

How Companies Can Conspire To Save The Planet

By **Demian Ordway** and **Peter Brody**

While attempting to do what was right for the environment, some of the largest automakers in the world got a rude awakening last year. Concerned that the U.S. Environmental Protection Agency was preparing to roll back automobile efficiency and greenhouse gas standards, the state of California announced in July that it had reached an agreement “on a voluntary framework to reduce emissions” with Ford Motor Co., Honda Motor Co. Ltd., BMW of North America LLC and Volkswagen AG.[1]

Importantly, the automakers agreed to apply the framework not just to cars sold in California, but to all of their cars sold nationwide. The U.S. Department of Justice responded by opening an investigation into whether the agreement violated federal antitrust law.[2] Although that inquiry quietly came to an end last month,[3] the fact that it was brought at all raises a more general question: How can businesses work together to advance the broader social good without fear of violating the antitrust laws?

Answering this question is challenging, because antitrust law has long viewed cooperation among competing businesses with great skepticism. Any effort to restrict the way in which rivals compete potentially diminishes competition itself, the social good that the antitrust laws were designed to protect. As the head of the DOJ’s Antitrust Division opined, “[n]o goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws.”[4]

Applying this reasoning, the Wall Street Journal’s editorial board argued that the California fuel-standards deal was effectively an agreement to raise prices on traditional gas-powered vehicles and steer customers towards electric cars.[5] As the argument goes, if consumers want more electric cars, Ford can simply make more. It doesn’t need an agreement with Honda, BMW and Volkswagen to do so unless it is illegally seeking protection from competition.

Fortunately, not all agreements among competing businesses pose the same antitrust risk. Businesses looking to cooperatively advance broader social goods like protecting the environment can do so in ways that minimize their exposure. Concerted efforts to lobby for government action are generally immune from scrutiny under the antitrust laws, as are certain instances of state-authorized conduct.

Alternatively, competing businesses can pursue joint ventures with the goal of establishing nonmandatory “green” standards or developing new eco-friendly products or services. This article briefly explores some of these strategies.



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Getting the Government to Help — Lobbying and State Action

Lobbying the government is one of the few instances of competitor cooperation that is largely immune from antitrust scrutiny. As the U.S. Supreme Court explained in *United Mine Workers of America v. Pennington*, joint lobbying efforts “do not violate the antitrust laws even though intended to eliminate competition.”[6]

Consistent with the antitrust laws, competitors can jointly hire a public relations firm, generate and distribute advertisements supporting their cause, and otherwise direct their efforts towards influencing the passage of legislation or regulation to remedy the targeted social ill. Courts have even suggested that bribing government officials cannot serve as a basis for a violation of the antitrust laws when done for the purpose of bringing about government action.[7]

Only joint lobbying that is a sham or mere cover for illegal activity will lack immunity. Under that carveout, competitors may not, for example, abuse the judicial process by filing claims in bad faith[8] or use lobbying itself as a means to delay a competitor’s entry. For immunity to attach, the lobbyists’ goal must still be government action.[9]

State legislation or regulation can also immunize conduct that has no relation to lobbying, and would otherwise be illegal under federal antitrust law. Under the state-action immunity doctrine, a private entity that “acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition” can be “exempt from scrutiny under the federal antitrust laws.”[10]

Ford, Volkswagen, BMW and Honda took a step in this direction when they agreed to work with California to create a cooperative public-private regulatory scheme. The framework is voluntary for now,[11] but California has promised to enact it by regulation if the forthcoming federal emissions regulations are insufficient.

An example of immunity in practice is *Yeager’s Fuel Inc. v. Pennsylvania Power & Light Co.* In that case, the U.S. Court of Appeals for the Third Circuit rejected an antitrust challenge in the residential heating market, holding that Pennsylvania’s program favoring energy “conservation, load management, and alternate energy supply products as alternatives to expanding capacity” immunized certain conduct of the defendant utility that was sanctioned by the state’s program.[12]

The legality of state-authorized restraints on competition is judged under the two-prong test set out in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*[13] First, the restraint “must be ‘one clearly articulated and affirmatively expressed as state policy.’”[14] “[S]econd, the policy must be ‘actively supervised’ by the state itself.”[15]

It is not enough that the conduct exempted from antitrust scrutiny is “efficient, well-functioning, or wise.” Without a clear statement and active supervision, state-action antitrust immunity will be unavailable.[16]

The benefits of state-action immunity can be substantial. If its requirements are met, conduct that would otherwise violate the antitrust laws is immunized from both private lawsuits and Federal Trade Commission claims.[17] But pursuing a strategy that seeks protection under the state-action immunity doctrine is not without risks.

