

Antitrust Laws and ESG Shareholder Engagement¹

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I. Introduction

Shareholder activism to further environmental, social, and governance (ESG) goals faces intense antitrust scrutiny in the United States. Some members of Congress and state attorneys general claim these efforts may violate the antitrust laws.² For example, in November 2023, the House Judiciary Committee issued subpoenas for documents and communications to As You Sow and the Glasgow Financial Alliance for Net Zero, claiming such initiatives “appear to facilitate collusion that may violate U.S. antitrust law.”³ This scrutiny may have a chilling effect on shareholders and companies seeking to further ESG-related initiatives or goals.⁴

In our view, many of the antitrust arguments against ESG-related shareholder activism are overstated. The reality is that many common forms of shareholder activism do not raise any substantive antitrust risks, because they do not constitute agreements under antitrust law, nor do they result in any meaningful harm to competition. Further, shareholders can manage antitrust risk by following reasonable precautions. This memorandum describes common forms of shareholder activism in furtherance of ESG and explains how antitrust law applies to these efforts. While we focus primarily on U.S. antitrust law, we also highlight possible material differences in approach in jurisdictions that may take more permissive stances towards ESG collaborations, such as the European Union (EU) or the United Kingdom (UK).

This advisory is for information purposes only and should not be construed as legal advice. By clarifying the general scope of antitrust law, we hope to help shareholders and advocacy organizations engage with companies and counsel to further their objectives with a greater understanding of the antitrust implications and precautions that will reduce the risk of running afoul of the antitrust laws. Activist shareholders cannot completely rule out any scrutiny or investigation from an antitrust enforcer—the only sure way to do that is to avoid ESG-related shareholder activism entirely. But shareholders can take reasonable and practical steps, including those outlined below, to increase the likelihood that any antitrust claims against them lack merit.

This advisory proceeds as follows. Section II explains certain antitrust law principles that are most likely to apply to common forms of shareholder activism. Section III outlines the types of shareholders that are typically involved in activism efforts and the common forms of activism in which they engage. Section IV explains how the antitrust laws would typically apply to common scenarios in shareholder activism and lays out general guidelines for shareholders to follow. Section V concludes.

II. Relevant Principles from Antitrust Law

In this section, we define and explain antitrust concepts necessary to analyze common forms of shareholder activism.

There must be an agreement. For antitrust purposes, it does not take much to have an agreement. Agreements do not need to be formal written contracts. They can be informal understandings, established through emails or phone calls. An agreement may even be inferred from circumstantial evidence, such as competitors acting in ways that do not make economic sense, or evidence that competitors have exchanged confidential pricing information with each other.⁶ However, a group of competitors merely acting in the same way is not enough to establish an agreement. There must also be evidence, either direct or circumstantial, suggesting there has been an agreement among the competitors to take a common course of action.⁷

The agreement must be among competitors. The agreement at issue must be among firms that compete with one another, or that may potentially compete against each other in the future. For antitrust purposes, “competition” does not just mean competition to sell products or services to end consumers. Companies can also compete to buy inputs. For example, food manufacturers may compete with one another to purchase agricultural inputs for their products. Further, companies may compete for labor if they hire the same types of workers, even if they do not compete in downstream product or service markets.⁸

The antitrust laws also regulate “vertical agreements,” or agreements among firms at different levels of the supply chain, such as manufacturers and distributors. They are generally considered less harmful than horizontal agreements. While shareholder activism is unlikely to raise purely vertical antitrust issues, there is one arguable exception worth further discussion. Some anti-ESG advocates allege that ESG-related shareholder activism may constitute a “hub-and-spoke” conspiracy in violation of the antitrust laws.⁹ A “hub” is typically a powerful supplier or customer, while the “spokes” are a group of firms that do business with the hub and compete with one another. A hub-and-spoke conspiracy is created through both vertical and horizontal agreements. First, each of the spokes reaches a vertical agreement with the hub. Second, the spokes form a horizontal agreement among one another (often called “the rim of the wheel”) through the hub. The key point, as we will discuss below, is that a hub-and-spoke conspiracy cannot be established without evidence of a horizontal agreement among the competing spokes.¹⁰ It is not enough to show there is a vertical relationship between the hub and each spoke.

The agreement must unreasonably harm competition. Most agreements among competitors are evaluated under the antitrust “rule of reason.” Essentially, the rule of reason asks whether the agreement at issue creates procompetitive benefits that outweigh any anticompetitive harm.¹¹ Antitrust law construes “procompetitive benefits” narrowly, such as lower prices, higher output, or increased innovation. At least in the United States, courts and enforcers cannot account for other policy goals, such as ESG objectives.

