Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

June 17, 2022

Re: Proposed SEC Rule on The Enhancement and Standardization of Climate-Related Disclosures for Investors. Attention: 87 FR 21334; Docket ID: SEC-2022-06342; File No. S7-10-22

Ms. Countryman:

The Center for International Environmental Law (CIEL) is a nonprofit 501(c)(3) legal organization with offices in Washington DC and Geneva, Switzerland. Since 1989, CIEL has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society.

We appreciate the opportunity to comment on the proposed rule (the "Rule") by the Securities and Exchange Commission (the "SEC" or the "Commission") on the Enhancement and Standardization of Climate-Related Disclosures for Investors.[1] The Rule rightly identifies the urgent need for mandatory climate-related disclosures in order to ensure decision-useful information is provided to investors to enable informed judgments about the impact of climate-related risks on current and potential investments. In particular, these disclosures will be critical in stemming the rising tide of climate-related greenwashing. For this reason, we broadly welcome the proposed Rule.

CIEL is one of many signatories to the letters spearheaded by Americans for Financial Reform Education Fund, Public Citizen, Amazon Watch and others, commenting on various aspects of the proposed Rule.[2] We fully support the recommendations contained in those letters, and

[1] Proposed SEC Reg. 17 C.F.R. 210, 229, 232, 239, and 249 [Release Nos. 33-11061; 34-94867; File No. S7-10-22] RIN 3235-AM87 ("The Enhancement and Standardization of Climate-Related Disclosures for Investors"), https://www.sec.gov/rules/proposed/2022/33-11042.pdf [hereinafter SEC Proposed Rule]

[2] See Commentary from Americans for Financial Reform et al., https://ourfinancialsecurity.org/wp-content/uploads/2022/06/8pg-Sign-on-Letter_SEC-Climate-Disclosure-June-16.pdf; Commentary from Amazon Watch et al, https://amazonwatch.org/assets/files/2022-06-16-sec-comment-letter.pdf; Commentary from Ocean Conservancy et al, https://oceanconservancy.org/wp-content/uploads/2022/06/EJ-Comment-Letter-June16-9am.pdf.

present this submission to highlight further opportunities for specific disclosures around six issues – 1) registrant use of carbon capture and storage technologies; 2) registrant use of carbon offsets; 3) disclosure of climate-related human rights due diligence and impacts; 4) climate-related litigation; 5) Scope 3 emissions, and 6) the fiduciary duty of corporate directors to manage climate risks. We have indicated below the questions posed by the SEC that pertain to each issue.

1. Use of Carbon Capture, Utilization and Storage (CCUS) technologies

Applicable Question: 170

Recommendation:

- **In recognition of increasing reliance by companies on experimental emissions reduction and removal technologies such as carbon capture, utilization, and storage (CCUS), registrants should disclose, at a minimum, any assumptions about the feasibility, emissions reduction capability, costs, risks, and permanence of carbon insets as well as CCUS and carbon removal technologies used to reduce or remove emissions within their operational and organizational boundaries or for which they are providing financial support.**
- **Registrants planning to use or currently using CCUS should disclose the current or intended destination of the captured carbon, whether for storage or utilization.**
- **Registrants should disclose actual, disaggregated emissions and emissions reductions from the carbon capture units, which include: (a) the absolute and relative amounts of emissions captured for the underlying facility or activity to which the technology is applied; (b) the remaining emissions that are not captured; and (c) the additional emissions from powering the CCUS unit.**

Explanation:

We support the SEC requiring a registrant to discuss how it intends to meet climate-related targets, goals, and related claims. This is particularly important where companies' future goals and targets can rest on speculative assumptions that may or may not be viewed as credible by investors. Investors must be able to ascertain if claimed approaches to 'net zero' or other corporate climate targets are robust, because their efficacy in reducing emissions and inducing a shift away from climate change-causing activities will dramatically impact a registrant's transition risk profile.

We focus this commentary on disclosures related to the use of CCUS, given the significant role that this technology is already playing in companies' climate transition plans. The promise of the technology is that it can reduce, but not eliminate, a significant percentage of emissions that would otherwise be released from fossil fuel combustion or other industrial activity.

The effectiveness of CCUS as an emissions reduction measure is highly dependent on its ability to achieve promised reduction rates ("capture rates") and the permanence of the carbon storage.

Absent specific disclosures regarding the costs of deploying carbon capture technology and the availability of uses, markets, and/or storage sites for the captured carbon, representations that a corporation will pursue a program of carbon capture to reduce its emissions, or that it will fund others to do so, may mislead investors as to the program's economic feasibility and technological readiness. The failure of pledged CCUS programs to deliver on their stated aims could lead to significantly increased costs for the company, stranded assets, carbon risk, or all of the above.

CCUS is presented as an emission-reduction approach, but the reality is not so simple.[3] The carbon capture process may increase on-site energy consumption as well as Scope 3 emissions both up- and downstream. Because CCUS technologies enable continued fossil fuel combustion, CCUS may extend the economic life of underlying facilities, increasing lifetime emissions overall. Moreover, CCUS projects have a long history of underperformance and cost overruns, despite promises and projections from project proponents (see below for examples). For these reasons, the ability of CCUS to meaningfully contribute to climate goals and net zero plans should be understood as uncertain and warrant heightened scrutiny from the Commission and specific disclosures from registrants.

Carbon capture and compression processes are extremely energy-intensive, generating their own emissions on-site and increasing upstream emissions. Running carbon capture equipment incurs an "energy penalty" of 13-44%, typically around 20-30%, of the energy consumption of the underlying emitting process.[4] This energy penalty necessitates the combustion of additional fuel to achieve the same energy output, or a significantly diminished energy output if the amount of fuel used is held constant. CCUS therefore increases either or both the per-unit or absolute upstream (Scope 3) emissions from fossil fuel production, and can quite dramatically reduce any purported climate benefit. One study that calculated the lifecycle emissions associated with CCUS used for energy production from fossil fuels found that "the equipment captured the equivalent of only 10-11 percent of the emissions they produced, averaged over 20 years."[5]

In practice, CCUS projects have repeatedly failed to meet optimistic and ambitious CO2 capture targets set by proponents.[6] In July 2021, Chevron, operator of Australia's only commercial-scale CCUS project, admitted that the project failed to meet its five-year capture target of 80% CO2, and is now seeking a deal with regulators on how to make up for millions of tons of CO2

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[3] Center for International Environmental Law, *Confronting the Myth of Carbon-Free Fossil Fuels: Why Carbon Capture is not a Climate Solution* (July 2021), https://www.ciel.org/wp-content/uploads/2021/07/Confronting-the-Myth-of-Carbon-Free-Fossil-Fuels.pdf

[4] IPCC, 2022: *Climate Change 2022: Mitigation of Climate Change*. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change Ch. 6, at 6-38 (P.R. Shukla et al. eds, 2022), https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf. See also Budinis, S. et al., An assessment of CCUS costs, barriers and potential, 22 Energy Strategy Reviews, 61, 67-68 (2018), https://doi.org/10.1016/j.esr.2018.08.003 (discussing energy and efficiency penalty estimates for coal and gas).

