

**MEMO# 35942**

December 6, 2024

# State Attorneys General Sue Three Asset Managers Alleging Antitrust Violations

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TO: ICI Members

ESG Advisory Group

SEC Rules Committee SUBJECTS: State Issues RE: State Attorneys General Sue Three Asset Managers Alleging Antitrust Violations

The Attorneys General of eleven States, led by Texas, filed suit against three asset managers in the U.S. District Court for the Eastern District of Texas, alleging that the asset managers' (also referred to herein as "Defendants") "acquisition and use of shareholdings in ... domestic coal producers" violated antitrust laws.[\[1\]](#)

The suit alleges that as "demand for the electricity Americans need to heat their homes and power their businesses has gone up, the supply of the coal used to generate that electricity has been artificially depressed—and the price has skyrocketed," the asset managers "have reaped the rewards of higher returns, higher fees, and higher profits, while American consumers have paid the price in higher utility bills and higher costs." The Attorneys General cite Section 7 of the Clayton Act, which prohibits any acquisition of stock where "the effect of such acquisition may be substantially to lessen competition" and claims that the asset managers' "acquisition and use of shareholdings in the domestic coal producers has violated Section 7 of the Clayton Act."

The filing notes the asset managers' membership in organizations such as Climate Action 100+ ("CA 100+") and Net Zero Asset Managers Initiative ("NZAM") and asserts that the asset managers "effectively formed a syndicate and agreed to use their collective holdings of publicly traded coal companies to induce industry-wide output reductions." The suit outlines the asset managers' collective ownership stake in publicly traded domestic coal producers and alleges that the asset managers "have used that collective power—by proxy voting and otherwise—to pressure the major coal producers to reduce production of coal ...." The filing further claims that the asset managers violated state antitrust provisions and the Sherman Act (which prohibits unreasonable restraints on trade). Additionally, the filing claims that one of the asset managers was "actively deceiving investors about the nature of its funds."

The Suit Alleges that Defendants' Acquisitions of Stock Pose a Substantial Threat to

## Competition in the Relevant Markets

After detailing the Defendants' holdings in domestic coal producers, the specific characteristics of coal, and the relevant product and geographic markets, the filing asserts that the "Defendants' acquisitions of stock have given each of them the power to influence the management" of the coal producers. It then states that when "a shareholder is among the largest shareholders not only of nearly every major company in an industry but also of the banks and investment firms that finance that industry, that shareholder has the power to influence the entire industry." The States assert that "Congress enacted Section 7 of the Clayton Act to address the threat to competition that attends when such a single shareholder acquires directly or indirectly the stock of multiple horizontal competitors," and that each "Defendant's ownership of the Coal Companies creates the sort of anticompetitive arrangement that Section 7 forbids." The filing alleges that the "power to influence management means that Defendants' partial acquisitions of the shares of these horizontal competitors in the coal industry pose a similar risk to competition as an outright merger of those competing coal producers" and that the "Defendants have attained and exercised a degree of control over the Coal Companies that has been more than sufficient for Defendants to set and enforce common policies that substantially reduce competition across the entire coal industry."

The suit claims that "Defendants' acquisition of substantial shares in the Coal Companies also significantly increases the risk of coordination between the Coal Companies in each of the relevant markets" and that "[b]y acquiring substantial partial interests in these competitors in the coal industry, Defendants made collusion possible—a possibility that has in fact been realized." The suit further claims that "Defendants' acquisitions of the stock of the Coal Companies also significantly increases the risk of substantially lessening competition by diminishing the incentive for management of those firms to compete to win market share from each other." The filing alleges that the "when management knows their firm is owned by so-called 'horizontal shareholders'—i.e., by shareholders who own shares in the competing firms across an industry— management has an incentive to maximize the profits of the industry," and that "the incentive is to operate as a cartel."

### The Suit Alleges that Defendants Agreed to a Common Strategy to Reduce Output

The States claim that the asset managers' "open participation" in NZAM (and, for two of the asset managers, in CA 100+) "provides substantial evidence of a horizontal agreement among Defendants to use their common ownership of the Coal Companies to set and enforce output restrictions on coal that have impacted the entire industry."

The suit asserts that "CA 100+ provided its signatories with a roadmap for using their shareholdings in coal producers to influence corporate governance at each of these firms to ensure that each of these companies would simultaneously be reducing their output of coal to achieve the same level of output reduction and would report on their ongoing compliance with these targets to their common shareholders." It further asserts that "CA 100+ signatories were agreeing, in effect, to organize and police an output reduction cartel, to play the role of the hub in a hub-and-spoke reduction arrangement." Finally, the suit indicates that "signatories to the Net Zero Asset Managers Initiative specifically commit to phasing out coal investments."