Some horizontal agreements always or almost always tend to harm competition and decrease output. These agreements are considered “*per se*” illegal, meaning they are illegal regardless of their actual effect on competition. The enforcer or plaintiff merely needs to prove that the agreement existed. Courts have recognized price-fixing (agreements on any aspect of price or price-related terms), market allocation (agreements to divide territories, customers, or products), and bid-rigging (agreements to influence an otherwise competitive bidding process) as *per se* antitrust violations. In the United States, *per se* violations are punishable by civil and criminal penalties. Rule of reason violations are subject only to civil penalties.

B. Group Boycotts

A group boycott, also called a concerted refusal to deal, is a specific type of horizontal agreement that may violate the antitrust laws. As some anti-ESG critics have claimed ESG initiatives constitute group boycotts, the concept is worth further explanation.¹²

In brief, a group boycott is an agreement among competitors to refuse to do business with another firm, such as another competitor, a supplier, or a customer.¹³ Group boycotts can take many forms. For example, a group of competing sellers may agree they will not do business with a customer, unless the customer agrees they will not buy from lower-priced competitors.¹⁴ Firms may also agree they will not sell to a customer, typically at the request of another powerful customer. In one such case, a national toy retailer obtained agreements from several toy manufacturers not to supply lower-priced club retailers.¹⁵ Regardless of the precise form they take, the goal of the group boycott is to harm a competitor (such as the lower-priced sellers or lower-priced club retailers in the examples above). Group boycotts typically target specific companies, not entire industries or classes of companies (e.g., “the fossil fuel industry,” “suppliers who do not adopt fair labor standards”). To our knowledge, no court has considered whether an attempted group boycott of an entire industry would violate the antitrust laws.

Group boycotts are typically evaluated under the rule of reason. The U.S. Supreme Court has clarified that a group boycott is *per se* illegal only when it involves an agreement among direct competitors with market power to deny another competitor something it needs to compete.¹⁶ By contrast, an agreement between one supplier and one retailer whereby the supplier agrees not to sell its products to competing retailers that do not adopt ESG commitments would be subject to the rule of reason.¹⁷ An ESG-related group boycott could still violate the rule of reason if there is meaningful harm to competition; as noted above, antitrust law generally would not recognize ESG benefits as procompetitive benefits.

As a final note, U.S. courts have held that group boycotts that are non-economic in nature and motivated solely by political or moral goals do not violate the antitrust laws. In *NAACP v. Claiborne Hardware Co.*, the Supreme Court

upheld the NAACP’s right to boycott white-owned businesses resisting integration, because the purpose of the boycott “was not to destroy legitimate competition” but to “vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself.”¹⁸ The Court further noted there was “no suggestion that the [participants in the Claiborne boycott] were in competition with the white businesses or that the boycott arose from parochial economic interests.”¹⁹ As another example, in *Missouri v. NOW*, the U.S. Court of Appeals for the Eighth Circuit held that a boycott organized by a feminist group against political conventions in states that did not ratify the proposed Equal Rights Amendment was held immune from the antitrust laws, reasoning that “using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act.”²⁰

The distinction between a “non-competitive political” boycott exempt from antitrust and a “commercial” boycott subject to antitrust is not always clear. One helpful guideline is to ask whether the boycotters profit from any reduction in competition resulting from the boycott.²¹ In *FTC v. Superior Court Trial Lawyers Association*, a group of trial lawyers from the District of Columbia agreed to stop representing indigent criminal defendants until legislation was passed to increase the lawyers’ compensation.²² The lawyers argued that the boycott was justified by the public interest in obtaining better representation for indigent defendants, but the Supreme Court disagreed and held it constituted an antitrust violation.²³ The Court reasoned that the boycott was an antitrust violation because it was “conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market.”²⁴ Note that once a boycott or other agreement is found to be “commercial,” the fact that the participants might have good intentions does not save the agreement from antitrust scrutiny.²⁵

At least some ESG-related goals—particularly those focused on issues like racial justice, human rights standards, or slavery in supply chains—may fall within this exception to the antitrust laws. For example, companies could argue that collaborations to terminate suppliers engaged in human rights abuses in their supply chains do not raise antitrust concerns, because the companies are not in competition with the suppliers, nor do they benefit economically from harming or terminating the suppliers.

C. Exchange of Competitively Sensitive Information

Another concern in the shareholder activism context is the exchange of competitively sensitive information (CSI) among competitors. Exchanging CSI among competitors can lead to antitrust liability in two ways. First, the exchange of CSI could be used as evidence of a *per se* unlawful price-fixing or market allocation arrangement among competitors.²⁶ As described above, such an arrangement can result in both criminal and civil liability. Second, the mere exchange of CSI, even if not amounting to some form of *per se* illegal agreement, may be illegal in and of itself under the rule of reason and trigger civil liability. Third parties that facilitate the exchange of CSI among competitors can potentially be held liable for antitrust violations, and they are likely targets for antitrust scrutiny and investigation.