[5] Taylor Kubota, *Stanford Study casts Doubt on Carbon Capture*, Stanford News (October 25, 2019), https://news.stanford.edu/2019/10/25/study-casts-doubt-carbon-capture/, citing Mark Z. Jacobson, *The health and climate impacts of carbon capture and direct air capture*, 12 Energy Envt. Sci. 3567 (2019), https://pubs.rsc.org/en/content/articlelanding/2019/ee/c9ee02709b/unauth#!divAbstract

[6] See U.S. Government Accountability Office, *Carbon Capture and Storage: Actions Needed to Improve DOE Management of Demonstration Projects* (2021), https://www.gao.gov/assets/gao-22-105111.pdf.

emitted.[7] Other high-profile projects, including Archer Daniel Midland's Illinois Industrial Carbon Capture Project,[8] the Petra Nova[9] and Boundary Dam[10] projects at coal-fired power plants, and the Quest and Air Products capture projects at hydrogen plants,[11] have all missed capture targets advertised by proponents, have claimed high capture rates by only capturing a minute fraction of total facility emissions, or both.

Critically, the role of CCUS in providing carbon dioxide for enhanced oil recovery (EOR) – increasing oil production – further undermines any purported climate benefit of CCUS while also introducing additional financial risk. More than 95% of all CCUS capacity deployed in the United States has been used for EOR, with only a single major project capturing carbon dioxide for geological storage.[12] Not only does the climate rationale for CCUS evaporate if captured carbon is used to pump more oil, reliance on EOR as the market for captured carbon introduces additional financial risk. Where a CCUS project relies on EOR as part of its business model, low oil prices can lead to a cessation of capture operations as the revenue from carbon dioxide sales does not cover the costs of capture. The one coal-fired power plant with carbon capture equipment in the United States, the Petra Nova project in Texas, shut down for exactly this reason.[13]

Disclosure rules should also contemplate the fact that CCUS projects may also serve to extend the economic life of an underlying emitting source and therefore increase lifetime emissions even while reducing emissions intensity. Of the two coal plants with CCUS operations in North America, CCUS explicitly extended the life of one of them (and as discussed above, the other is no longer operating its carbon capture equipment). The Boundary Dam power station was planning to close, but instead retrofitted with CCUS and is now expected to continue operating for several more decades.[14] Similarly, a coal plant in North Dakota recently reversed its decision

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[7] Michael Mazengarb, *Chevron admits failure of $3 billion CCS facility in Western Australia*, IEFFA (July 19, 2021), https://ieefa.org/chevron-admits-failure-of-3-billion-ccs-facility-in-western-australia/.

[8] See Jonathan Hettinger, *Despite hundreds of millions in tax dollars, ADM's carbon capture program still hasn't met promised goals*, Midwest Center for Investigative Reporting (November 19, 2020), https://investigatemidwest.org/2020/11/19/despite-hundreds-of-millions-in-tax-dollars-adms-carbon-capture-program-still-hasnt-met-promised-goals/.

[9] See Nichola Groom, *Problems plagued U.S. CO 2 capture project before shutdown: document*, Reuters (Aug. 6, 2020), https://www.reuters.com/article/us-usa-energy-carbon-capture/problems-plagued-u-s-co2-capture-project-before-shutdown-document-idUSKCN2523K8.

[10] See Carlos Anchondo, *CCUS 'red flag?' World's sole coal project hits snag*, E&E News (January 10, 2022), https://www.eenews.net/articles/ccs-red-flag-worlds-sole-coal-project-hits-snag/.

[11] See David Schlissel et al., *Institute for Energy Economics and Financial Analysis, Blue Hydrogen: Technology Challenges, Weak Commercial Prospects, and Not Green* (2022), https://ieefa.org/wp-content/uploads/2022/02/Blue-Hydrogen-Presentation_February-2022.pdf.

[12] Global Carbon Capture and Storage Institute, *Global Status Update 2021* (2021), p.63, https://www.globalccsinstitute.com/wp-content/uploads/2021/10/2021-Global-Status-of-CCS-Report_Global_CCS_Institute.pdf.

[13] *See* Groom, *supra* note 9.

[14] Karin Rives, *Only still-operating carbon capture project battled technical issues in 2021*, S&P Global (January 6, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/only-still-operating-carbon-capture-project-battled-technical-issues-in-2021-68302671.

to retire and is pursuing a sale and CCS retrofit instead, and the state of Wyoming has mandated coal plants to install carbon capture equipment to stave off retirement.[15] Even though the total and per-unit energy emissions may be lower from the retrofitted facilities, the overall emissions are greater than what the plant would have emitted had it been shuttered (i.e., none). Reporting on GHG emissions should therefore include a temporal element to them. Put another way, a registrant should not be able to report emissions reductions where the alternative would have been the closure or retirement of the underlying facility.

CCUS projects also face significant feasibility risks, owing to the substantial costs[16] and land use footprint associated with CCUS infrastructure, and its serious environmental, public health, and safety risks.[17] One study estimates that to scale, the CCUS build-out—including the pipelines and infrastructure required to capture, compress, transport, and store CO2—will need to be 2 to 4 times larger than the current global oil industry.[18] It is for these reasons that there is widespread and growing opposition to CCUS from community, environmental justice, and other groups, which present additional obstacles to the use of CCUS. There is also the emergence of litigation to contest reliance on CCUS in corporate net zero plans.[19] (See Section 4 below)

For the reasons stated above, the Rule should require registrants that rely on CCUS to achieve their climate targets to articulate the true costs, feasibility, and potential emissions impacts of their proposed or intended CCUS programs. To ensure investors are not misled into believing that carbon capture is a cure-all for GHG emissions, companies should disclose the disaggregated emissions and emissions reductions from carbon capture units. Disclosures should enable investors to evaluate and quantify the total emissions over time from CCUS projects, not merely changes in the rate of emissions or carbon intensity, especially where facilities are increasing their expected economic life. CCUS projects and investments should not automatically count as emissions reduction, but rather should be compared to a no-CCUS alternative, especially for facilities with planned or expected retirement.

