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Via email: rule-comments@sec.gov

Vanessa A. Countryman
Secretary, United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: File Number: S7-10-22

Comments submitted by Neville S. Hedley and the
Hamilton Lincoln Law Institute in Response to "Proposed Rule:
The Enhancement and Standardization of Climate-Related Disclosures for
Investors" RIN 3235-AM87; 87 Fed. Reg. 21334 (Mar. 21, 2022)

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Security and Exchange Commission's proposed rule on The Enhancement and Standardization of Climate-Related Disclosures for Investors, which proposes to revise portions of 17 CFR §§ 210, 229, 232, 239 and 249. 86 Fed. Reg. 57272 (Oct. 14, 2021). We believe that the proposed rule is unwarranted and is a dramatic overreach of the Commission's authority and mission to protect investors and will result in needless and frivolous securities class-action lawsuits which will primarily enrich class-action attorneys and their opposing defense counsel and do little to protect shareholders or investors, improve corporate performance, or help solve the alleged "climate crisis." Registrant companies will seek out an army of rent-seeking climate-disclosure consultants and other similar "professionals" to advise them on the best means to avoid such lawsuits, as well as how to avoid the ire of activist shareholders and interest groups focused on Environmental, Social, and Governance ("ESG") goals, rather than a registrant's financial performance and enhancement of shareholder value.

The Hamilton Lincoln Law Institute ("HLLI") is a nonprofit public-interest law firm dedicated to, among other things, principles of protecting consumers and shareholders and from conflicts of interest, limited constitutional government, and the free market. The Center for Class Action Fairness ("CCAF") is part of HLLI. CCAF's mission is to litigate on behalf of class members against unfair class action procedures and settlements, including securities law class-action lawsuits. *See e.g., In re Stericycle Sec. Litig.*, —F.4th—, No. 20-2055, 2022 U.S. App. 13414 (7th Cir., May 18, 2022).

Although there is much to criticize about the proposed rule, we write this letter primarily to warn about the likelihood of frivolous and expensive securities class-action lawsuits that will inevitably result if this proposed rule becomes final. Accordingly, we recommend that the proposed rule be withdrawn or in the alternative, include a broad safe-harbor exclusion for all climate-related disclosures for all registrants, rather than the more limited one in the proposed rule. In the alternative, we suggest that Scope 3 climate-related disclosures should never be considered material and that all Scope 3 climate-related disclosures be granted a safe-harbor.

The proposed rule will require registrants to disclosure a variety of information concerning the registrant company's climate-related risks and greenhouse gas ("GHG") emissions. The proposed rule will require disclosures of not only climate-related risks and activities directly related to a registrant's business activities (Scope 1 and Scope 2), but extends to both upstream and downstream climate impacts (Scope 3).

Although the proposed rule acknowledges that heretofore climate-risk disclosures have been imprecise and inconsistent across registrants, including those in similar industries, that didn't stop the Commission from concluding that such risks are "material" and therefore require disclosure. In reaching this conclusion, the proposed rule relies heavily on the framework for disclosure established by the Task Force on Climate-Related Financial Disclosure ("TCFD") and the Greenhouse Gas ("GHG") Protocol. The TCFD is a creation of the Financial Stability Board ("FSB"), which in turn is a creature of the Group of 20 ("G20") finance ministers and central bank governors dominated by the United States and European Union countries. Established in 2015, the TCFD has developed a framework for climate-related disclosures to help evaluate climate-related risks over short-, medium-, and long-term horizons. The TCFD framework has been widely-adopted by several other countries and also has been incorporated into voluntary disclosures prepared by registrant companies.

The proposed rule attempts to emphasize the importance and "materiality" of climate-related disclosures as on par with financial disclosures. "For example, one commentator stated that it is *critical* to investors and others assessing a company's risk profile, estimating its risk-adjusted returns, and completing other relevant financial analyses to include information on how climate-related risks and climate-related opportunities affect companies' income statements, cash flow statements, and balance sheets." 87 Fed. Reg. 21334 at 21367. The commentator cited is Bloomberg LP, which is one of several times Bloomberg is cited in the proposal as authoritative support for the proposed rule and the notion that climate-related disclosures are "material" to investor decisions. Bloomberg LP, of course, was founded by billionaire Michael Bloomberg, a failed Democratic candidate for President. Bloomberg LP is not an investment advisor, investment manager or a brokerage. Rather, it is privately-held media and financial data and software company for which Mr. Bloomberg still serves as Chief Executive Officer. Coincidentally, Bloomberg LP also provides an array of climate-related data and climate risk consulting services to companies. Hence, Mr. Bloomberg clearly has a financial incentive to see climate-related disclosures become mandatory and classified as material. Whether such disclosures benefit investors is debatable. But Mr. Bloomberg also serves in another capacity; he is Chair of the TCFD, the organization the developed the climate-disclosure framework upon which the Commission has used as a foundation for the proposed rule.

