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ESG Factors and Antitrust

Recently, the World Economic Forum (“WEF”) released a [Consultation Draft](#) of proposed common standards for corporate disclosure of environmental, social, and governance (“ESG”) factors. The draft proposal highlights the need for a common framework from which to evaluate corporate actions and their impact on ESG factors. While it is unclear precisely which of the proposed standards will ultimately prevail, it is clear that we are poised to enter a new era of corporate governance and disclosure, and that there is an increasingly acute need to better understand how these standards may affect all aspects of corporate regulation, including antitrust.

It is not immediately apparent whether the adoption of these new standards will directly impact antitrust regulation of mergers, acquisitions or joint ventures, but there are some intriguing possibilities. Fundamentally, antitrust analysis is underpinned by the economic assumption that corporations are motivated by profit maximization. This bedrock principle drives the analysis of whether any given transaction will create or change incentives to raise price or reduce output, innovation, or quality in a way that is harmful to consumers.

An era in which corporations measure performance by factors other than profit could change this fundamental assumption with potentially interesting implications. For example, when evaluating the potential anticompetitive effects of a transaction, the U.S. antitrust authorities are expected to account for the transaction’s procompetitive synergies—an analysis traditionally driven by effects on the combined firm’s profit margins. However, environmental efficiencies (a factor identified by the proposed WEF standards) resulting from a transaction should perhaps be credited as a benefit to be weighed against any perceived harm to competition, even if such efficiencies are not captured by looking to profit margins alone.

These developments bear watching, and we will continue to monitor and report on these issues as they progress.

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