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[15] See Nicholas Kusnetz, *In a Bid to Save Its Coal Industry, Wyoming Has Become a Test Case for Carbon Capture, but Utilities are Balking at the Pricetag*, InsideClimate News (May 29, 2020), https://insideclimatenews.org/news/29052022/coal-carbon-capture-wyoming/.

[16] *See* Hélène Pilorgé et al., *Cost Analysis of Carbon Capture and Sequestration of Process Emissions from the U.S. Industrial Sector*, 54(12) Envtl. Sci. & Tech. 7524-7532 (2020), https://pubs.acs.org/doi/abs/10.1021/acs.est.9b07930.

[17] Sandra Steingraber, *Carbon capture and storage fails to mitigate the dangers of fracking*, in Concerned Health Professionals of New York and Physicians for Social Responsibility, Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking and Associated Gas and Oil Infrastructure" (Eighth Edition, 2022), https://www.psr.org/wp-content/uploads/2022/04/compendium-8.pdf. See also Beth Warden, *Government report on CO2 pipeline leak in Mississippi could affect South Dakota Pipelines*, Dakota News Now (June 11, 2022), https://www.dakotanewsnow.com/2022/06/12/government-report-co2-pipeline-leak-mississippi-could-affect-south-dakota-pipelines/.

[18] N. Mac Dowell et al., *The role of CO2 capture and utilization in mitigating climate change*, 7 Nature Climate Change 243 (2017), https://www.nature.com/articles/nclimate3231.

[19] Environmental Defenders Office, *World-first Federal Court case over Santos' 'clean energy' & net zero claims* (August 26, 2021), https://www.edo.org.au/2021/08/26/world-first-federal-court-case-over-santos-clean-energy-net-zero-claims/

2. Use of Carbon Offsets

Applicable Questions: 24, 101, 170, 173

Recommendation:

- **Registrants should exclude any use of purchased or generated offsets when disclosing its Scope 1, Scope 2, and Scope 3 emissions, as currently proposed.**
- **The definition of carbon offsets should be revised to explicitly apply to offsets for GHG emissions avoidance, reduction, and removal.**
- **In addition to the disclosures stipulated in Item 1506 (d), registrants should disaggregate offset disclosures based on the type of offset (avoidance, reduction, or removal) and describe the method of GHG avoidance, reduction, or removal and permanence of the offset, including the duration of the offset contract used.**
- **Registrants should disclose any due diligence steps they have taken to ensure that the offset programs they participate in fully respect the land rights of local and Indigenous communities.**
- **Registrants should disaggregate reporting on the use of offset credits and the use of offset credit derivatives.**

Explanation:

We are encouraged by the SEC's proposed Rule on disclosing the use of carbon offsets, given the problems of transparency and integrity in the current carbon offset market that present significant financial risks to investors—as well as more fundamental problems with the premise that emissions avoided or reduced in one place can "offset" or compensate for continued or increased emissions elsewhere. We fully support the proposed disaggregation of offsets when reporting Scope 1, 2 and 3 emissions. In order to ensure accurate carbon offset disclosure, we further recommend a revised definition of carbon offset; greater differentiation between offsets for carbon removal and for emissions avoidance or reduction; disclosure of human rights due diligence and impacts that pertain to the use of offsets (see Section 3 below); and disclosure of the use of offset derivatives.

We are aware that an increasing number of registrants will seek to utilize carbon offsets to meet climate-related goals, instead of reducing their respective gross greenhouse gas emissions.[20] Unfortunately current carbon market disclosures do not provide investors the necessary information to assess the credibility of relying on offsets to manage climate transition risks, thereby creating a substantial risk of information asymmetry and asset mispricing.[21] For instance,

[20] Ewa Krukowska, *Carbon Offsets Have an Integrity Problem. COP26 May Help Fix*, Bloomberg (November 17, 2021), Ithttps://www.bloomberg.com/news/articles/2021-11-17/carbon-offsets-have-an-integrity-problem-cop26-may-help-fix-it; Net Zero Tracker, https://zerotracker.net/#companies-table.

[21] See. e.g., Sadie Frank, Danny Cullenward, and Freya Chay. 2022. "Why Carbon Offset Disclosure Matters." *CarbonPlan* (blog). February 8, 2022. https://carbonplan.org/blog/offset-disclosure-needs. There are also serious questions among market participants about whether RECs encourage additional renewable energy deployment. Because these concerns are very similar to the additionality problems faced by participants in the offsets market, we

an investor today often cannot ascertain what offsets a company has acquired, or when a company has actually claimed the underlying benefit of the offset. Further, in voluntary markets, the current disclosure regime means that a company can decide to report its offset use in one year and then to not disclose at all the next, leaving investors with information that is not comparable.

As the SEC rightly recognizes, carbon offsets are beset with various risks that warrant enhanced disclosure. Key risks include market and regulatory uncertainty that could affect offset credit prices and availability[22]; reputational risks, particularly from the use of low-quality offsets that do not represent real additional emissions reductions[23]; litigation risk associated with the credibility of GHG emissions reduction claims[24] (see Section 4 below); and the risk of community conflict and human rights violations (see Section 3 below).

It is for these reasons that detailed disclosure of offset use is critically important, and **we fully support the proposal to require disclosure of the role that offsets play in a registrant's overall strategy to reduce its net carbon emissions.** The SEC should also clarify that registrants either purchasing or generating offset credits must disclose the role that carbon offsets play in their strategies regardless of whether they have set a goal or a target, since carbon offset suppliers will also be exposed to transition risks facing the offset market.

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recommend that the Commission treat offsets and RECs identically in this rulemaking. For simplicity, our analysis in this letter focuses primarily on offsets. See, e.g. Naik, Gautam. 2021. "Problematic Corporate Purchases of Clean Energy Credits Threaten Net Zero Goals." S&P Global, May 5, 2021. https://www.spglobal.com/esg/insights/problematic-corporate-purchases-of-clean-energy-credits-threaten-net-zero-goals.

