

ONE HUNDRED SEVENTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON THE JUDICIARY  
2138 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6216  
(202) 225-3951  
judiciary.house.gov

December 6, 2022

Ms. Mindy S. Lubber  
Ceres, Chief Executive Officer and President  
Investor Network Representative, North America, Climate Action 100+  
99 Chauncy Street, 6th Floor  
Boston, MA 02111

Mr. Simiso Nzima  
Managing Investment Director, Global Equity, CalPERS  
Investor Representative, North America, Climate Action 100+  
400 Q Street  
Sacramento, CA 95811

Dear Ms. Lubber and Mr. Nzima:

We are writing to you because of your roles coordinating how some companies pursue environmental, social, and governance (ESG) policies in ways that may violate antitrust laws. Each of you is on the Steering Committee for Climate Action 100+, which seems to work like a cartel to “ensure the world’s largest corporate greenhouse gas emitters take necessary action on climate change.”<sup>1</sup> In addition, Ms. Lubber leads Ceres, a non-profit co-founder of Climate Action 100+. Ceres runs a regional corporate network for Climate Action 100+, advancing ESG policies by encouraging and helping drive “collective action.”<sup>2</sup> Mr. Nzima works for the California Public Employees’ Retirement System (CalPERS), the largest U.S. public pension fund. CalPERS—a board member of Ceres—also co-founded and now helps govern Climate Action 100+.<sup>3</sup> In short, you and your organizations appear to play major roles in efforts to advance ESG policies. We therefore write to request information about related conduct or agreements that may be unlawful under U.S. antitrust laws.

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<sup>1</sup> *Climate Action 100+*, CERES, <https://www.ceres.org/climate/climate-action-100#:~:text=Ceres%20is%20a%20founding%20network,necessary%20action%20on%20climate%20change> (last visited Dec. 2, 2022); *About Climate Action 100+*, CLIMATE ACTION 100+, <https://www.climateaction100.org/about/> (last visited Dec. 2, 2022).

<sup>2</sup> *See id.*; *About Us*, CERES, <https://www.ceres.org/about-us> (last visited Dec. 2, 2022).

<sup>3</sup> *Climate Change*, CALPERS, <https://www.calpers.ca.gov/page/investments/sustainable-investments-program/climate-change> (last visited Dec. 2, 2022); *How We Got Here*, CLIMATE ACTION 100+, <https://www.climateaction100.org/approach/how-we-got-here/> (last visited Dec. 2, 2022).

Woke corporations are collectively adopting and imposing progressive policy goals that American consumers do not want or do not need.<sup>4</sup> An individual company's use of corporate resources for progressive aims might violate fiduciary duties or other laws, harming its viability and alienating consumers.<sup>5</sup> But when companies agree to work together to punish disfavored views or industries, or to otherwise advance environmental, social, and governance (ESG) goals, this coordinated behavior may violate the antitrust laws and harm American consumers.

Many domestic corporate interests increasingly march in unison in advancing progressive policy goals.<sup>6</sup> Some companies and executives promote these left-wing views and policies<sup>7</sup> even when doing so runs counter to consumer sentiment<sup>8</sup> or robs Americans of hard-earned income.<sup>9</sup> Certain large companies—some of which are involved in the work of Climate Action 100+ or Ceres, or may have connections to CalPERS—appear to be important players in these efforts. For example, Larry Fink, who chairs one of the world's largest asset managers, BlackRock, is infamous “for his annual letters to America's CEOs chiding them to adopt the latest MSNBC-approved wisdom on politics and policy.”<sup>10</sup>

At its core, ESG is merely partisan politics masquerading as responsible corporate governance. A major ESG “policy centerpiece” is stifling investments in oil and gas,<sup>11</sup> and Wall Street firms have “bragg[ed] about their coordinated efforts to choke off investment in energy.”<sup>12</sup> Boycotting certain energy investment, however, is just a subset of the types of ESG-related

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<sup>4</sup> See, e.g., Sean Fieler, *The ESG Movement Is a Ripe Target for Antitrust Action*, WALL ST. J. (June 2, 2022); see also Mike Pence, *Republicans Can Stop ESG Political Bias*, WALL ST. J. (May 26, 2022).

