

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-6906
judiciary.house.gov

August 1, 2023

Mr. Andrew Behar
Chief Executive Officer
As You Sow
Main Post Office
P.O. Box 751
Berkeley, CA 94701

Dear Mr. Behar:

The Committee on the Judiciary is conducting oversight of the adequacy and enforcement of U.S. antitrust laws.¹ We write because As You Sow is potentially violating U.S. antitrust law by entering into agreements to “decarbonize” corporate assets and reduce emissions to net zero—with potentially harmful effects on Americans’ freedom and economic well-being. Accordingly, to advance our oversight and inform potential legislative reforms, we write to ask As You Sow to produce relevant documents and information.

Stockholder engagement service providers advance progressive environmental, social, and governance (ESG) goals by helping “investors to influence the companies they own on questions of corporate social responsibility” through “proxy voting in favor of shareholder-sponsored resolutions” and “direct engagement of management in investor dialogues.”² Founded in 1992, As You Sow claims to be “the nation’s non-profit leader in shareholder advocacy,” with a “mission . . . to promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies.”³

As You Sow is a member of Climate Action 100+. Through Climate Action 100+, As You Sow appears to have colluded with other institutional investors to “work with the companies in which [they] invest to . . . deliver[] net zero [greenhouse gas (GHG)] emissions by 2050.”⁴

¹ See generally Rules of the House of Representatives R. X (2023).

² INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, SHAREHOLDER ENGAGEMENT AND THE PROXY PROCESS (2021), <https://www.iccr.org/our-approach/shareholder-engagement-101>.

³ AS YOU SOW, ABOUT US, <https://www.asyousow.org/about-us>.

⁴ CLIMATE ACTION 100+, THE THREE GOALS, <https://www.climateaction100.org/approach/the-three-goals/>.

Reaching net zero would require draconian “declines in the use of coal, oil and gas”: as much as 98% for coal,⁵ 94% for oil, and 86% for fossil fuels overall.⁶ This, in turn, would require radical “steps such as halting sales of new internal combustion engine passenger cars by 2035, and phasing out all unabated coal and oil power plants by 2040.”⁷ It also would mean “that no new oil and gas fields must be developed,” choking off investment in these industries.⁸ Such restrictions limit output and increase prices, and deprive businesses of investments and consumers of choices. The potential consequences for American freedom and economic well-being are far-reaching.

Collusive agreements harm competition and consumers and are illegal under the Sherman Act.⁹ Horizontal output restrictions are per se illegal,¹⁰ but “the types of conduct banned” are not limited to “regulat[ing] prices . . . or limit[ing] production.”¹¹ Rather, any “[c]oercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned.”¹² This holds true whether or not there is “an effect on prices”¹³ because “all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”¹⁴ Moreover, as the Supreme Court has explained, “[t]he social justifications proffered for [the] restraint of trade” cannot redeem anticompetitive collusion.¹⁵

Accordingly, to help the Committee better understand As You Sow’s role in entering into agreements to “decarbonize” corporate assets and reduce emissions to net zero, please produce, for the period from December 1, 2016, to the present:

1. All documents and communications referring or relating to the need for As You Sow to advance decarbonization and net zero emissions goals, including As You Sow’s decision to join Climate Action 100+;

⁵ See INTERNATIONAL ENERGY AGENCY, NET ZERO BY 2050: A ROADMAP FOR THE GLOBAL ENERGY SECTOR (May 2021), <https://www.iea.org/reports/net-zero-by-2050>.

⁶ See STATE OF CALIFORNIA, CALIFORNIA RELEASES WORLD’S FIRST PLAN TO ACHIEVE NET ZERO CARBON POLLUTION (Nov. 16, 2022), <https://www.gov.ca.gov/2022/11/16/california-releases-worlds-first-plan-to-achieve-net-zero-carbon-pollution/>; see also INTERNATIONAL ENERGY AGENCY, *supra* note 5 (Fossil fuels must “fall from almost four-fifths of total energy supply today to slightly over one-fifth by 2050.”).