[22] See, e.g., Nathaniel Bullard. *Carbon Offsets Trading Could Go Two Very Different Ways*. Bloomberg, Jan. 21, 2022, https://www.bloomberg.com/news/articles/2022-01-21/carbon-offsets-trading-could-go-two-very-different-ways; Sadie Frank and Danny Cullenward. 2021. "Climate-Related Financial Risk and Corporate Net-Zero Commitments." *CarbonPlan* (blog). November 1, 2021. https://carbonplan.org/blog/climate-financial-risks.

[23] See, e.g. White, Natasha, and Akshat Rathi. 2022. "China Says the 2022 Winter Olympics Are Carbon Neutral. They Aren't." Bloomberg, February 16, 2022, sec. Energy & Science. https://www.bloomberg.com/news/articles/2022-02-16/beijing-olympics-carbon-neutral-claim-is-based-on-junk-offsets; Badgley, G., Freeman, J., Hamman, J. J., Haya, B., Trugman, A. T., Anderegg, W. R. L., & Cullenward, D. (2021). Systematic over-crediting in California's forest carbon offsets program. *Global Change Biology*, gcb.15943. https://doi.org/10.1111/gcb.15943 (California's forest offset protocol generates half of all offset credits from projects in the United States, but was found to overcredit from the methods used to set baselines (resulting in 30% over-crediting) and leakage (resulting in 50-82% over-crediting); West, T. A. P., Börner, J., Sills, E. O., & Kontoleon, A. (2020). Overstated carbon emission reductions from voluntary REDD+ projects in the Brazilian Amazon. *Proceedings of the National Academy of Sciences*, *117*(39), 24188. https://doi.org/10.1073/pnas.2004334117. *See also* Taskforce on Scaling Voluntary Carbon Markets (TSVCM). 2021. *Public Consultation Report*. Washington, DC: Institute of International Finance. https://www.iif.com/Portals/1/Files/TSVCM_Public_Consultation.pdf, at 50 (finding 45 percent of those surveyed were concerned about "a lack of environmental and social integrity of certain projects.")

[24] See, e.g. *Golden Door Properties, LLC v. County of San Diego.* 2020. Cal. Ct. App. (http://climatecasechart.com/climate-change-litigation/case/sierra-club-v-county-of-san-diego-2/); *Elfin Forest Harmony Grove Town Council v. County of San Diego*. 2021. Cal. Ct. App. (http://climatecasechart.com/climate-change-litigation/case/elfin-forest-harmony-grove-town-council-v-county-of-san-diego/); Smith, Joshua Emerson. 2020. "Court Tosses San Diego County Climate Plan, Calls Carbon-Offset Program 'Unlawful.'" *Los Angeles Times*, June 17, 2020. https://www.latimes.com/california/story/2020-06-17/court-san-diego-carbon-offset-plan.

a) Modification of "carbon offset" definition

In order to ensure the disclosure of decision-useful information on carbon offsets, we suggest the definition be modified as follows (suggested additions in red, deletions are crossed out):

> ***Carbon offset*** **represents an emissions reduction, emissions avoidance, or removal of greenhouse gases ("GHG") in a manner calculated and traced for the purpose of ~~offsetting~~ partially or fully compensating for an entity's GHG emissions.**

We believe it is important to distinguish between three types of climate action for which offset credits are created: the avoidance of emissions into the atmosphere in the first place, emissions reductions, and the removal of GHGs from the atmosphere.[25] Emissions reductions offsets include those generated through point-source CCS such as CCS on power plants, while emissions avoidance can encompass a switch to renewable energy or avoided deforestation. Technologies such as Direct Air Capture and Carbon Sequestration (DACCS) are considered an example of GHG removal.[26] Given the significant difference in the nature of these offsets, we believe such distinctions are material and should be clearly delineated in the disclosures.

We note that "[O]ffsetting an entity's GHG emissions" is not a clear statement of what an offset does or does not do or purport to do with respect to a company's climate impact, and therefore recommend the term "partially or fully compensating" an entity's emissions instead.

b) Modification of Proposed Disclosure requirements

We support the Rule's proposal in Item 1506(d) to require disclosure of information about the amount of carbon reduction represented by the offsets; the source of the offsets; the nature of the underlying projects including location; any registries or other authentication of the offsets; and the associated costs.

Given the importance of differentiating between offsets for avoided emissions, emissions reduction, or GHG removal, **we recommend that registrants further disaggregate the various offset disclosures stipulated in Item 1506(d) by the aforementioned type of offset used**. Such a differentiation is critical when assessing both a registrant's progress towards its climate targets, and a registrant's transition risk profile. This is already becoming standard market practice. For example, two offset crediting mechanisms, American Carbon Registry and the Architecture for REDD+ Transactions (ART-TREES)[27], are each planning to annotate their issued credits with

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[25] Heuberger, Renat. 2021. "Avoidance and Removal of Carbon Emissions: The Big Misunderstanding." *Environmental Finance*, November 9, 2021. https://www.environmental-finance.com/content/analysis/avoidance-and-removal-of-carbon-emissions-the-big-misunderstanding.html.

[26] See, for example, M. Allen et al, *The Oxford Principles for Net Zero Aligned Carbon Offsetting 2020* (September 2020), p7 Fig 1, https://www.smithschool.ox.ac.uk/sites/default/files/2022-01/Oxford-Offsetting-Principles-2020.pdf.

[27] ART-TREES credits will be issued for removals, emissions reductions, and for 'High Forest, Low Degradation' areas where deforestation has not been significant. (Architecture for REDD+ Transactions (ART). 2021. "TREES: The REDD+ Environmental Excellence Standard." Accessed June 1, 2022. https://www.artredd.org/trees/.) On this

information on whether the credits are resulting from removals projects or reductions/avoided emissions projects as is the Integrity Council on Scaling Voluntary Markets (IC-VCM)[28] which is an offset credit rating organization under development and calls this added information 'attributes'. As these attributes would be attached to credits in the IC-VCM model contract language, they would therefore be knowable and reportable by registrants.