To ensure compliance with Midcal’s first prong, lobbying businesses should endeavor to develop a legislative or administrative record in support of any contemplated conduct that is

facially anti-competitive. To ensure compliance with Midcal's second prong, businesses should do their best to ensure that the regulating governmental entity is attentive and involved, and that policies are updated in response to changes in market conditions.[18] State officials must "have and exercise power to review particular anti-competitive acts of private parties, and disapprove those that fail to accord with state policy."[19]

In the event of litigation, a defense based on state-action immunity also carries some procedural risk. Defendants bear the burden of proof, and should they fail to carry it, the prima facie elements of an antitrust claim may not be as difficult for the plaintiff to establish.[20]

There is also a circuit split over whether the denial of state-action immunity is immediately appealable.[21] Until that split is resolved, defendants in at least the Fourth, Sixth and Ninth Circuits may face costly discovery and protracted litigation if their defense is denied at the trial level.

Doing It Yourself — Certification Programs and Other Joint Ventures

Of course, seeking government intervention is not the only way to minimize antitrust risk for competing businesses looking to cooperate. Federal antitrust law does not proscribe all such cooperation, just that which restrains competition and has a net anti-competitive impact.

Competitors hoping to work together to protect the environment might consider establishing a private entity whose sole purpose is to certify products that adhere to environmental standards. Well-known examples of this include the U.S. Green Building Council's LEED program and the Forest Stewardship Council's certification of responsible forest management.[22]

Instead of working with California to promulgate binding regulations, Ford, Honda, Volkswagen and BMW could have funded the creation of a certification body for cars with limited or no greenhouse emissions. Although private standards or certification bodies have been the subject of antitrust scrutiny,[23] voluntary certification, if done properly, is likely to have few antitrust concerns.

By statute, standards-setting activity is "judged on the basis of its reasonableness, taking into account all relevant factors affecting competition,"[24] and private certification and standards-setting can, as the Third Circuit has recognized, create the sorts of efficiencies that "enhance[] consumer welfare and competition in the marketplace." [25] As such, standard-setting and certification processes, when truly voluntary[26] and applied in a nondiscriminatory fashion,[27] have been upheld by courts.

Of course, as with lobbying, certification programs cannot simply operate as a cover for conduct that otherwise violates the antitrust laws. In the Processed Egg Products Antitrust Litigation, for example, a group of chicken farms created a voluntary certification program, the United Egg Producers Certification Program, under which producers could certify eggs as compliant if they followed certain animal-friendly guidelines, like minimum cage sizes for hens.[28] Although there was little doubt that the program promoted animal welfare, the district court nevertheless permitted a jury to hear claims that the underlying agreement was a sham, the purpose and effect of which was reducing the overall supply of eggs.[29]

More generally, competing businesses have often collaborated on joint ventures for the purpose of innovating or offering new products and services relating to the environment or

other broad social goods. In 2017, for example, General Motors and Honda announced a joint venture to build hydrogen fuel cell engines at a factory in Michigan.[30] And this past summer, Ford and Volkswagen reached a similar agreement to collaborate on electric and self-driving vehicle technology.[31]

Such joint ventures have a low risk of being challenged under the antitrust laws, because the parties likely do not have market power, because there is no evidence that any end products will be sold at supracompetitive prices, and because the agreements don't appear to prevent the automakers from otherwise competing with each other.[32] Moreover, courts evaluating these joint ventures would consider the likely positive benefits of the agreements, including the cost-cutting, innovation and economies of scale that allow new products to come to market.[33]

Congress has also demonstrated its support for such collaborations in the National Competitive Research Act of 1984 and the National Cooperative Research and Production Act of 1993.[34] Challenges to joint ventures registered under those statutes are guaranteed to be reviewed under the more deferential "rule of reason" standard for actions brought under the federal antitrust laws, and treble damages are unavailable to litigants seeking to challenge the ventures.[35] Thus, Ford, Honda, BMW and Volkswagen could have collaborated (and still can) to develop greenhouse-gas-reducing technologies without state involvement, and still have faced a low risk of antitrust scrutiny.

Nevertheless, even where joint ventures seek to develop new technologies, products or services, participants should ensure that the venture does not function to reduce output or increase prices of nonventure products, outcomes that will be difficult to justify in the rule of reason inquiry.[36] Further, joint venture participants should ensure that their collaboration does not extend beyond the core purposes of the agreement.[37]

Conclusion

The strategies discussed in this article are still limited and not without risks under the antitrust laws. But for many challenges posed by environmental concerns, collaborative, private efforts may be the most productive way forward and should be given serious consideration.

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[1] <https://ww2.arb.ca.gov/news/california-and-major-automakers-reach-groundbreaking-framework-agreement-clean-emission>.

[2] <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>.