⁷ INTERNATIONAL ENERGY AGENCY, *supra* note 5.

⁸ NET-ZERO ASSET OWNER ALLIANCE, NET-ZERO ASSET OWNER ALLIANCE SETS EXPECTATIONS FOR OIL AND GAS INVESTMENTS AND CALLS ON COMPANIES AND POLICYMAKERS TO ALIGN WITH 1.5C PATHWAYS (Mar. 29, 2023), <https://www.unepfi.org/industries/net-zero-asset-owner-alliance-outlines-new-guidance-for-oil-and-gas-investments-while-calling-on-companies-policymakers-and-investors-to-align-with-1-5c-pathways/>.

⁹ See 15 U.S.C. § 1.

¹⁰ See *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 (1984).

¹¹ *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941).

¹² *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983).

¹³ *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

¹⁴ *Nat’l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 695 (1978).

¹⁵ *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 424 (1990).

2. All documents and communications referring or relating to how As You Sow developed its decarbonization and net zero emissions targets and commitments, including those targets and commitments developed by alliances or initiatives such as Climate Action 100+ and the Net Zero Asset Managers initiative (NZAM);
3. All documents and communications referring or relating to how As You Sow and other stockholder engagement service providers can or should advance decarbonization and net zero emissions goals, including but not limited to through direct engagement, sponsoring, supporting, opposing, or voting for directors and stockholder proposals, and entering into agreement, commitment, or other participation with alliances or initiatives such as Climate Action 100+ and NZAM;
4. All documents and communications referring or relating to how proxy advisors, including but not limited to Institutional Shareholder Services and Glass Lewis, can or should advance decarbonization and net zero emissions goals, including but not limited to through sponsoring, supporting, opposing, or voting for directors and stockholder proposals;
5. All documents and communications referring or relating to any agreement or commitment, or any effort to reach such an agreement or commitment, between or among As You Sow, asset managers such as BlackRock, State Street Global Advisors, Arjuna Capital, and Trillium Asset Management, proxy advisors such as Institutional Shareholder Services and Glass Lewis, and alliances or initiatives such as Climate Action 100+ and NZAM or any of their members, to advance decarbonization and net zero emissions goals, including but not limited to documents and communications referring or relating to any of their knowledge or awareness of another's agreement or commitment, and documents and communications reflecting or suggesting agreement or commitment as to specific steps, policies, or best practices; and
6. All documents and communications referring or relating to how As You Sow's decarbonization and net zero emissions goals, agreements, and commitments, including those goals, agreements, and commitments developed by alliances or initiatives such as Climate Action 100+ and NZAM, affect output, price, or the choices available to consumers and investors, including but not limited to the markets for fossil fuels such as coal, gas, and oil.

Please produce the requested information as soon as possible, but no later than 5:00 p.m. EDT on August 15, 2023.

Furthermore, this letter serves as a formal request to preserve all existing and future records and materials relating to the topics addressed in this letter. You should construe this preservation notice as an instruction to take all reasonable steps to prevent the destruction or alteration, whether intentionally or negligently, of all documents, communications, and other information, including electronic information and metadata, that are or may be responsive to this

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congressional inquiry. This instruction includes all electronic messages sent using your official and personal accounts or devices, including records created using text messages, phone-based message applications, or encryption software.

If you have any questions about this request, please contact Committee staff at (202) 225-6906. Thank you in advance for your prompt attention to this matter.

Sincerely,



Jim Jordan
Chairman



Thomas Massie
Chairman
Subcommittee on the Administrative
State, Regulatory Reform, and
Antitrust



Dan Bishop
Member of Congress

cc: The Honorable Jerrold L. Nadler, Ranking Member

The Honorable Lou Correa, Ranking Member
Subcommittee on the Administrative State, Regulatory Reform, and Antitrust