Second, **the SEC should require registrants to disclose the GHG removal and storage method utilized and the duration of the offset contract used.** Different types of carbon credits face different risks of reversal or project failure - for instance, forest carbon credits can be destroyed by wildfire, rendering their value worthless and requiring repurchase. To assist investors in assessing the risk of credit failure and the permanence of removal, registrants should disclose the removal method (nature-based or technology-based) and the storage method (biological, geological, in products, or without storage) used. Tagging of these attributes is already contemplated by the IC-VCM and should facilitate straightforward disclosure by registrants.[29] We further suggest the SEC require registrants to describe transition risk planning assumptions that underpin its decision regarding what types of removal method to use, and disclose the duration of the offset contract utilized.

Third, in order to further mitigate the risk of greenwashing and over-crediting, the **SEC should require disclosure of all credits a company has retired in each fiscal year as well as the registry project ID**, or if not available, sufficient information to identify the specific project from which offsets are sourced. This will mitigate the problem that it is often impossible for investors to ascertain whether a company has laid exclusive claim to the benefits of the carbon offset it uses.[30] Given the growing crypto carbon offset market and the risks associated with cryptocurrencies, disclosures should also indicate if a registrant has purchased offsets from block-chain based technologies like cryptocurrencies.

Lastly, **the SEC should require the disclosure of any external standards a company has signed onto which may govern or guide the registrants' offset disclosure**. This could include

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latter designation, see also the critique of providing offset credits for this type of (non)-activity: "While it is essential for the world to protect forests that are not under immediate threat of deforestation, treating carbon credits from their conservation as fungible compliance instruments threatens to undermine carbon market integrity." (Streck, Charlotte, et al. 2022. "Comment: We Must Protect Intact Forests, but CORSIA Got It Wrong." *Carbon Pulse*, April 14, 2022. https://carbon-pulse.com/156727/.)

[28] Taskforce on Scaling Voluntary Carbon Markets (TSVCM). 2021. *Public Consultation Report*. Washington, DC: Institute of International Finance. https://www.iif.com/Portals/1/Files/TSVCM_Public_Consultation.pdf. The proposed new credit would be differentiated as an avoidance/reduction credit or a removal credit. "Whether a CCP represents a ton of CO_2e avoided/reduced or removed is an integral characteristic of the CCP that must be labelled by Standards on all CCPs. Standards are expected to increasingly tag credits within a methodology into removal and avoidance/reduction. Where not possible, credits would automatically belong to the "avoidance/reduction or mixed" category." [The CCP is the new carbon credit unit being defined by the TSVCM.]

[29] TSVCM, *supra* note 28, at p. 96.

[30] Carbon Market Watch. 2022. *Carbon Market Watch Recommendations on Carbon Market Infrastructure for Article 6 of the Paris Agreement.* Brussels: Carbon Market Watch. https://carbonmarketwatch.org/publications/carbon-market-watch-recommendations-on-carbon-market-infrastructure-for-article-6-of-the-paris-agreement/.

whether a company is setting net-zero emissions reduction targets according to specific criteria and recommendations like SBTi, or is subject to other voluntary efforts like the UN's Race to Zero campaign.[31] Such disclosure is germane to investors since different standards have specific criteria that companies must follow. For instance, for SBTi net zero emissions reduction target setting, "The use of carbon credits must not be counted as emission reductions toward the progress of companies' near-term science-based targets."[32] If a registrant is contractually following SBTi criteria, but is utilizing offsets inappropriately investors may view that company's actions as less credible.

c) Disaggregated reporting on the use of carbon offset derivatives

It is important to recognize that there is a significant speculative market for carbon offset credits unrelated to compensating for the emissions of any particular emitting entity, contributing to further uncertainty about actual corporate action and resulting impacts on the climate.

For this reason, we believe **there should be an additional definition in Item 1500 for "carbon offset derivative" (comprising futures, options and swaps contracts), and derivatives should be reported separately from the non-derivative offset credits.** Offset derivatives pose additional due diligence challenges and costs as compared to offset credits, and therefore warrant more tailored disclosure requirements. For example, for offset derivatives trading, registrants should report the gross notional value of these derivatives transactions for the Fiscal Year.

The need for separate reporting of registrant use of offset credits and offset derivatives is partly dictated by derivatives "rollover" trading strategy, which combines risk appetite and profit objectives[33] that may or may not include offset physical delivery/retirement within a Fiscal Year. A registrant should report its use of offset derivatives for physical delivery (retirement with corresponding verified emissions reductions) within the Fiscal Year, with an estimate of physical delivery of offset derivatives contracts carried beyond the Fiscal Year into the derivatives contracts' rollover periods.

Another reason to report offset derivatives separately is the complexity of the underlying asset of these derivatives, particularly if the underlying asset is an index that combines more than one asset in a proprietary formula. For example, the underlying asset of emissions offset derivatives, such as the Chicago Mercantile Exchange's Global Emissions Offset (CME GEO), which is aviation industry emission oriented,[34] and Nature Based-GEO (land, agricultural and forestry

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[31] United Nations Climate Change. N.d. "Race to Zero Campaign." Climate Action. Accessed May 13, 2022. https://unfccc.int/climate-action/race-to-zero-campaign.

[32] Science Based Targets Initiative (SBTi). 2021. *SBTi Criteria and Recommendations*. SBTi. https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf, at 7.

[33] *See, e.g.*, Raichura, Sandip. 2019. "Understanding Derivatives Rollover Data." *Prabhudas Lilladaher* (blog). April 28, 2019. https://www.plindia.com/blog/understanding-derivatives-rollover-data/.

[34] CME Group. 2022. "CBL Global Emissions Offset Futures." Accessed May 13, 2022. https://www.cmegroup.com/trading/energy/cbl-global-emissions-offset-futures.html.

based),[35] emissions offset futures contracts are comprised of offset credits from more than one verification protocol. In the case of the CME GEO futures contract, the underlying asset is a proprietary index that risk weights the VCU prices of three of eight different carbon registries[36] accepted by the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).[37] To evaluate the investment risks in such offset derivatives, the investor not only needs to understand the protocols and technologies used to validate emissions reductions in offset projects, but also the consequences of changes to verification protocols.