<sup>5</sup> See generally Jed Rubenfeld & William Barr, *ESG Can't Square With Fiduciary Duty*, WALL ST. J. (Sept. 6, 2022); Lydia Moynihan, *BlackRock faces scrutiny from 19 state AGs over ESG investments*, N.Y. POST (Aug. 16, 2022); Steven Adams, *West Virginia treasurer joins with 15 other states to warn financial institutions of 'woke capitalism'*, WVNEWS (Nov. 28, 2021); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005); Todd Zywicki, *Cancel Culture Comes to Banking*, NEWSWEEK (Jan. 13, 2022); STEPHEN SOUKUP, *THE DICTATORSHIP OF WOKE CAPITAL* 9 (2021); Brian Morgenstern, *5 Ways American Corporations Can Avoid Becoming The Next Disney*, THE FEDERALIST (May 6, 2022); Liz Peek, *Message to woke corporate America: Butt out of politics*, THE HILL (Apr. 26, 2022).

<sup>6</sup> See, e.g., Holman W. Jenkins, *Inflation and the Trump Factor*, WALL ST. J. (June 14, 2022) (describing “Larry Finkism”).

<sup>7</sup> See, e.g., Matthew Impelli, *A Full List of Companies That Have Advocated Against Georgia's New Voting Law*, NEWSWEEK (Apr. 1, 2021); David Kihara, *DeSantis says Disney 'crossed the line' in calling for 'Don't Say Gay' repeal*, POLITICO (Mar. 29, 2022).

<sup>8</sup> James Varney, *One thing partisan voters agree on: Woke CEOs miss the mark*, WASH. TIMES (Dec. 1, 2021).

<sup>9</sup> See, e.g., Mark Brnovich, *ESG May Be an Antitrust Violation: I'm investigating a coordinated effort to allocate markets*, WALL ST. J. (Mar. 6, 2022) (describing how Americans’ “retirement funds are likely helping facilitate . . . campaigns to advance far-left policy goals, with consumers bearing the costs of increased energy prices,” and describing harm to “the pocketbook of all Americans, especially lower-wage workers”).

<sup>10</sup> *Inflation and the Trump Factor*, *supra* n.6; *cf. id.* (identifying “the rise of the ‘woke’ corporation” and explaining “if you remember the 1970s [Larry Fink’s] missives might strike a familiar bell. They are updated expressions of the three-martini lunch—i.e., a business honcho indulging himself with on-the-job consumption, aka an untaxed perk”).

<sup>11</sup> *The ESG Movement Is a Ripe Target for Antitrust Action*, *supra* n.4; see also Mark Hendrickson, *ESG Is Evil*, THE AMERICAN SPECTATOR (Oct. 17, 2022).

<sup>12</sup> Mark Brnovich, @GeneralBrnovich, TWITTER (Mar. 7, 2022),

<https://twitter.com/GeneralBrnovich/status/1500878845704118274?s=20&t=9nWxZMzquqBN4HVx86N28g>.

goals.<sup>13</sup> The list includes, for example: “climate change (e.g., reporting on climate change, risks of climate change, greenhouse gas emissions goals),” “sustainability reporting,” and other “energy-related” issues.<sup>14</sup> ESG goals can also include other policy concerns, such as “fake news dissemination” or “gun control.”<sup>15</sup> Access to abortion has even become part of ESG.<sup>16</sup>

Corporate America’s collusion in pursuit of ESG goals may violate federal or state antitrust laws.<sup>17</sup> Antitrust law is generally “skeptical of cooperation among competitors” over certain matters, and that includes coordination over ESG goals.<sup>18</sup> The “traditional principles that prohibit cooperation among competitors in ways that restrict price, output, or quality” apply “regardless of their values-based intent.”<sup>19</sup> As one antitrust expert has explained, “[t]he loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That’s long-standing antitrust law.”<sup>20</sup> Accordingly,

when competitors agree with each other on how they should act in the marketplace, antitrust law enforcers have stepped in and taken a good, hard look. Anti-competitive agreements among competitors . . . are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and . . . harm consumers.<sup>21</sup>