The breadth of the proposed rule, especially with respect to Scope 3 disclosures is potentially limitless given that it reaches a registrant's upstream and downstream activities. As such, the proposed rule touches almost all, if not all, economic activity, with the consequence that, if finalized, the rule will be perhaps the most important and far-reaching regulation of industrial and financial policy in the United States. Before finalizing the rule, the Commission should have to explain why an individual such as Mr. Bloomberg, who clearly has a political agenda, has played such an outsized role in crafting this policy and proposed rule. While climate change and related ESG issues may be of paramount importance to billionaires like Michael Bloomberg and Larry Fink of BlackRock,[1] such issues rank very low in recent public opinion surveys. Indeed, recent public opinion surveys

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[1] Mr. Fink is the founder and CEO of BlackRock, one of the largest institutional investment management and advisory firms in the world. Mr. Fink is an outspoken advocate of "stakeholder" capitalism and the notion that ESG factors should be major considerations for company management and boards of directors. Similar to Bloomberg, BlackRock submitted a comment letter in response to the Commission's initial request for comments in 2021. The proposed rule cites favorably BlackRock's comment letter repeatedly.

from Gallup and Statista show that only 2% of the population rank climate change as a major public policy concern.[2] This would seem to undercut the argument that climate-related disclosures are material to the investing public.

The notion that climate-related disclosures are material to investors is further undermined that investors appear to be making reasoned investment decisions without mandatory climate-related disclosures and are quite content to rely upon the voluntary disclosures that many companies prepare. This is illustrated by the recent performance of publicly traded coal companies such as NACCO Industries, Inc., Arch Resources, Peabody Energy, and Consol Energy. All of the foregoing have significant operations mining coal, perhaps the dirtiest and least favored fossil fuel. All of the foregoing companies issued voluntary climate-related disclosures. Yet, even in light of coal's poor environmental reputation and the voluntary climate-related disclosures, all four of the foregoing companies have seen dramatic increases in their share prices over the past year. For instance, Arch has gone from trading at approximately $45 a year ago to well over $160, and Consol has gone from less than $10 per share to close to $50. Similarly, NACCO has more than doubled in value, and Peabody has increased by almost ten-fold over the same period.[3]

Also notable are the litany of state law tort lawsuits that municipalities and local governments have initiated against major multinational oil and gas companies seeking damages for the alleged harms of climate change. *See e.g., City of New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021) (lawsuit against Chevron, ExxonMobil, ConocoPhillips, Royal Dutch Shell and BP). These lawsuits have been broadly publicized and no doubt have been disclosed as a litigation risk in corporate filings. Nonetheless, ConocoPhillips shares have doubled in value within the past year, ExxonMobil is up approximately 75%, Royal Dutch Shell and Chevron are up approximately 50%, and BP is up approximately 30%.[4]

There are other factors contributing to the share prices of the forementioned companies. But the negative climate-change stigma associated with the fossil fuel industry is well documented and widely publicized. These companies are frequently

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[2] *See* https://www.news.gallup.com/poll/1675/most-important-problem.aspx; https://www.statista.com/statistics/323380/public-opinion-on-the-most -important-problem-facing-the-us/.

[3] The stock price data is derived from https://finance.yahoo.com for the ticker symbols ARCH, CEIX, NC, and BTU for the period April 2021 through May 2022.

[4] The stock price data is derived from https://finance.yahoo.com for the ticker symbols XOM, CVX. SHEL, and BP for the period April 2021 through May 2022.

the target of climate-change regulation and opprobrium. Nonetheless, investors have continued to favor such "bad for the climate actors" with continued investment. Presumably that would also include some of the large institutional investors such as BlackRock and Vanguard that submitted comment letters advocating for the proposed rule. Accordingly, that begs the question about how "material" really are climate-related disclosures?

Even if an argument can be made that Scope 1 and Scope 2 are material because those climate-related disclosures are directly tied to a registrant's internal operations and energy consumption, extending the "materiality" standard to Scope 3 disclosures is extreme. Requiring registrants, especially registrants in carbon-intensive industries such as oil and gas, coal, automotive or heavy machinery, to assess Scope 3 activities for materiality and then make associated climate-related disclosures would be an all-consuming exercise without limits. Managers and board members would feel compelled to exhaustively address all potential impacts that carbon emissions might have on upstream and downstream activities. More time would be spent analyzing and assessing an endless list of unknowable risks or impacts. This illustrates the folly of the rule, particularly with respect to Scope 3 climate-related disclosures, and especially if such disclosures are deemed material. Registrant managers and board members will be consumed focusing on the near limitless reach of Scope 3, rather than focusing on more immediate and tangible operational and financial risks to the company. The rule, as proposed, essentially converts corporate managers and board members into climate-risk managers because of its all-consuming nature.