The Commodity Futures Trading Commission (CFTC) allows exchanges to self-certify that new derivatives contracts and changes to contract terms, including for offset futures, comply with CFTC rules and core principles, even for novel contracts.[38] Although offset derivatives are overseen by the CFTC, not the SEC, the SEC nevertheless should have an information-sharing agreement with the CFTC about self-certifications of new offset derivatives contracts, and self-certifications of changes to existing offset derivatives contracts. **The SEC should publicly notify investors of new offset derivatives self-certifications, for example on a website page regarding implementation of the proposed disclosure rule.**

3. Disclosure of Climate-related Human Rights Due Diligence and Impacts

Applicable Questions: 2, 9-13, 15-16, 19-20, 38, 42, 48, 61, 107, 168

Recommendation:

- **Registrants should assess and disclose the human rights risks and impacts related to the GHG emissions within their operational and organizational boundaries, their carbon-intensive activities, and their climate mitigation measures.**
- **Registrants should disclose any due diligence steps they have taken to ensure that the use of offsets or emissions reduction, avoidance or removal technologies fully respect the rights of local and Indigenous communities, including most notably the right to Free, Prior and Informed Consent (FPIC).**
- **Registrants should disclose their exposure to and measures taken to mitigate the risk of any and all known land rights conflicts that have arisen or may arise from their carbon-intensive activities or any offset project or climate mitigation**

[35] CME Group. 2022. "CBL Nature-Based Global Emissions Offset (N-GEO) Futures." Accessed May 13, 2022. https://www.cmegroup.com/trading/energy/nature-based-global-emissions-offset-futures.html.

[36] CME Group. 2022. "CBL Global Emissions Offset Futures (GEO) FAQ." Accessed May 13, 2022. https://www.cmegroup.com/education/articles-and-reports/cbl-global-emissions-offset-futures-faq.html#five.

[37] International Air Transport Associate (IATA). 2021. "Corsia: Fact Sheet." IATA, October 2021. https://www.iata.org/en/iata-repository/pressroom/fact-sheets/fact-sheet---corsia/. (In addition to use of CORSIA credits by the aviation industry, CORSIA offsets have been used by fossil fuel companies to claim "carbon neutral" fossil fuel shipments. *See* Camilla Hodgson, "Use of carbon credits for fossil fuel shipments surges," *Financial Times*, November 3, 2021)

[38] John Kostyack, Lee Reimers and Steve Suppan, Letter to the Commodity Futures Trading Commission regarding issues discussed at the Energy and Environmental Markets Advisory Committee, September 28, 2021. https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=65876&SearchText=.

measures that the registrant makes use of.

Explanation:

The proposed SEC rule makes no mention of human rights or Indigenous Peoples' rights. This omission neglects the international consensus, reflected in resolutions adopted by the U.N. Human Rights Council, that governments and companies should adopt a rights-based approach to climate change, and that companies have a responsibility to respect human rights, including in and through their operations which affect climate change and their actions to mitigate those climate impacts.[39] It also neglects the significant financial risks that result from disregarding human rights and land rights of local communities and Indigenous Peoples, as exemplified by litigation and/or protests which can lead to project delays or even cancellation.[40] As detailed in the joint submission to the SEC on the inclusion of Indigenous Peoples' rights in the climate risk disclosure framework,[41] registrants' approach to Indigenous rights can be central to how they manage climate risk, not least because Indigenous Peoples steward a significant percentage of the forests and soils that play a critical role in storing carbon, particularly in the tropical and subtropical regions.[42]

The IPCC has affirmed that centering climate justice and incorporating Indigenous rights and knowledge in climate responses is both imperative and effective in addressing climate change.[43] The recent IPCC report states that "equality and justice are central dimensions of transitions in the context of sustainable development… Neglecting issues of justice will have implications for

[39] See, e.g., UN Guiding Principles on Business and Human Rights (2011), adopted by the UN Human Rights Council, A/HRC/RES/17/4, July 6, 2011 (UN Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04 (2011)), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf; UN Office of the High Commissioner for Human Rights, Human Rights, Climate Change and Business: Key Messages (undated), https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMBusiness.pdf; see also UN Human Rights Council Resolution, U.N. Doc. A/HRC/RES/47/24 (July 26, 2021); UN Human Rights Council Resolution, U.N. Doc. A/HRC/RES/48/14 (Oct. 18, 2021); UN Office of the High Commissioner on Human Rights, Special Rapporteur on climate change, https://www.ohchr.org/en/specialprocedures/sr-climate-change.

[40] *See, e.g.*, Rights and Resources Initiative, The Financial Risks of Insecure Land Tenure: An Investment View (December 2012), https://rightsandresources.org/wp-content/exported-pdf/rritenurereriskreportfinaldec2012.pdf; Amazon Watch et al, Re: Response to Call for Public Input on Climate Change Disclosures from Commissioner Allison Herren Lee (June 14, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-9061308-246408.pdf.

[41] Amazon Watch et al, Re: Response to Proposed Rule on The Enhancement and Standardization of Climate-Related Disclosures for Investors [File No. S7-10-22] (June 16, 2022) https://amazonwatch.org/assets/files/2022-06-16-sec-comment-letter.pdf.

[42] *See, e.g.*, Rights and Resources Initiative, A Global Baseline of Carbon Storage in Collective Lands (September 10, 2018), https://rightsandresources.org/global-baseline-carbon-storage-collective-lands/.

[43] Intergovernmental Panel on Climate Change (IPCC), 2022: Summary for Policymakers, at SPM-7, SPM-30-31, and Technical Summary TS.A at TS-3, TS-5. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the IPCC, https://www.ipcc.ch/report/ar6/wg2/.

the pace, scale and quality of the transition."[44] In other words, mitigation measures that center justice and equity and protect human rights are more effective in achieving a sustainable transition. Companies that neglect human rights in their transition pathways therefore face a greater transition risk, most notably in the form of litigation risk, as discussed below.

On this basis, we believe that registrants should assess and disclose the human rights risks and impacts resulting from their carbon-intensive activities and the GHG emissions within their operational and organizational boundaries, as well as from their climate mitigation measures. This will enable investors to better evaluate the company's management of transition risk. In order to be decision-useful for investors, we recommend that this disclosure include registrants' assessment of their exposure to known land rights conflicts that have arisen, or that could foreseeably arise, from the registrant's carbon-intensive activities or climate mitigation measures pursued by the registrant.

