general ("State AGs"), not federal enforcers, however, were the first movers in this space. In November 2024, a coalition of eleven State AGs, led by Texas' Ken Paxton, sued three of the world's largest institutional investors—BlackRock, State Street, and Vanguard—for allegedly conspiring to suppress U.S. coal production (and thus increase coal prices) in violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act. The lawsuit alleges that all three companies acquired substantial (albeit minority) shares in every significant publicly held U.S. coal producer, and exercised their influence as shareholders to push each producer to reduce coal output in accordance with industry-wide ESG initiatives.

The DOJ and FTC's joint Statement of Interest in this case makes clear that the Trump Administration was not making idle threats about collaborations on ESG initiatives and provides a window into how federal antitrust enforcers may pursue their own ESG cases over the next several years:

- ***Retrospective Challenge to Minority Interest Acquisitions Under Section 7.*** The State AGs challenge the investor defendants' acquisitions of minority shares (ranging from 1.2% to 15.56%) in coal companies under Section 7 of the Clayton Act, which prohibits acquisitions that substantially lessen competition. The DOJ and FTC acknowledge that most Section 7 cases prospectively analyze the reasonably probable future effects of an acquisition, but argue that a claim focused on the use of stock should also analyze post-acquisition behavior by the acquirer and the effects of the acquirer's involvement. Consequently, according to the DOJ and FTC, they may use Section 7 to retrospectively challenge stock acquisitions (even of a non-controlling interest) by ESG-minded shareholders. The idea that investors' combined minority shares in competitor companies could dampen incentives to compete and form the basis of an antitrust violation has been debated by academics in recent years and was incorporated into the 2023 revision of the Merger Guidelines. But this is the first instance, to our knowledge, of the FTC and DOJ embracing such a "common ownership" theory in an active litigation.

- ***Drawing a Line Between Passive Investing and Anticompetitive Behavior.*** The defendants emphasize that, as asset managers, their acquisitions fall under Section 7's exemption for stock purchases that are "solely for investment." By contrast, the DOJ and FTC criticize defendants' "attempt to mask allegations of illegal, anticompetitive behavior behind the veil of passive investing and good governance principles." It is not entirely clear when, in the Agencies' view, investors who lobby for "good governance" across multiple competing companies in which they own shares eventually cross the line into anticompetitive behavior. But the joint statement appears to draw a distinction between efforts to "influence or change governance structures and processes" (within the exemption) and efforts to control the strategy or day-to-day operations of a company (outside the exemption).

- ***Industry ESG Initiatives Get No Special Protection from Section 1.*** The plaintiffs also allege that the defendants violated Section 1 of the Sherman Act, which is designed to prevent concerted activity that harms competition. The violation allegedly stems from both unlawful agreements to reduce coal output and unlawful sharing of competitor information, each done in accordance with public ESG initiatives. The DOJ and FTC pointedly write that "it is irrelevant to the existence of concerted action that the alleged agreements at issue in this case focus on 'climate' issues."

Indeed, not only does it appear irrelevant to the Agencies that concerted action stem from an ESG initiative, but, in light of some of their leaderships' prior comments, it may be that enforcement may be *more* likely in such a scenario. We expect that this joint filing is likely just the first step. Stay tuned!

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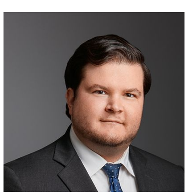

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