Ultimately, agreements not to compete can have disastrous results in relevant markets,<sup>22</sup> hurting both the economy and the American people.<sup>23</sup>

When enterprises like Climate Action 100+ or Ceres invite or facilitate collusion to achieve progressive policy goals, that activity can aid anticompetitive and unlawful agreements and behavior.<sup>24</sup> The actions of such organizations may enable prohibited conduct on a large

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<sup>13</sup> Cf. Peter Atkins et al., *Social Responsibility and Enlightened Shareholder Primacy: Views from the Courtroom and Boardroom*, HARVARD LAW SCHOOL FORUM ON SOCIAL GOVERNANCE (Feb. 21, 2019), <https://corpgov.law.harvard.edu/2019/02/21/social-responsibility-and-enlightened-shareholder-primacy-views-from-the-courtroom-and-boardroom>.

<sup>14</sup> *Id.* at n.6.

<sup>15</sup> Cf. *id.*

<sup>16</sup> See Shelley Alpern, *The Newest ESG Frontier: Reproductive Rights at the Corporate Level*, CONFLUENCE PHILANTHROPY (June 16, 2022).

<sup>17</sup> See, e.g., *ESG May Be an Antitrust Violation*, *supra* n.9; C. Boyden Gray, *Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market*, 4-7, TEXAS PUBLIC POLICY FOUNDATION (June 2021); Letter from Mark Brnovich, Arizona Attorney General, et al., to Mr. Lawrence Fink, BlackRock, Inc., 5 (Aug. 4, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf>.

<sup>18</sup> See Michael Murray & Tara Giunta, *How To Mitigate Antitrust Risk In ESG Efforts*, LAW360 (Oct. 19, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> Makan Delrahim, *Popular ends should not justify anti-competitive collusion*, USATODAY (Sept. 12, 2019).

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *ESG May Be an Antitrust Violation*, *supra* n.9 (offering anecdote of how “trying to raise wide-scale capital for drilling oil” has been “almost impossible”).

<sup>23</sup> *Id.*; see also Terrence Keeley, *ESG Does Neither Much Good nor Very Well*, WALL ST. J. (Sept. 12, 2022).

<sup>24</sup> See, e.g., *Corporate Collusion*, *supra* n.17, at 6.

scale,<sup>25</sup> and may even lead to liability for such organizations under antitrust laws.<sup>26</sup> Ultimately, “[a]dvancing the ESG agenda requires that the owners of capital collude to restrict the supply of certain goods and services” and—regardless of motivations—that is a “textbook antitrust violation.”<sup>27</sup> This is the type of prohibited conduct that Climate Action 100+ and Ceres appear to be facilitating.

No matter how firmly a company or its executives believe in the goals of ESG, that belief does not excuse anticompetitive agreements or unlawful conduct to advance progressive policies. The Committee on the Judiciary has jurisdiction to examine unlawful restraints of trade and commerce.<sup>28</sup> Accordingly, to help us better understand the roles you and your organizations play in facilitating and coordinating companies’ efforts to achieve ESG-related goals, we request that you produce the following documents and information, for the period December 1, 2016, to the present:

1. All documents and communications referring or relating to the various markets, sectors, or industries, in which Climate Action 100+ or Ceres help investors, members, or other companies advance ESG-related goals.
2. All documents and communications referring or relating to guidance from Climate Action 100+ (including from any of its investor networks, any of its working groups, or its Steering Committee) or Ceres on how investors, members, or other companies can or should advance ESG-related goals, including but not limited to how they can or should do so with so-called “focus companies.”
3. All documents and communications referring or relating to any efforts by Climate Action 100+ (including by any of its investor networks, any of its working groups, or its Steering Committee) or Ceres to obtain or solicit agreements, commitments, or other types of participation from any investors, members, or other companies, including but not limited to BlackRock, State Street, or Vanguard, to advance ESG-related goals. Please

