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ALERT

FTC and DOJ Signal Expanded Antitrust Scrutiny of DEI, ESG, and "Viewpoint Competition" Initiatives

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Federal Trade Commission (FTC) Chairman Andrew N. Ferguson issued warning letters to 42 U.S. law firms on January 30, 2026, regarding potentially unfair and anticompetitive employment practices tied to diversity, equity, and inclusion (DEI) hiring initiatives. According to the FTC's press release, the agency is concerned that coordinated use of DEI "metrics," candidate pools, or promotion criteria may distort competition in labor markets – particularly when employers make collective decisions affecting hiring, compensation, or advancement.

Although the letters stop short of enforcement action, they explicitly criticized certain DEI practices required for participation in the Mansfield Certification program administered by Diversity Lab, "a for-profit DEI-consultancy business." In the FTC's view, these common certification-driven practices may amount to unlawful coordination among competing employers.

This position reinforces a growing enforcement trend: The FTC and the Department of Justice (DOJ) are applying traditional antitrust concepts to activities long treated as policy-driven, governance-oriented, or expressive. That trend now encompasses DEI, ESG-related environmental commitments, and even matters involving speech or viewpoint access.

DEI: Applying Labor-Market Collusion Principles to DEI "Metrics" and Hiring Practices

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Practice Areas

Antitrust

Diversity, Equity, and Inclusion (DEI) Counseling and Support

Environmental, Social & Governance (ESG)

FTC and Consumer Protection

Litigation

The January 2026 warning letters build on the FTC's 2025 announcement of a Labor Markets Task Force. In his February 26, 2025 "Directive Regarding Labor Markets Task Force," Chairman Ferguson listed "collusion or unlawful coordination on DEI metrics" among examples of labor market conduct the FTC would prioritize, including coordination that may exclude workers or students based on race, sex, or sexual orientation.

The new letters sharpen that theory. They warn that anticompetitive conduct may include:

- Agreements among competing employers to meet quotas or structured candidate-pool requirements based on race or sex;
- Coordinated hiring or promotion decisions; or
- Information-sharing or benchmarking arrangements that reduce independent judgment in hiring, wages, or advancement decisions.

The important theme is not the merits of DEI programs themselves, but the antitrust principle: When competitors coordinate employment decisions – even for socially motivated reasons – enforcement agencies may view those actions as horizontal restraints under Section 1 of the Sherman Act, Section 5 of the FTC Act, and traditional antitrust doctrines.

ESG: Antitrust Scrutiny of "Net Zero" Commitments and Industry Collaboration

The agencies are taking a similar approach in the ESG space. In May 2025, the FTC and DOJ jointly filed a Statement of Interest in litigation alleging that investors in energy companies coordinated to restrict coal output as part of "Net Zero" environmental commitments. As the agencies explained in their press release, the alleged agreement could distort U.S. coal output, even when entities describe the conduct as part of "Net Zero" or ESG-related commitments – a framing the agencies argue does not alter traditional antitrust analysis.

The same logic appeared in the FTC's August 2025 statement closing its investigation of the Clean Truck Partnership (CTP), a voluntary initiative among major truck manufacturers tied to emissions goals. The agency reiterated that agreements reducing production levels pose obvious antitrust concerns and emphasized skepticism toward:

- State-action arguments, which sometimes shield state-mandated cooperation among or by competitors.
- *Noerr-Pennington* arguments, which protect joint petitioning of government.

The FTC closed its investigation after obtaining written commitments from four manufacturers and the trade association. The manufacturers agreed the Clean Truck Partnership was unenforceable, committed to act independently, and promised not to make similar anticompetitive agreements with a state regulator going forward. The agency's message is clear: Sustainability initiatives – even those involving government actors – are not automatically immune from antitrust scrutiny.

Viewpoint-Related Conduct: Framing Content Moderation and Advertiser Actions as Competition Issues

The agencies have also begun invoking antitrust principles in matters involving deplatforming, advertiser boycotts, and media-market access. In July 2025, the DOJ Antitrust Division filed a Statement of Interest asserting that antitrust law protects competition among viewpoints in markets for news and information – and that coordinated efforts to exclude or suppress particular viewpoints may cause competitive harm.

The FTC has adopted similar themes. In February 2025, it requested public comments on alleged "tech censorship," stating that content-based access restrictions could raise consumer-protection or competition concerns.

This approach surfaced again in the FTC's investigation of Media Matters in connection with its probe of an alleged advertiser boycott related to the social media platform X. Although a federal court issued a preliminary injunction that blocked the FTC's inquiry, the dispute illustrates the agency's willingness to analyze alleged advertiser coordination and pressure campaigns under competition theories. And just last week. Chairman Ferguson sent a letter to Apple CEO Tim Cook warning that suppressing or promoting news articles "based on the perceived ideological or political viewpoint of the article or publication may violate the FTC Act" in certain circumstances.

Conclusion

Across DEI, ESG, and viewpoint-related matters, the FTC and DOJ are cultivating a consistent message: Initiatives framed as socially beneficial, ethically motivated, or expressive, do not escape antitrust scrutiny when they involve coordination among competitors or any restraint on market competition. Many organizations may have treated these initiatives as low-risk; the agencies now view them as potential applications of familiar, traditional antitrust theory.

Companies, trade associations, and other participants should review whether their DEI, sustainability, or content-related programs:

- Preserve independent decision-making.
- Avoid coordinated commitments that could be characterized as output restrictions or hiring restraints.
- Limit sensitive information sharing to what is legally permissible.
- Do not rely too heavily on state-action or *Noerr-Pennington* protections without careful legal analysis.

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