The filing then cites statements and disclosures from the Defendants regarding their proxy voting and other engagements that the suit claims were evidence that "Defendants had committed to a common strategy of 'engaging' with management of competing firms in the

coal industry to obtain their commitment to reduce carbon emissions substantially and requiring those firms to disclose their compliance with those commitments."

#### The Suit Claims that Defendants have Used the Stock they Acquired to Substantially Reduce Competition

The suit alleges that Defendants' "commitments to Climate Action 100+ and the Net Zero Asset Managers Initiative make clear," that Defendants "did not acquire and have not used these shares solely for passive investment purposes" and that "Defendants openly committed to wielding the substantial power of the shares they control to recalibrate carbon production and competition to reduce overall coal production and thereby increase market-wide profits above competitive levels." The filing further claims that "Defendants have used their shares—by engagement, by proxy voting, and otherwise—to bring about a lessening in carbon emissions by reducing the output of ... coal," and that "[t]hese efforts have imposed a significant restraint on competition in domestic coal markets."

The filing cites statements and disclosures by the Defendants regarding their proxy voting and engagement activities as evidence of efforts to "enforce the output restrictions." The suit alleges that "Defendants colluded to suppress competition in the coal markets identified and achieve their desired output reduction goals ... by sharing information concerning their output production targets for the jointly owned Coal Companies, by engaging in joint efforts to obtain that adherence, and by sharing the degree of the success or failure of those efforts."

#### The Suit Claims that Defendants' Actions Resulted in Output Reductions and Climate Disclosures

The suit cites statements and disclosures from coal companies as evidence that "Defendants' pressure campaign also had its intended effect, as the Coal companies repeatedly conceded that they were complying with Defendant's wishes in investor calls and elsewhere."

#### The Suit Claims that One Asset Manager Deceived its Customers in Pursuit of Defendants' Output Reduction Scheme

The filing notes that one of the asset managers markets "non-ESG funds" in "a way that would lead a reasonable consumer to conclude that these funds will not buy, sell, vote, or otherwise use shares in publicly-traded equities to promote the ESG agenda." The suit cites the asset manager's "climate commitments to groups like NZAM and CA 100+, which involve implementing a sustainable, impact, or ESG investment strategy across all ... assets" [emphasis in original] as being incompatible with disclosure indicating that a particular fund "does not seek to follow a sustainable, impact or ESG investment strategy," making such disclosure "false or misleading." Further, the suit alleges that the asset manager's "persistent use of proxy votes to reduce greenhouse gas emissions in line with [asset manager's] sustainability and climate commitments" also renders the non-ESG fund disclosure as "false or misleading." The filing cites numerous prospectus, Statement of Additional Information and website disclosures, along with statements from the asset manager's representatives and proxy votes, as evidence that the asset manager has "materially misrepresented the characteristics of the exchange trade[d] funds, mutual funds, and other financial products that it marketed to investors as not being governed by ESG principles."

## The Suit Alleges that the Defendants' Acquisition of Stock has Substantially Lessened Competition, Resulting in Cartel-Level Revenues and Profits

The suit alleges that the "Defendants' acquisitions of shares enabled Defendants to substantially lessen competition in domestic coal markets." It further claims that the "result of Defendants' efforts to bring about industry-wide output reductions have been precisely what the antitrust laws exist to prevent—increased prices, lower production, surging revenues for producers, and massive supra-competitive profits for producers."

### Causes of Action and Prayer for Relief

The suit alleges: 1) acquisitions of stock in violation of the Clayton Act; 2) unlawful agreement to restrain trade in violation of the Sherman Act; 3) conspiracy to exchange and share competitors' information in violation of the Sherman Act; 4) State law antitrust claims in violation of Texas, Montana and West Virginia laws; and 5) State law deceptive trade practices claims (against one asset manager) in violation of Texas law.

The suit seeks damages, injunctive relief (including divestiture), equitable relief, civil fines, penalties and the award of costs and fees associated with the litigation.

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### Notes

[1] See State of Texas, et al. v. BlackRock, Inc., State Street Corporation and The Vanguard Group, Inc., Case 6:24-cv-00437, U.S. District Court for the Eastern Division of Texas, Tyler Division (November 27, 2024), available at: <https://texasattorneygeneral.gov/sites/default/files/images/press/States%20v%20BlackRock%20Complaint%20Filed.pdf>