CSI is challenging to define. Whether information is “competitively sensitive” is fact-specific and varies by industry. As a general rule, CSI is any nonpublic information that, if shared among competitors, would affect their competitive decision-making. Information is competitively sensitive if sharing it allows the recipient to predict a competitor’s pricing or output, changes the recipient’s competitive decision-making, facilitates collusion or coordination, or otherwise causes competitors to compete less vigorously in the marketplace. Based on caselaw and guidance from the antitrust agencies, the following are often characteristics of CSI:

- **Sensitivity:** The information pertains to a parameter of competition, such as price, cost, margins, or output.
- **Timeliness:** The information is recent or is forward looking.
- **Detail:** The information includes details on specific facilities, suppliers, or customers, or is otherwise not aggregated or anonymized.
- **Asymmetry:** The information is not publicly available, and/or is not made available to others in the industry.

The table below lists examples of information that are and are not likely to be considered competitively sensitive.

| Likely CSI | Likely Not CSI |
|--|---|
| <ul style="list-style-type: none"> ▪ Pricing ▪ Output ▪ Costs ▪ Capacity or production capability ▪ Customer lists/prospects ▪ Future product or R&D roadmaps ▪ Granular information on employee compensation ▪ Granular information on customers or product performance (e.g., revenues for specific products or customers) | <ul style="list-style-type: none"> ▪ Publicly available information ▪ Aggregated information (e.g., global or regional sales) ▪ Historical information |

III. Background on Shareholder Engagement

This section describes the types of shareholders that participate in ESG-related shareholder activism, and common forms of engagement among shareholders and between shareholders and companies. This background, based on interviews with shareholder activists and organizations in the field, helps inform the antitrust analysis of shareholder activism.

A. Types of Shareholders Engaged in Activism

Shareholders propounding ESG-related goals are varied. Based on our research, shareholder proponents of ESG goals include pension funds, foundations, religious organizations, asset managers, and limited partners in private equity firms. Nonprofit organizations also play an important role in the shareholder activism space by assisting shareholders in advocacy efforts, facilitating dialogue among shareholders, and providing research and best practices.

In general, shareholders may compete with one another to buy and sell shares in public companies. Some types of shareholders, such as asset managers, may compete downstream with one another to attract investors in their funds. Similarly, limited partners may compete with one another to invest capital with a general partner administering a private equity fund.

B. Common Forms of Shareholder Engagement

Below we outline ways that shareholders commonly engage with each other, and with companies, to further ESG objectives.

Shareholder educational efforts. Shareholders and organizations may hold informal meetings or initiatives to educate other shareholders on specific ESG issues. These initiatives may or may not also focus on specific companies.

Proxy voting recommendations. Shareholders and advocacy organizations may recommend shareholders vote a certain way on shareholder proposals, guided by ESG criteria. For example, an advocacy organization may evaluate director candidates and make voting recommendations to shareholders based on the director's performance on an ESG-related issue. Relatedly, proxy advisory firms (such as ISS and Glass Lewis) research and provide recommendations to shareholders on proxy voting, including recommendations on ESG-related proposals.²⁷

Informal approaches to companies. Shareholders may approach one or more companies outside the scope of formal mechanisms. For example, shareholders may write a letter to a company requesting a change in some aspect of the company's behavior, or requesting the company release more information about its activities. Further, shareholders may meet with company management to discuss issues or put forth proposals. These informal approaches may simply describe a problem or may put forward concrete demands for change.

Shareholder proposals. Shareholders may put forth proposals for shareholder resolutions on which all shareholders vote. Proposals are typically put forth by one proponent but can be "co-filed" by other proponents. Activist shareholders may collaborate on language for a proposal to be used across multiple companies.

IV. Applying Antitrust Law to Shareholder Engagement

In this section, we apply the antitrust law principles laid out in Section II to the common forms of shareholder engagement outlined in Section III. We begin with collaborations among shareholders, and then proceed to the facilitation of collaboration among companies.

A. Collaboration Among Shareholders

In general, shareholders are free to collaborate with other shareholders of the same company on ESG initiatives without fear of antitrust liability. Shareholders are permitted to collaborate and align with one another to exercise their rights, such as calling for shareholder meetings or crafting proposed resolutions. There are few cases where antitrust law has been used to challenge collective action among shareholders, and these cases involve shareholders who were also business competitors with one another (e.g., a joint venture among competitors).²⁸

Shareholders may also want to collaborate with one another to prepare template shareholder proposals to be used across multiple companies or coordinate on the companies each shareholder will approach (to avoid duplicative efforts). These types of collaborations do not raise antitrust concerns, as they do not affect any competition existing between shareholders.

