Volume 3, Number 6 November–December 2025

# THE JOURNAL OF FEDERAL AGENCY ACTION

**Editor's Note: Limits**
*Victoria Prussen Spears*

**Limits of the International Emergency Economic Powers Act's Designation Authority**
*Michelle Nicole Diamond, Joshua A. Geltzer, Zachary Goldman, Matthew G. Olsen, Susan J. Hennessey, Amy Gopinathan, Joshua L. Mogil, and Annaka M. Merrick*

**New Department of Justice Guidelines: The FCPA Has Survived … But Not Without a Dent**
*Wifredo A. Ferrer and Marcelo Ovejero*

**Tariff Evasion Is Within Justice Department's Crosshairs: Potential Criminal and Civil Consequences for Noncompliance With Increased U.S. Tariffs**
*Kristin Graham Koehler, Ted Murphy, Craig Francis Dukin, and Aaron M. Applebaum*

**U.S. Export Controls on "AI Diffusion" Officially Paused, But New Guidance Elevates Risk for AI-Related Exports**
*Joshua A. Geltzer, Neena Shenai, Barry J. Hurewitz, Hilary A. Hurd, Heather E. Hedges, Sydney J. Warren, Shervin Z. Taheran, and Jarrod R. Carman*

**Federal Trade Commission's Robinson-Patman Case Against Pepsi Goes Flat. Will Its Push for Robinson-Patman Act Enforcement Fizzle Out?**
*Sonia Kuester Pfaffenroth, Matthew Tabas, Wilson D. Mudge, and Annette Cremata Day*

**Federal Trade Commission and Department of Justice Weigh in on the Applicability of Antitrust Laws to Environmental, Social, and Governance Initiatives**
*Andre Geverola, Sonia Kuester Pfaffenroth, and Javier Ortega Alvarez*

**Securities and Exchange Commission's EDGAR Next Filer Management System Is Here**
*Darrick M. Mix and J. Blake Hovander*

fastcase FULL COURT PRESS

# The Journal of Federal Agency Action

Volume 3, No. 6 | November–December 2025

**399** **Editor's Note: Limits**
Victoria Prussen Spears

**403** **Limits of the International Emergency Economic Powers Act's Designation Authority**
Michelle Nicole Diamond, Joshua A. Geltzer, Zachary Goldman, Matthew G. Olsen, Susan J. Hennessey, Amy Gopinathan, Joshua L. Mogil, and Annaka M. Merrick

**413** **New Department of Justice Guidelines: The FCPA Has Survived … But Not Without a Dent**
Wifredo A. Ferrer and Marcelo Ovejero

**419** **Tariff Evasion Is Within Justice Department's Crosshairs: Potential Criminal and Civil Consequences for Noncompliance With Increased U.S. Tariffs**
Kristin Graham Koehler, Ted Murphy, Craig Francis Dukin, and Aaron M. Applebaum

**427** **U.S. Export Controls on "AI Diffusion" Officially Paused, But New Guidance Elevates Risk for AI-Related Exports**
Joshua A. Geltzer, Neena Shenai, Barry J. Hurewitz, Hilary A. Hurd, Heather E. Hedges, Sydney J. Warren, Shervin Z. Taheran, and Jarrod R. Carman

**433** **Federal Trade Commission's Robinson-Patman Case Against Pepsi Goes Flat. Will Its Push for Robinson-Patman Act Enforcement Fizzle Out?**
Sonia Kuester Pfaffenroth, Matthew Tabas, Wilson D. Mudge, and Annette Cremata Day

**441** **Federal Trade Commission and Department of Justice Weigh in on the Applicability of Antitrust Laws to Environmental, Social, and Governance Initiatives**
Andre Geverola, Sonia Kuester Pfaffenroth, and Javier Ortega Alvarez

**447** **Securities and Exchange Commission's EDGAR Next Filer Management System Is Here**
Darrick M. Mix and J. Blake Hovander

THE JOURNAL OF FEDERAL AGENCY ACTION (ISSN 2834-8818 (online)) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. 