[3] <https://www.law360.com/articles/1242161>.

- [4] <https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/>.
- [5] <https://www.wsj.com/articles/progressive-antitrust-paradox-11568243792>.
- [6] *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965).
- [7] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 203 (citing *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 378 (1991)).
- [8] See, e.g., *CVD Inc. v. Raytheon Co.*, 769 F.2d 842, 850–51 (1st Cir. 1985).
- [9] *City of Columbia*, 499 U.S. at 381.
- [10] *FTC v. Phoebe Putney Health Sys. Inc.*, 568 U.S. 216, 219 (2013).
- [11] <https://ww2.arb.ca.gov/news/california-and-major-automakers-reach-groundbreaking-framework-agreement-clean-emission>.
- [12] *Yeager’s Fuel Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267 (3d Cir. 1994) (internal citations and quotation marks omitted).
- [13] *California Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980).
- [14] *Id.* at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)).
- [15] *Id.* (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).
- [16] *N. Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1112 (2015).
- [17] *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).
- [18] See, e.g., *Lotus Business Group LLC v. Flying J Inc.*, 532 F. Supp. 2d 1011, 1023 (E.D. Wis. 2007) (finding the active supervision requirement not met where Wisconsin failed to oversee costs and markup percentages in its gasoline price program, including failing to change a component of its scheme for nine years).
- [19] *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988); but see *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1116 (noting that “day-to-day involvement” and “micromanagement” are not required).
- [20] *Yeager’s Fuel*, 22 F.3d at 1266.
- [21] Compare *Martin & Mem. Hosp. at Gulfport*, 86 F.3d 1391, 1395–95 (5th Cir. 1996) and *Commuter Transp. Sys. Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289–90 (11th Cir. 1986) with *SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District*, 859 F.3d 720, 722 (9th Cir. 2017), *S. Car. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 441–47 (4th Cir. 2006), and *Huron Valley Hosp. Inc. v. City of Pontiac*, 792 F.2d 563, 567–68 (6th Cir. 1986).
- [22] Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 *Am. Bus. L. J.* 97, 105–06 (2016); see also <https://www.usgbc.org/leed>;

<https://us.fsc.org/en-us/certification>.

[23] *Allied Tube & Conduit Corp. v. Indian Head Inc.*, 486 U.S. 492, 500 (1988).

[24] 15 U.S.C. § 4302.

[25] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309 (3d Cir. 2007); see also Hajin Kim, 22 N.Y.U. *Env't'l L. J.* 181, 194–99 (2015) (providing an overview of the pro-competitive benefits of environmental certification).

[26] See, e.g., *U.S. Board of Oral Implantology v. American Board of Dental Specialties*, 390 F. Supp. 3d 892, 905–07 (N.D. Ill. 2019).

[27] *ECOS Elecs. Corp. v. Underwriters Labs.*, 743 F.2d 498, 501 (7th Cir. 1984); *Eliason Corp. v. Nat'l Sanitation Fdn.*, 614 F.2d 126, 129–30 (6th Cir. 1980). See also Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 *Yale J. Reg.* 147, 199–200 (1993).

[28] *In re Processed Egg Products Antitrust Litigation*, 902 F. Supp. 2d 704, 713 (E.D. Pa. 2012).

[29] 206 F. Supp. 3d 1033 (E.D. Pa. 2016). The plaintiffs ultimately lost at trial, but an appeal to the Third Circuit is pending.

[30] <https://hondanews.com/en-US/honda-corporate/releases/release-0c275ef4ffaf4266bfd696612dfac6c2-gm-and-honda-to-establish-industry-first-joint-fuel-cell-system-manufacturing-operation-in-michigan>.

[31] <https://www.reuters.com/article/us-volkswagen-electric-alliance/volkswagen-ford-reach-outline-agreement-to-share-electric-autonomous-tech-source-idUSKCN1U01K1>.

[32] See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5–6 (2006) (approving a joint venture where defendants “participated in [the relevant] market jointly through their investments in [the joint venture],” rather than as competitors).

[33] *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1334–35 (Fed. Cir. 2010); see also Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (“J.V. Guidelines”) at 14–15 (“Most [joint research] agreements are procompetitive, and they typically are analyzed under the rule of reason,” but noting that this rule is not absolute).

[34] See 15 U.S.C. §§ 4301–06.

[35] 15 U.S.C. §§ 4302, 4303(a), 4304(a)(2).

[36] *Areeda & Hovenkamp* § 2101; see also Scott, 53 *Am. Bus. L. J.* at 139–40 (describing a series of informal private agreements related to the conservation of fishing stocks, which were approved by the federal government on the assumption that overall output would not decline).

[37] Cf. *Dagher*, 547 U.S. at 7–8.