As noted above, shareholders do compete with one another, either to buy or sell shares in a company or to attract investors to funds. But shareholders do not compete with one another to advocate regarding ESG initiatives. The antitrust laws forbid shareholders from reaching agreements in areas where they compete (fees charged to investors) but allow shareholders to collaborate in areas where they do not compete (ESG advocacy). We would recommend shareholders *not* coordinate decisions to buy or sell shares of a given company that does not meet ESG criteria (though we understand coordination on investment or divestment decisions is not typical in shareholder activism.) We also recommend that asset managers *not* coordinate with one another on parameters of competition

to attract downstream investors, such as management fees or investment options, though such coordination seems unnecessary to further ESG initiatives.

B. Facilitating Anticompetitive Conduct Among Companies

Shareholder engagement involving multiple companies can present antitrust risks if it facilitates improper sharing of CSI or leads to an impermissible horizontal agreement among competing companies. But as we explain in this section, such risks are manageable. We describe potential antitrust pitfalls and provide guidance so shareholders and advocates can stay on the right side of the law.

1. Risks from Sharing Competitively Sensitive Information

Shareholder engagement can present antitrust risk if it leads to improper sharing of CSI among competing companies. Shareholders may face antitrust liability for facilitating improper information sharing. The good news for shareholders is that the antitrust risk is remote, as shareholders generally do not receive or share nonpublic information from companies.²⁹ Any remaining risk can be managed by taking precautions with any nonpublic information received.

Publicly available information. Shareholders are free to share publicly available information and analysis derived from public sources, either with other shareholders or with the companies in which they invest. By definition, such information is not competitively sensitive.

Reception of nonpublic information from a company. We understand that companies generally do not share nonpublic information with shareholders due to securities regulations. Even if they do, because the nonpublic information is not considered material³⁰, shareholders are highly unlikely to face antitrust liability for merely receiving CSI from a company or from another shareholder (particularly if the information was provided inadvertently). At a minimum, the shareholder would also need to take further steps, such as passing the information along to competing firms.

At times, shareholders may need to obtain nonpublic information from a company in order to engage regarding ESG proposals or to evaluate the company's compliance with ESG commitments. For example, a company's management may need to share information about the company's future plans to reduce its carbon footprint or share internal data on employee compensation in response to a pay equity proposal. In such cases, shareholders should request only the information needed to accomplish their goals. As discussed above, exchanging information that is aggregated in nature (e.g., average pay for a job function) or information that is historical in nature is less likely to raise risk. Shareholders should also implement safeguards to ensure the nonpublic information received is not shared with other companies that compete with the company that shared the information, because of the risk the nonpublic information may be considered competitively sensitive.

Sharing nonpublic information with a competing company or its shareholders. Under U.S. antitrust law, a shareholder that passes along one company's CSI to a competing company could face antitrust liability. But unless the shareholder knew that the information would be used to facilitate an agreement among competing companies, there would be no risk of *criminal* antitrust liability. The shareholder could potentially face civil liability, which would be assessed under the rule of reason (in other words, depending on whether the exchange harmed competition more than it benefited competition). To minimize the risk of civil liability in the U.S., shareholders receiving nonpublic information from a company should take reasonable steps to guard against its disclosure to competing companies.

Under EU competition law, shareholders are unlikely to be found liable if they unwittingly share CSI with competing companies (i.e., they shared the information but did not understand its competitively sensitive nature). A shareholder could theoretically be found liable as a "facilitator" of anticompetitive information sharing. However, facilitators are only liable if they know that their own behavior can contribute to the companies' anticompetitive conduct. In other words, they must know the information is competitively sensitive in nature or is facilitating an agreement among competing companies.

Best practices regarding nonpublic information. We recommend shareholders follow the below guidance when engaging with other shareholders and companies:

- Do not request or share information you know to be CSI.
- Do not share nonpublic information received from a company directly with its competitors. For example, if Company A is willing to make a concession to shareholders in response to a proposal, and that concession is not publicly known, shareholders should not disclose the concession to Company B, where a similar proposal is pending. If you decide to maintain the nonpublic information, note its source, and take precautions against inadvertently sharing it with others.
- If you find it is necessary to share nonpublic information with another company or shareholder, proceed with caution. Consider whether it constitutes CSI based on the guidelines provided above and seek legal counsel if needed.

