To Our Clients and Friends,

The last edition of our Insurance Industry Corporate Governance Newsletter focused on the *In Re Mindbody, Inc., S'Holder Litig.* decision of the Delaware Court of Chancery that provided yet more judicial gloss on M&A processes - in particular the risks to a target company's management of giving a private equity sponsor pole position in a sale process and the risks to the sponsor itself from pursuing an inside track in the *Revlon* context.

This month's edition focuses on the changes of the Net Zero Insurance Alliance (NZIA), explaining the original idea behind the formation of NZIA, why it was appealing as a matter of insurance companies' corporate governance, and why now so many companies that initially signed up for the NZIA have announced their departure.

The NZIA experience highlights the importance of good corporate governance for insurance industry participants when working collaboratively with peers on shared climate and other ESG goals. As FTC Chair Lina Khan stated in Congressional testimony last fall, there is no "ESG exemption" to the antitrust laws.

Net Zero Insurance Alliance: What Happened?

What Is NZIA?

NZIA is an initiative launched in November 2021 during the 27th meeting of the Conference of the Parties of the UN Framework Convention on Climate Change, known as COP27. NZIA, a sister initiative to various other climate-oriented initiatives within the broader GFANZ alliance, seeks to support insurance industry members in transitioning their underwriting portfolios to net-zero greenhouse gas ("GHG") emissions by 2050. NZIA members included industry giants and was intended to be a forum for collaboration among industry participants on shared challenges related to climate change and its adverse effects.

What Happened in May?

On May 15, 2023, a group of 23 U.S. state Attorneys General sent a letter to the 30 insurers and reinsurers who were at the time members of NZIA.

The state AGs' letter identified concerns stemming from NZIA members' required commitment to collaborate in order to advance what the letter refers to as an "activist climate agenda," requesting substantial documentation and responses to questions to be provided by June 15.

Among the identified potential legal concerns were possible violations of federal and state antitrust laws, including laws prohibiting insurers from altering contract terms for reasons not related to the risk or expense of providing insurance, as well as antitrust laws under which "certain arrangements among business competitors are strictly forbidden because they are unfair or unreasonably harmful to competition" and could amount to an "illegal boycott" if certain businesses are intentionally targeted because they have not complied with carbon reduction efforts.

Notably, the letter did not assert detailed allegations of specific violations of antitrust law but rather highlighted areas that, in the AGs' view, could constitute antitrust violations.

The letter represents one among several parallel efforts brought by certain state executives and legislatures targeting asset managers' and other financial institutions' participation in climate initiatives created to facilitate collaboration within industries to reduce GHG emissions.

What's Been the Fallout?

In the weeks since the AG letter, numerous NZIA participants have ended their involvement, in some cases highlighting antitrust concerns in their decision to do so. One founding CEO stated: "In our view, the opportunities to pursue decarbonization goals in a collective approach among insurers worldwide without exposing ourselves to material antitrust risks are so limited that it is more effective to pursue our climate ambition to reduce global warming individually."

What started as a trickle of defections has become a widespread series of departures with, at most recent count, just 13 of the original 30 members remaining.

To date, no claims have been brought against organizations for participating in the various climate initiatives, under federal or state antitrust laws or otherwise. However, that circumstance might quickly change depending on the information received pursuant to the recent requests for information. In the (unlikely) event that such information were to include, for example, communications suggesting coordinated efforts that could result in increased insurance prices for certain consumers or industries, or limited or diminished coverage for those consumers, it is possible the AGs would move forward with claims. It is important to note that the risk to participants of the various climate initiatives is not limited to the risk of claims but also includes the risk of a lengthy and expensive investigation by the state AGs that would precede bringing any claims as well as potential reputational harm from being a target in the state AGs' efforts.

Good Corporate Governance Is Critical

Certain kinds of agreements or collaborations are more likely to create antitrust risk including improper information-sharing agreements that might include sharing of competitively sensitive information among competitors; initiatives that could amount to an unlawful group boycott of a rival, such as an upstart competitor, or certain customers or suppliers; or coordination as a pretext for collusion, for example, an improper agreement to not invest in fossil fuels with the anticompetitive effect of raising prices for consumers.

Agreements that do not affect price or output may be permissible, but the benefits must outweigh the harms which can involve a complex calculus, particularly where ESG issues are involved.

Generally speaking, participation in climate initiatives that involves sharing information, such as best practices, but which does not involve agreements or collaborations with competitors should pose minimal risk so long as good corporate governance measures are taken, including with respect to certain antitrust risk-mitigating measures, such as:

- when planning ESG initiatives, consult antitrust counsel to identify any competition concerns that may be presented;
- when engaging in a joint ESG initiative, do not share competitively sensitive information. To the extent information must be shared to achieve the ESG objective, antitrust counsel

can help ensure that it is properly aggregated and anonymized;

- stick to formal, scheduled meetings with a distributed agenda that ideally is reviewed by antitrust counsel in advance and in any event raises no concerns about improper information exchange or requests to impermissibly coordinate on pricing, sales, output, markets or product strategies;
- keep written minutes of ESG initiative meetings to demonstrate that discussions did not stray from permissible topics;
- properly document your stated sustainability goals and the positive effects the initiative is intended to achieve;
- establish compliance trainings for company representatives that will be involved in joint ESG initiatives; and
- ensure that membership to joint ESG initiatives is open to all or is based on relevant and objective criteria that do not selectively disadvantage other market participants.

Conclusion

It is clear that organizations participating in ESG initiatives are weighing carefully the benefits and risks of such participation, with many choosing to end their involvement, in part due to perceived antitrust risk. While the number of organizations withdrawing from such initiatives generally has, to date, been limited – with NZIA being the notable exception – and therefore the viability of such initiatives doesn't currently appear to be under threat, this could ultimately be impacted by the efforts of the state AGs. As one example, the Net Zero Asset Owner Alliance (NZAOA) currently counts 85 members with more than $11 trillion in assets under management. To date, there is no evidence of mass withdrawals of investors or other participants withdrawing from NZAOA.

However, any decision to participate in the various climate initiatives should be made on the basis of a full understanding of the benefits and risks of doing so. This should include an evaluation of the risks for potential antitrust violations of the kind set out in the state AGs' letter along with other areas of potential concern.

Eric Dinallo
Partner
+1 212 909 6565
edinallo@debevoise.com

Nicholas F. Potter
Partner
+1 212 909 6459
nfpotter@debevoise.com

Ulysses Smith
ESG Senior Adviser
+1 212 909 6038
usmith@debevoise.com

Brita M. Siepker
Associate
+1 212 909 6263
bsiepker@debevoise.com