Certain large-scale climate mitigation measures, such as offsets and CCS, also face significant feasibility and litigation risks owing to their projected social impacts. **Registrants should disclose any due diligence steps they have taken to ensure that the use of offsets or emissions reduction, avoidance or removal technologies fully respect the rights of local and Indigenous communities, with particular focus on respect for their right to Free, Prior and Informed Consent (FPIC) as outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).**

These risks are particularly pronounced with respect to offsets. The financial risks associated with offsets can be exacerbated by the potential for conflicts with communities that inhabit areas of land used as offset tracts. As much as 80% of land-based carbon mitigation potential is located in developing and least-developed countries,[45] and the establishment of offset programs can create conflicts with Indigenous and local peoples that live in these areas. One such example is the Cordillera Azul National Park in the Peruvian Amazon, which is currently facing a legal challenge from Indigenous Kichwa communities who were not properly consulted during the formation of the project.[46] As a result, the validity of the offset credits generated by this project is in question, creating material legal and reputational risks for the companies that purchased them. Such risks may significantly decrease an issuer's share price and the value of the investor's position in those shares. In order to mitigate such risks, the SEC should require registrants to disclose any due diligence steps they have taken to ensure that the offsets that are generated or purchased fully respect the rights of local and Indigenous communities, with a particular

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[44] Intergovernmental Panel on Climate Change (IPCC), 2022: Climate Change 2022: Mitigation of Climate Change, IPCC, Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the IPCC) (April 2022), Ch. 17, at 17-65, https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf.

[45] Roe, Stephanie, et al. 2021. "Land-Based Measures to Mitigate Climate Change: Potential and Feasibility by Country." *Global Change Biology* 27, no. 23 (October): 6025–58. https://onlinelibrary.wiley.com/doi/10.1111/gcb.15873.

[46] Forest Peoples Programme. "Press Release: Indigenous Kichwa Community Take Peruvian State and National Park to Court." Press release, July 1, 2021. https://www.forestpeoples.org/en/press-release/kichwa-take-Peru-state-PNAZ-court.

emphasis on the right to FPIC. This information will allow investors to more accurately assess potential legal, reputational, political and social risks borne by companies when participating in offset programs.

4. Climate-related Litigation risk

Applicable Question: 10

Recommendation:

- **The Rule should elevate the risks associated with climate-related litigation and require registrants to be more explicit in how they are managing financial and operational risks resulting from potential litigation against themselves as well as against institutions to which they are exposed, such as clients or business partners.**
- **The Rule should provide more examples of climate-related litigation risks, with a particular focus on litigation related to greenwashing, breach of fiduciary duty, and violations of human rights.**
- **On litigation, registrants should additionally disclose any active climate-related litigation facing the company; climate-related litigation outcomes during the reporting year that could materially impact the business; litigation risk that arises from its business operations, climate mitigation efforts or transition activities; projections on the financial costs of climate-related litigation and legal liability; and any exposure to litigation risks through their clients or business partners.**

Explanation:

Climate change-related cases are on the rise, with over 1,000 cases having been brought to courts around the world in just the last six years.[47] Private sector actors, including financial actors, are increasingly being targeted. Already in 2015, then Governor of the Bank of England Mark Carney observed that the risks arising from such litigation are "significant, uncertain and non-linear" and "will only increase as the science and evidence of climate change hardens."[48]
In 2021 alone, a Dutch court ruled that the oil and gas company Royal Dutch Shell has to cut its greenhouse gas emissions 45% by 2030 to align its policies with the Paris Agreement,[49] and the first climate-related case was brought against a central bank, the National Bank of Belgium.[50]

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[47] Setzer J and Higham C (2021) *Global Trends in Climate Change Litigation: 2021 Snapshot.* Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 4, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

[48] *Breaking the Tragedy of the Horizon – climate change and financial stability*, speech given by Mark Carney at Lloyd's of London (September 29, 2015), https://www.bis.org/review/r151009a.pdf.

[49] The Hague District Court, *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, case number C/09/571932, Judgment of 26 May 2021. https://climaterightsdatabase.com/2021/05/26/milieudefensie-and-others-v-royal-dutch-shell-plc/.

[50] *ClientEarth v. Belgian National Bank* (filed April 13 2021 with the Brussels Court of First Instance), http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/

The former case is on appeal, while the latter case is pending. Carmakers have also been the subject of litigation for inadequate carbon emissions reduction targets.[51]

Owing to this trend, the Network for Greening the Financial System (NGFS) has recently identified climate-related litigation as a growing source of risk, one that exacerbates companies' physical and transition risks, and one that can also have significant material impacts on financial actors. Potential litigation identified by the NGFS include: (1) litigation against an entity alleged to be (indirectly or directly) responsible for a climate-related extreme event/impact, facilitated by advances in climate attribution science; (2) litigation against entities on the basis of their failure to take sufficient action to reduce greenhouse gas emissions as mandated by laws or international agreements; (3) litigation by investors against entities for failing to appropriately disclose and manage known climate-related risks, or for alleged breaches of the fiduciary duties of their directors or other officers; (4) breach of contract claims relating to green financial products; and (5) cases against financial actors as "indirect polluters" for financing polluting projects.[52]

Such litigation can pose significant financial risk, for example, where successful litigation against an entity results in fines and costs that affect the value of the firm, its creditworthiness and/or its financing costs; or the resulting reputational damage decreases the value of the firm. In addition, climate-related cases brought on the grounds of human rights violations are on the rise,[53] targeting both governments and corporations, mirroring the litigation pathways outlined above from the perspective of human rights, particularly in light of corporations' human rights responsibilities as articulated in the UN Guiding Principles on Business and Human Rights.[54]

NGFS has recommended that "the risks associated with climate-related litigation vis-à-vis financial and non-financial corporations should be taken into account in microprudential supervision and financial stability monitoring."[55] They note that this is because of: the potential magnitude of the financial impact from these suits; the wide scope of entities that can be affected; the possibility that the impact of climate-related litigation could materialize in a non-linear manner resulting in a surge of litigation; the increasing incorporation of climate commitments into laws and regulations; and the unique characteristics of climate change as a global risk.

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[51] See, e.g., Reuters, *Climate NGOs in Germany threaten legal action against VW, Daimler, BMW* (September 3, 2021), https://www.reuters.com/business/sustainable-business/german-climate-ngos-take-legal-action-against-automakers-wintershall-2021-09-03/.

[52] Network for Greening the Financial System (NGFS), *Climate-related litigation: Raising awareness about a growing source of risk* (November 2021), p.5-7, https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf.