2. Risks from Facilitating Anticompetitive Agreements Among Companies

Shareholder engagement efforts may focus on multiple companies within the same industry, or on an industry broadly. For example, shareholders advocating for decarbonization efforts may focus on oil and gas producers. Living wage initiatives may be targeted at large apparel brands with suppliers in developing countries. Activist shareholders may also encourage their companies to enter into ESG-focused collaborations with competitors. For example, shareholders may urge large retailers to join an industry code of conduct regarding human rights-related due diligence in their supply chain.

These types of engagements are common in ESG-related shareholder activism. They generally do not raise substantive antitrust concerns for the shareholders or organizations involved. But shareholders should understand that facilitating discussion and collaboration among competing firms inherently raises some antitrust risk. Shareholders can face antitrust liability if they facilitate horizontal agreements among competitors that unreasonably restrain competition. The good news is that most ESG-related initiatives do not rise to this level. Shareholders can further manage their risk by following some simple precautions.

Engagement with multiple competing firms does not constitute an agreement. As we discussed in Section II.A above, proving an antitrust violation requires evidence of an agreement among competing firms. It is not enough for an antitrust plaintiff to show that a group of competitors merely behaved in the same way. They must also show direct or circumstantial evidence that the competitors agreed to coordinate their actions.

Shareholder activists often approach multiple firms in the same industry with a proposal, and the firms they approach may compete with one another. As a hypothetical, suppose a group of shareholders approach every large grocery retailer in the United States and ask them to adopt a paid sick leave policy with a minimum number of paid sick days. The shareholders engage with each grocery retailer individually. The shareholders do not ask each grocery retailer to meet with their competitors, nor do they exchange messages or information among the grocery retailers.

In our hypothetical, there is no agreement among the competing grocery retailers, and no antitrust violation. This is true even if every retailer agrees to adopt the proposed sick leave policy. There is no express agreement among the grocery retailers to adopt the policy. Nor is there any circumstantial evidence indicating the retailers have reached an understanding with one another to adopt the policy. To infer the existence of an agreement, courts look for facts that would exclude the possibility that the parties were acting independently. These facts, often called “plus factors,” can include a motive to conspire (meaning the parties can do something in concert that they could not do on their own), evidence that the actions taken made no economic sense without a conspiracy (e.g., refraining from competing for each other’s customers), or traditional evidence of conspiracy (e.g., establishing the existence of meetings or information exchanges among the parties).³¹ No plus factors are present here. Each individual retailer is acting on its own in response to its shareholders’ demands. There is no reason to think that a more generous paid sick leave policy is motivated by conspiracy or lacks economic sense.³²

Anti-ESG advocates may argue that the hypothetical presented above constitutes a hub-and-spoke conspiracy. For example, in a recent op-ed, Sen. Tom Cotton argued that Climate Action 100+, an investor-led initiative to reduce greenhouse gas emissions, “may constitute a ‘spoke and hub conspiracy’” because “firms [in the initiative] often communicate with multiple competing companies at the same time.”³³ But the mere fact shareholders “communicate with multiple competing companies at the same time” is not sufficient to establish the existence of a horizontal agreement *among the competing companies*. An antitrust plaintiff would either need to show direct evidence of the agreement, or circumstantial evidence from which a court could infer the agreement exists.³⁴ Examples of sufficient circumstantial evidence would include evidence that each company was willing to adopt the sick leave policy only if other companies did so as well, or evidence that executives among the companies were having meetings or phone calls around the time of deciding to adopt the policy.

Engagement with one company regarding its suppliers or subcontractors does not constitute an agreement. We understand shareholders may engage with a company regarding ESG issues in its supply chain or with subcontractors. As one example, shareholders may demand a company ensure that its suppliers pay their employees a living wage. As another example, a company may outsource its janitorial services to a subcontractor. The company’s shareholders may be concerned that the company lacks oversight over the subcontractor’s treatment of its janitorial workers, and they may push the company to ensure their subcontractors respect fair labor practices.

There is little antitrust risk to shareholders from advocating to a company that it should establish minimum ESG standards for its suppliers or subcontractors. In general, the antitrust laws permit companies to decide unilaterally who they will deal with, and on what terms. As discussed in the next section, antitrust concerns may arise when shareholders advocate that a company collaborate with other companies in their industry to further an ESG-related goal.

Many common ESG-related collaborations among companies do not raise antitrust concerns. Shareholder activists may propose that a company join in some form of ESG-related collaboration with other companies in their industry, such as adopting a standard or an industry code of conduct. In general, these collaborations are unlikely to raise antitrust concerns, either because they do not constitute an agreement for antitrust purposes (because the companies do not reach an understanding about the actions each company will take) or because they do not have an impact on any significant parameter of competition, such as product prices, product quality, output levels, or

innovation. Below, we examine common forms of ESG collaborations, analyze the antitrust issues involved, and recommend best practices to ensure the collaborations do not violate the antitrust laws.