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: David Nayer
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)


A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

## Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and anyone interested in federal agency actions.



QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

David Nayer, Publisher, Full Court Press at david.nayer@vlex.com or at 202.999.4777

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

# Federal Trade Commission and Department of Justice Weigh in on the Applicability of Antitrust Laws to Environmental, Social, and Governance Initiatives

Andre Geverola, Sonia Kuester Pfaffenroth, and
Javier Ortega Alvarez*

*In this article, the authors review a statement of interest filed by the Federal Trade Commission and the Department of Justice in a Texas-led lawsuit that wades into the highly politicized environmental, social, and governance landscape.*

The Federal Trade Commission (FTC) and the Department of Justice, Antitrust Division (DOJ) filed a statement of interest (the Statement) in the Texas-led lawsuit against asset managers BlackRock, State Street, and Vanguard, which alleges that the asset managers acquired substantial stockholdings in every significant publicly held coal producer in the United States to influence the policies of these companies to reduce coal production. The Statement is the first time during the second Trump administration that the agencies have waded into the highly politicized environmental, social, and governance (ESG) landscape. Indeed, the FTC's press release describes the actions challenged in the lawsuit as "an unlawful left-wing ideological scheme."[1]

## The Texas Lawsuit

The Texas-led lawsuit alleges that the asset managers violated antitrust law through a joint commitment to reduce coal output as a means to effectuate their commitment to reduce carbon emissions through Net Zero Asset Managers Initiative (NZAM). The asset managers allegedly implemented the conspiracy through their common stock ownership of competing coal producers, using their

*The Journal of Federal Agency Action* / November–December 2025, Vol. 3, No. 6, pp. 441–445.

ISSN ISSN 2834-8818 (online).

ownership stakes to influence company management to reduce coal production. The lawsuit claims the agreement to reduce output violated Section 1 of the Sherman Act as well as Section 7 of the Clayton Act because their "acquisition, holding, and use of their shares in competing coal companies" substantially lessened competition.

## The Statement of Interest

Citing to President Donald Trump's Executive Order 14,156, "Declaring a National Energy Emergency,"[2] the Statement takes aim at what it describes as "the coordinated use of the power of horizontal shareholdings to distort output and prices in energy markets."[3] According to the Statement, the asset managers engaged in concerted action in violation of Section 1 of the Sherman Act under *Interstate Circuit v. United States* and their acquisition of shares in competing coal companies was not exempt under the Clayton Act's "solely for investment" exception. Specifically, the Statement argues that the "anticompetitive use of common shareholdings to reduce the production of American coal to the detriment of American consumers and businesses" is outside the bounds of permissible passive-investor behavior.

According to the Statement, the "solely for investment" exception does not grant perpetual immunity. Instead, under *United States v. E.I. du Pont de Nemours & Co.*, the immunity applies as long as stock "is not used by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."[4] If an investor, even a minority one, turns a passive investment into an active one by exerting anticompetitive influence over its portfolio of competing firms, such investment is not made solely for investment purposes.

Additionally, the Statement elaborates on the plaintiffs' claim that the asset managers engaged in an unlawful conspiracy under *Interstate Circuit v. United States*. That case establishes that the acceptance of an invitation to participate in concerted action is sufficient to establish a violation of Section 1 of the Sherman Act, regardless of whether there are any communications among the alleged conspirators.