If Scope 3 is included in required disclosures and deemed material, then this highlights the fact that anything and everything no matter how tangentially tied to the company becomes a climate-related risk that may require disclosure, even when it might not be climate-related at all. The proposed rule's treatment of severe weather events illustrates this point. Mother Nature has unleashed severe floods, tornados, blizzards, droughts, and hurricanes long before the industrial revolution, but one wouldn't think that is the case based on the commentary in the proposed rule, which treats all severe weather events as climate-related. But this cannot possibly be the case.

Indeed, the 1930s witnessed devastating weather-related events that had severe and lasting economic impacts; the Dust Bowl droughts during the early 1930s and the New England Hurricane of 1938. Both were extreme weather events that occurred long before climate change was a consideration, and the economic and financial consequences to both were severe. The proposed rule, however, repeatedly

emphasizes that severe weather events should be evaluated only through the lens of climate change and therefore must be included in climate-related disclosures. *See, e.g.,* 87 F.R. at 21349-50; 21362; 21365-21372; 21464 (proposed § 210.14-02(c)). Yet the forementioned severe weather events of the 1930 were just that, severe weather events unrelated to alleged climate-change driven by carbon emissions. Sometimes severe weather is just severe weather. Under the proposed rule, however, severe weather and potential negative consequences of severe weather will, by default, be considered climate-related. Accordingly, if a registrant company suffers a financial or operational set-back because of severe weather that was not sufficiently addressed in climate-related disclosures, then the registrant might be exposed to litigation for a material omission. As a practical matter, registrants will begin to be over-inclusive and treat all potential risks as climate-related to alleviate the risk of such omission.

This "for want of a nail" logic will drive climate-related disclosures, regardless of real materiality. Managers and board members will error on the side of disclosure and be overinclusive to address all possible risks, regardless of how remotely associated those risks are to climate change or carbon emissions, and regardless of how remotely upstream or downstream those risks are to the registrant's value chain. Even so, the limitless nature of Scope 3 will inevitably result in registrants being sued for inadequate or omitted Scope 3 climate-related disclosures, and it will be nearly impossible for the registrant company to defend because, using severe weather situation as an example, registrants will be in the impossible position to prove that the severe weather was simply weather, rather than a climate-change driven event. The practical effect of the rule will be to dramatically increase the volume of registrant disclosures, many of which will be meaningless to shareholders or potential investors. Moreover, the increased volume of disclosures will lead to increased litigation, since there is empirical evidence that more disclosures result in more, rather than less, securities litigation. Joshua Cutler, Angela K. Davis & Kyle Peterson, *Disclosure and the Outcome of Securities Litigation*, REVIEW OF ACCOUNTING STUDIES 24:230-263 (2019).

Allowing Scope 3 climate-related disclosures to be deemed material will provide securities class-action attorneys and their stable of institutional shareholder clients an almost endless number of avenues to initiate lawsuits and registrant companies will be forced to defend these suits by trying to prove a negative—that any alleged Scope 3 climate-related omission or inadequate disclosure had no bearing upon the asserted shareholder loss. Hence registrant firms will most likely attempt to quickly settle such lawsuits. *See* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG* Disclosure, 98 WASH. U. L. REV. 1821,

1847-54 (2021) (discussing risk of increased abusive private securities litigation that would result from SEC-mandated ESG disclosures). Based on CCAF's experience many such settlements will not provide meaningful relief to shareholder class members, but rather will be vehicles to enrich rent-seeking plaintiffs' attorneys with outsized fee awards. *See* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1312-14 (Oct. 2008) (noting that Rule 10b-5 class action lawsuits "fail to provide meaningful compensation to class members" and that such "compensatory shortcomings" have been "well chronicled").

HLLI encourages the Commission to withdraw the proposed rule. In the alternative, HLLI believes that due to the novelty and extreme reach of the rule, particularly with respect to Scope 3 and the acknowledged overlap of Scopes 1, 2, and 3, all climate-related disclosures should be subject to a safe-harbor exclusion. At the very least, the Commission should not mandate Scope 3 disclosures, but rather allow registrants to continue to provide voluntary Scope 3 disclosures. If the Commission insists on requiring Scope 3 disclosures, they should either be deemed non-material or be subject to a broad safe-harbor exclusion. Doing so will dramatically reduce the likelihood of frivolous class-action litigation that will do little to benefit shareholders and registrant companies or the climate.

Respectfully submitted,

s/ *N.S. Hedley*
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