Industry standards, codes of conduct, or certifications. Shareholders may encourage companies to adopt an ESG-related standard or code of conduct. For example, shareholder proposals may encourage a company to adopt a standard to reduce emissions like the Science Based Targets initiative (SBTi). Standards may help companies further their ESG goals by providing best practices to implement commitments and ways to measure progress. Similarly, shareholders may also encourage companies to join ESG-related certifications. For example, grocery retailers may wish to implement a certification for agricultural products that were grown using labor paid a living wage. These certifications can be procompetitive because they give consumers more information about the products they are buying. The antitrust laws have long allowed for the establishment of industry standards or certifications. But there is inherent antitrust risk when bringing together competitors to establish and administer a standard or certification. Further, participating companies could deny a competing firm access to the standard or certification in order to undermine their ability to compete.

To guard against risk, we recommend participation in standard or certification programs be voluntary and nonbinding. By this, we mean participating companies should be free to choose whether and how they will comply with a proposed standard or code of conduct and should be able to go above and beyond that standard if they so choose. Companies should not form a binding or mandatory agreement with their competitors on the standard or certification, meaning they agree not to deviate from or exceed the standard or certification requirements. Participation in the certification or standard should be nonexclusive, meaning that participating companies should be able to join other standards or certifications on the same topic if they want. Finally, these programs should have transparent and objective criteria for participation. It is helpful if the standard or certification is administered by an independent third party. This ensures participants will not unfairly deny access to a competitor.

Commitments or withdrawal agreements. Shareholders may encourage companies to collaborate on ESG-related commitments, such as a joint commitment to use more sustainable inputs in production. Along the same lines, shareholders may encourage companies to jointly cease business practices that run counter to ESG objectives, such as a joint commitment to stop using hazardous chemicals in manufacturing. Such agreements may be necessary to signal market demand for a more sustainable input or to eliminate a “first-mover” risk from discontinuing a cheaper input or product option that consumers value. But commitment or withdrawal agreements can also raise antitrust risk if they have a significant impact on competition (i.e., affect prices, output, innovation, or consumer choice).

To guard against antitrust risk in this context, we recommend shareholders avoid promoting commitments or withdrawal agreements that are likely to significantly increase price or significantly reduce output or consumer choice. (Shareholders can still advocate that a company unilaterally make changes to its suppliers or product lines to achieve an ESG-related goal.) As one cautionary example, the U.S. Department of Justice Antitrust Division investigated a collaboration among automakers and the state of California regarding heightened standards for auto emissions, reportedly because of a concern that heightened emissions standards would reduce the number of product lines available to consumers.³⁵ The Antitrust Division eventually closed its investigation without bringing legal action.³⁶

Living wage collaborations. Shareholders may encourage companies in an industry to agree on living wage standards for their workers. For example, a group of grocery retailers could form a collaboration to ensure the farms from which they buy produce pay workers a living wage. Such collaborations can be helpful by allowing companies to collaborate on methodologies and best practices for achieving a living wage. But antitrust risk can arise if companies agree on a binding wage level they will offer employees (meaning they cannot deviate from or exceed the agreed-upon wage rate). Recall that for antitrust law purposes, firms compete for labor if they hire the same types of workers, even if they do not compete in downstream product or service markets. It would be permissible for companies to collaborate on methodologies used to calculate a living wage benchmark based on local conditions, or to exchange best practices for determining a living wage. It would also be permissible for a company to make a commitment to its shareholders.

Finally, while competition authorities in the EU and UK have signaled a more permissive approach to ESG collaborations among companies, the principles outlined above would generally apply. Shareholders engaging with companies operating in the EU and UK that want to explore additional flexibility offered in those jurisdictions, such as concerning withdrawal agreements, should seek antitrust counsel.

Best practices when engaging with companies. In general, shareholders are unlikely to face substantive antitrust risk simply by making proposals to companies that involve collaboration with competitors. To minimize any risk, we recommend shareholders take the following precautions.

Keep advocacy flexible. We understand that securities regulations bar shareholders from micromanaging in shareholder proposals, so such proposals are typically flexibly written (e.g., “adopt a performance standard like SBTi”). We recommend shareholders maintain this flexibility for antitrust purposes as well. Flexible proposals will give each company the latitude to decide how they will implement an ESG objective and will reduce the appearance of an impermissible agreement among competitors entered into as a result of shareholders’ engagement. Shareholders should take care to maintain this flexibility in informal conversations or exchanges with companies, not just in written proposals.