## Increasing Antitrust Scrutiny of ESG Initiatives

Since the first Trump administration, federal antitrust agencies have trained their focus on ESG initiatives, such as when the DOJ investigated an initiative among automobile manufacturers and California regarding emission standards. Makan Delrahim, DOJ's Assistant Attorney General for the Antitrust Division during the first Trump administration, explained that "even laudable ends do not justify collusive means in our chosen system of laws."[5]

More recently, FTC Chair Andrew Ferguson stated in a "policy sheet" that, among other things, investigating and prosecuting alleged collusion on ESG would be a top priority for the FTC under his leadership.[6]

State attorneys general have also been active in the ESG space. Beyond the Texas lawsuit, Nebraska filed an antitrust lawsuit and Florida launched an investigation. In November 2024, Nebraska, along with two trade associations of state energy marketers and Nebraska ethanol producers, sued truck manufacturers and an industry trade association in Nebraska state court for alleged violation of Nebraska's antitrust law.[7] Reminiscent of the DOJ investigation during the first Trump administration, Nebraska alleges that defendants colluded by entering into an agreement with California relating to regulatory requirements that Nebraska claims will result in phasing out of medium- and heavy-duty internal combustion engine vehicles.

Likewise, in March 2025, Florida launched an investigation into whether proxy advice that considers ESG and other factors involves "possible unlawful collusion" in violation of Florida antitrust law. The Florida Attorney General is investigating whether Glass Lewis & Co. and Institutional Shareholder Services Inc. colluded in adopting and enforcing ESG investing policies.

Congress has also been active in scrutinizing ESG initiatives. The U.S. House Judiciary Committee issued two reports, one in June 2024 and another in December 2024, following an investigation into an alleged "climate cartel [that had] agreed to decarbonize the American economy by forcing corporations to disclose their carbon emissions, to reduce their carbon emissions, and to enforce (and reinforce) their disclosure and reduction commitments by handcuffing company leadership and muzzling corporate free speech and petitioning."[8]

A subsequent investigation by the U.S. House Judiciary Committee into over 60 U.S.-based asset managers regarding their involvement in the Glasgow Financial Alliance for Net Zero and NZAM resulted in leading U.S.-based financial firms withdrawing from the organizations and NZAM launching an evaluation about whether it could continue to operate given the presently hostile climate against ESG.[9]

## Conclusion

Antitrust scrutiny of ESG initiatives is likely to increase as the Trump administration's FTC and DOJ leadership settle into their new roles. Actions by state attorneys general and Congress are also likely to increase. All these efforts are likely to spur follow-on lawsuits from private plaintiffs. Given the heightened scrutiny, companies engaged in ESG initiatives—either through their own operations or through their ownership of other companies—should consult antitrust counsel and proactively manage enforcement and litigation risk.

## Notes

* The authors, attorneys with Arnold & Porter Kaye Scholer LLP, may be contacted at andre.geverola@arnoldporter.com, sonia.pfaffenroth@arnoldporter.com, and javier.ortega@arnoldporter.com, respectively.

1. Press Release, FTC, FTC and DOJ File Statement of Interest in Energy Collusion Case Against BlackRock, State Street, and Vanguard (May 22, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-doj-file-statement-interest-energy-collusion-case-against-blackrock-state-street-vanguard.

2. https://www.federalregister.gov/documents/2025/01/29/2025-02003/declaring-a-national-energy-emergency.

3. Statement of Interest, Texas et al. v. BlackRock, Inc. et al., 6:25-c-v-00437 (E.D. Tex. Nov. 17, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofInterest-TexasvBlackRock.pdf.

4. 353 U.S. 586, 589 (1957).

5. Makan Delrahim, DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion, USA Today (Sept. 19, 2019), https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

6. Andrew N. Ferguson, FTC Commissioner Andrew N. Ferguson for FTC Chairman, https://punchbowl.news/wp-content/uploads/FTC-Commissioner-Andrew-N-Ferguson-Overview.pdf.

7. Complaint, Nebraska et al. v. Daimler Truck North America et al. (Neb. Lincoln Cnty Nov. 19, 2024), https://ago.nebraska.gov/sites/default/files/doc/Complaint_8.pdf.

8. H.R. Comm. on the Judiciary, Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Initiatives (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(ESG)%20Investing.pdf.

9. Press Release, Update from the Net Zero Asset Managers Initiatives, NAZM (Jan. 13, 2025), https://www.netzeroassetmanagers.org/update-from-the-net-zero-asset-managers-initiative/.