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<sup>25</sup> See, e.g., *ESG May Be an Antitrust Violation*, *supra* n.9; Letter from Senator Tom Cotton to Mr. Larry Fink, Chairman & CEO, BlackRock, Inc. (July 13, 2022); see also *About Climate Action 100+*, CLIMATE ACTION 100+ (describing how Climate Action 100+ functions to affect corporate change), <https://www.climateaction100.org/about/> (last visited Dec. 2, 2022); Vivek Ramaswamy, @VivekGRamaswamy, TWITTER (June 7, 2022), <https://twitter.com/VivekGRamaswamy/status/1534285301773910017>; Vivek Ramaswamy, @VivekGRamaswamy, TWITTER (May 10, 2022), <https://twitter.com/VivekGRamaswamy/status/1524186401394368514>.

<sup>26</sup> See, e.g., *Corporate Collusion*, *supra* n.17, at 6-7; *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990); *Linens of Eur., Inc. v. Best Mfg., Inc.*, No. 03 CIV. 9612 (GEL), 2004 WL 2071689, at \*13 (S.D.N.Y. Sept. 16, 2004); *Spanish Broad. Sys., Inc. v. Clear Channel Commc’ns, Inc.*, 242 F. Supp. 2d 1350, 1361 (S.D. Fla. 2003); *Smithkline Beecham Corp. v. E. Applicators, Inc.*, No. CIV.A. 99-CV-6552, 2002 WL 1197763, at \*8 (E.D. Pa. May 24, 2002); *Tondas v. Amateur Hockey Ass’n of U. S.*, 438 F. Supp. 310, 315 (W.D.N.Y. 1977); *Ozdoba v. Verney Brunswick Mills Inc.*, 152 F. Supp. 136, 138 (S.D.N.Y. 1946); *Matter of Toys R Us, Inc.*, 126 F.T.C. 415, 584-85 (1998) (listing the elements for a hub and spoke conspiracy); *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 795 (S.D. Ill. 2018).

<sup>27</sup> *The ESG Movement Is a Ripe Target for Antitrust Action*, *supra* n.4.

<sup>28</sup> Rules of the House of Representatives, R. X, 117th Cong. (2021).

Ms. Mindy Lubber  
Mr. Simiso Nzima  
December 6, 2022  
Page 5

understand this request to include, but not be limited to, any documents and communications referring or relating to any investor's, member's, or other company's knowledge or awareness of a different investor's, member's, or other company's coordination or work with, or agreements to support efforts relating to, Climate Action 100+ or Ceres.

4. All documents and communications between or among investors, members, or other companies referring or relating to investors', members', or other companies' joint or collective efforts to advance ESG-related goals, including any documents and communications reflecting or suggesting agreement over specific steps, policies, or best practices.
5. All documents and communications referring or relating to the circumstances of the founding of Climate Action 100+, including any documents and communications about the need for Climate Action 100+ to facilitate advancing ESG-related goals, and about the roles of Ceres and CalPERS.
6. All documents and communications between or among proxy advisory firms, including Institutional Shareholder Services and Glass Lewis, or financial services companies, including PayPal, referring or relating to ESG-related goals.

Please produce this information as soon as possible but no later than 5:00 p.m. on December 20, 2022.

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 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 for your prompt attention to this matter.

Sincerely,

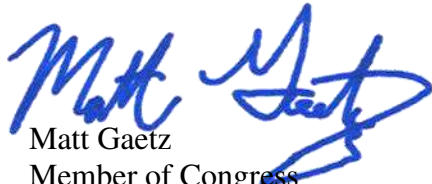


Dan Bishop  
Member of Congress



Jim Jordan  
Ranking Member

Ms. Mindy Lubber  
Mr. Simiso Nzima  
December 6, 2022  
Page 6



Matt Gaetz  
Member of Congress



Tom McClintock  
Ranking Member  
Subcommittee on Immigration and  
Citizenship



Scott Fitzgerald  
Member of Congress



Cliff Bentz  
Member of Congress

cc: The Honorable Jerrold L. Nadler, Chairman