Advocate to each company independently. Shareholders can encourage companies to collaborate with competitors. Further, shareholders can point out to a company that their competitors have taken public actions towards adopting or implementing a standard and encourage them to do the same. But shareholders should avoid facilitating discussions or exchanging information among competitors regarding a potential collaboration. Leave it to the companies (and their counsel) to discuss and implement collaborations.

Guardrails on topics to discuss. As shareholders engage with companies in informal discussions, written correspondence, or shareholder proposals, we recommend following the below guardrails. There may be “edge cases” where a shareholder feels the need to go beyond these guidelines; in such cases, we recommend seeking antitrust counsel.

| Do discuss or propose: | Do not discuss or propose: |
|---|--|
| <ul style="list-style-type: none"> ▪ publicly available information, including information about competitors or industry trends ▪ the company’s plans to achieve ESG-related goals ▪ the company’s participation in ESG-related standards, codes of conduct, certifications, or other collaborations ▪ adoption of best practices or methodologies to achieve ESG goals | <ul style="list-style-type: none"> ▪ information about another company’s operations or strategies that is not already publicly known ▪ prices the company pays to its suppliers (shareholders may discuss the wages a company pays employees but should avoid discussing highly granular/specific data and should safeguard any data received) ▪ prices the company charges to its customers ▪ facilitating specific agreements among companies or passing information or suggestions from one company to another (you may encourage companies to collaborate to achieve ESG objectives but leave it to the companies themselves to negotiate and implement collaborations). |

V. Conclusion

Despite the intense scrutiny being placed on ESG-related shareholder activism, the reality is that most common forms of shareholder activism do not violate the antitrust laws. Shareholder activism typically does not involve facilitating the exchange of competitively sensitive information or facilitating anticompetitive agreements among competing firms. While a legislator or antitrust enforcer is free to scrutinize or investigate ESG-related forms of activism, shareholders who are informed about antitrust laws and take appropriate precautions can be reasonably confident that any such investigation is unlikely to find a substantive antitrust problem.

For any questions or additional information about this topic, please contact [Brent Snyder](#), [Jindrich Kloub](#), or any member of the firm’s antitrust practice.

This advisory was originally produced for Omidyar Network. Wilson Sonsini partners Brent Snyder and Jindrich Kloub contributed to the preparation of this advisory.

[1] This communication is provided as a service to our clients and friends and is for informational purposes only. It is not intended to create an attorney-client relationship or constitute an advertisement, a solicitation, or professional advice as to any particular situation.

[2] See, e.g., Ross Kerber, “US House Judiciary leader subpoenas documents from climate groups,” Reuters.com (June 15, 2023) ([link](#)); Alicia McElhaney, “How the ESG Backlash Has Hit One Small Firm,” Institutional Investor (Oct. 3, 2023) ([link](#)).

[3] Press Release, “Chairman Jordan Subpoenas As You Sow and GFANZ in ESG Investigation,” Nov. 1, 2023 ([link](#)).

[4] For convenience, this memo will use “ESG” as shorthand for the very broad set of environmental, social, and governance goals investors seek to advance. “Environmental” issues may include greenhouse gas emissions, air, water, and ground pollution, sustainable production processes, and land use concerns like deforestation or biodiversity. “Social” issues may include labor issues, racial justice initiatives, and equitable hiring practices. “Governance” issues may include shareholder rights, executive compensation, and matters of corporate behavior such as anti-corruption or anti-bribery practices. Some ESG initiatives may be subject to greater scrutiny from legislators or enforcers, but the legal analysis of those initiatives will generally be the same.

[5] The antitrust laws also address “unilateral conduct,” or the things a firm does on its own. Unilateral conduct is unlikely to raise antitrust concerns unless a firm has market power and takes actions to harm competition. Shareholder activism is unlikely to raise issues under a unilateral theory, and we do not address it further in this advisory.

[6] See *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1245 (3d Cir. 1993) (finding defendants’ refusal to compete for one another’s customers did not make economic sense unless the defendants

had agreed not to compete); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (finding senior executives' exchange of future pricing information was sufficient to infer an agreement).

[7] See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (“[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”).

[8] For example, a large retail chain and a car manufacturer do not compete for customer business, but they may compete to hire the same marketing or data analytics personnel.

[9] See, e.g., Sen. Tom Cotton, “Busting the ESG trust,” *The Washington Times*, Feb. 27, 2023 ([link](#)) (“Adding a new dimension to their criminality, Climate Action 100+ firms often communicate with multiple competing companies at the same time. This may constitute what is called a ‘spoke and hub conspiracy.’”).

[10] See, e.g., *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110-11 (2d Cir. 2002) (holding Pepsi’s allegations of a hub-and-spoke conspiracy among Coca-Cola and independent food service distributors required evidence of “an agreement between or among direct competitors”); *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 934 (7th Cir. 2000) (“[T]he critical question here is whether substantial evidence supported the Commission’s finding that there was a horizontal agreement among the toy manufacturers, with TRU in the center as the ringmaster, to boycott the warehouse clubs.”).

[11] To be more precise, the rule of reason creates a three-step burden-shifting framework. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

[12] See, e.g., C. Boyden Gray, “Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market,” July 1, 2021, <https://www.texaspolicy.com/wp-content/uploads/2021/06/2021-06-RR-Gray-LP-Corporate-Collusion.pdf> (“If competitor banks have coordinated to boycott members of the energy sector, that conduct might violate federal antitrust law principles.”).

[13] Note that the antitrust laws generally permit companies to choose their business partners *on their own*. In antitrust parlance, a company’s unilateral decision to terminate doing business with another firm is called a “unilateral refusal to deal.”

[14] *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941).

[15] *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

[16] See *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (“[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (“Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.”) (internal citations and quotation marks omitted).

[17] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135-36 (1998) (“[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.... This precedent makes the *per se* rule inapplicable, for the case before us concerns only a vertical agreement and a vertical restraint, a restraint that takes the form of depriving a supplier of a potential customer.”).

[18] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982).

[19] *Id.* at 915.

[20] *State of Missouri v. National Organization for Women, Inc. (NOW)*, 620 F.2d 1301, 1315 (8th Cir. 1980).

[21] Philip E. Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 262b (“But the purely political boycott is different in that the boycotters do not profit in their own business interests as a result of the destruction or disciplining of the target. Indeed, often the boycotters and the target have no commercial relationship at all. Rather, the boycotters are seeking to force the target to alter its behavior for political, religious, moral, or some other economic reason.”).

[22] 493 U.S. 411 (1990).

[23] *Id.* at 419.

[24] *Id.* at 426–27 (internal citations and quotation marks omitted).

[25] See, e.g., *NCAA v. Alston*, 141 S. Ct. 2141, 2159 (2021) (“This Court has regularly refused... requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”).

[26] In the EU, the sharing of CSI related to a company’s future market conduct, and, in particular, its future prices and output, is illegal in and of itself.

[27] See, e.g., ISS Insights, “Commentary: Our Proxy Advice is Apolitical,” June 13, 2023, <https://insights.issgovernance.com/posts/commentary-our-proxy-advice-is-apolitical/>.

[28] See, e.g., *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (finding antitrust liability for a joint venture owned by 30 mattress manufacturers which engaged in market allocation among the manufacturers).

[29] Not all nonpublic information is competitively sensitive information. However, as noted above, whether information is competitively sensitive is a fact-specific and nuanced analysis that can be challenging for shareholders to undertake. To simplify compliance, we recommend shareholders treat all nonpublic information as potentially competitively sensitive.

[30] The scope of CSI and material nonpublic information under securities regulations does not necessarily overlap. It is possible for certain information to be CSI without it also being material nonpublic information. As such, it could be shared by a company with its investors without violating securities fair disclosure regulations.

[31] See, e.g., *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) (holding “plus factors” that “serve as proxies for direct evidence of an agreement” include “1) evidence that the defendant had a motive to enter into a price fixing conspiracy; 2) evidence that the defendant acted contrary to its interests; and 3) evidence implying a traditional conspiracy”) (internal citations and quotation marks omitted).

[32] For example, while there may be costs to providing more paid leave, the policy could also increase employee retention, thereby reducing recruiting and training costs.

[33] Sen. Tom Cotton, “Busting the ESG trust,” *The Washington Times*, Feb. 27, 2023, <https://www.washingtontimes.com/news/2023/feb/27/busting-esg-trust/>.

[34] Some anti-ESG advocates seem to acknowledge this weakness. In a 2021 article on the legal issues presented by ESG-related activism, C. Boyden Gray argued that environmental groups’ “pressure campaigns” against banks funding fossil fuels “could present the hub for tacit collusion between the spokes—banks collectively boycotting certain energy projects. However, any legal suit may require more specific factual allegations of tacit collusion—the ‘rim’ of the agreement between the various competitors—than current public behavior supports.” C. Boyden Gray, “Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market,” July 1, 2021, <https://www.texaspolicy.com/wp-content/uploads/2021/06/2021-06-RR-Gray-LP-Corporate-Collusion.pdf>.

[35] See Brent Kendall, “Justice Department Drops Antitrust Probe of Auto Makers Involved in California Emissions Deal,” *The Wall Street Journal* (Feb. 7, 2020) ([link](#)) (“Justice officials believed at the time the deal could effectively restrict competition by potentially limiting the types of cars and trucks the auto companies offer to consumers, people familiar with the department’s thinking say.”).

[36] *Id.*