[53] For further analysis, *see* Global Trends in Climate Change Litigation: 2021 Snapshot, *supra note 47.*

[54] See UN Guiding Principles on Business and Human Rights (2011), adopted by the UN Human Rights Council, A/HRC/RES/17/4, July 6, 2011 (*UN Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework*, UN Doc. HR/PUB/11/04 (2011)), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[55] NGFS, *supra* note 52.

Given this, the risk of climate-related litigation should be elevated in the The Rule, requiring registrants to be more explicit in how they are managing financial and operational risks resulting from potential litigation against themselves as well as against institutions to which they are exposed.

Registrants would benefit from examples of the myriad ways in which a registrant can be exposed to climate litigation, in order to aid in proper consideration and disclosure of such risks. Such examples should include cases involving climate-related greenwashing, breaches of fiduciary duty, and human rights violations resulting from the registrant's climate-affecting business activities.

As the SEC has recognized on multiple occasions,[56] there has been a significant uptick in greenwashing practices, jeopardizing the credibility of disclosures. Investors are increasingly wary of misleading information with respect to companies' management of climate risk and adherence to their public net zero commitments, and investor concerns are leading to increased litigation risk over misrepresentation. This risk is illustrated by a case filed in August 2021 by the investor group Australasian Centre for Corporate Responsibility (ACCR) against gas giant Santos over its claims that natural gas is "clean fuel" and that it has a credible pathway to net zero emissions by 2040, despite plans to develop new and existing oil and gas projects while heavily relying on both CCS processes and the production of "blue hydrogen" that is derived from fossil gas.[57] The lawsuit alleges that Santos engaged in misleading or deceptive conduct owing to these claims and its failure to disclose relevant information such as the dependence of its net zero plans upon a range of undisclosed qualifications and assumptions about CCS. A similar lawsuit was filed earlier this year against TotalEnergies for alleged greenwashing, related to the company's marketing of its role in the energy transition and carbon neutrality claims.[58]

In addition to greenwashing, there is increasing scrutiny of directors' fiduciary duties with respect to climate change, including through derivative litigation. In March of this year, a legal action was lodged against the Board of Directors of Shell under English law by shareholder ClientEarth, arguing that the Board's failure to properly prepare the company for the net zero transition puts them in breach of their legal duties.[59] The likelihood of such suits will increase as companies fail to responsibly manage climate-related risks.

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[56] SEC Proposed Rule, *supra* note 1, pp 176. 281, 348. *See also* Tim Quinson, *The SEC War on Greenwashing Has Begun*, Bloomberg (June 15, 2022), https://www.bloomberg.com/news/articles/2022-06-15/the-sec-s-war-against-greenwashing-and-esg-misuse-has-begun.

[57] Environmental Defenders Office, *supra* note 19.

[58] ClientEarth, Press Release, Environmental groups sue TotalEnergies for misleading the public over Net Zero (Mar. 3, 2022), https://www.clientearth.org/latest/press-office/environmental-groups-sue-totalenergies-for-misleading-the-public-over-net-zero/; Simon Jessop, Gloria Dickie & Benjamin Mallet, *Environmental groups sue TotalEnergies over climate marketing claims*, Reuters (March 2, 2022), https://www.reuters.com/business/sustainable-business/environmental-groups-sue-totalenergies-over-climate-marketing-claims-2022-03-03/.

[59] ClientEarth, *ClientEarth Shareholder Litigation against Shell's Board FAQ* (March 15, 2022), https://www.clientearth.org/latest/documents/clientearth-shareholder-litigation-against-shell-s-board-faq/; Sam Meredith, *Shell's Board of Directors Sued for 'Failing to Properly Prepare' for the Energy Transition* (March 15, 2022), https://www.cnbc.com/2022/03/15/oil-shell-directors-sued-for-failing-to-prepare-for-energy-transition.html.

Companies are also likely to experience a rise in climate-related litigation brought on the basis of human rights violations. More than 100 rights-based climate cases have been filed over the past two decades, and the trend has accelerated in the past five years, with 29 cases alone filed in 2020.[60] This includes the previously mentioned case successfully brought against Shell in 2019, on grounds that Shell's contributions to climate change violated its duty of care under Dutch law and human rights obligations.[61] More recently, the Commission on Human Rights of the Philippines found that Carbon Majors companies "need to know and be able to show" that they respect human rights in the climate context; and when they fail to do so, they can be held accountable for climate impacts in the Philippines and likely beyond,[62] laying important groundwork for future claims linking climate-related damages to carbon emitters. The Commission's report was the result of a multi-year investigation prompted by a 2015 petition brought by civil society groups and typhoon survivors in the Philippines, examining how publicly traded fossil fuel and cement producers have contributed to climate change and thereby to resultant harms that impact the human rights of Filipinos. The Commission found that dozens of investor-owned oil, coal, mining and cement companies, including Exxon Mobil Corp., Chevron Corp., Shell PLC, and TotalEnergies SE, had engaged in "willful obfuscation" of climate science to sow doubt and misinformation about climate change and prevent the transition to clean energy.[63] It concluded that "all acts to obfuscate climate science and delay, derail or obstruct this transition may be bases for liability."[64] It further found that the "carbon majors" have a corporate responsibility to undertake due diligence on human rights and provide remediation — and that responsibility extends not just to the immediate companies but to the enterprises in their value chains,[65] most notably their financiers.

The Commission's conclusions are grounded in international human rights law, which gives rise to the responsibility of corporations to respect human rights, including by taking adequate steps to cease or avoid contributing to foreseeable adverse impacts on human rights, including such impacts that result from contributions to climate change, and to remedy or cooperate in the remediation of such adverse impacts when they occur.[66] Moreover, a business that contributes to foreseeable human rights harms could face liability under private law.

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[60] Sara Schonhardt, Lesley Clark, *How a Philippine inquiry could shape global climate litigation*, ClimateWire (May 16, 2022), citing Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*, https://climate-laws.org/litigation_cases.

[61] Milieudefensie and Others v. Royal Dutch Shell PLC and Others, *supra* note 49.

[62] National Inquiry on Climate Change: Report, Commission on Human Rights of the Philippines (May 2022), p112-114; *See also* Carroll Muffett, Center for International Environmental Law, *Roadmap and Initial Reflections on CHR's Final Report in the Philippines National Inquiry on Climate Change: A Systematic and Searing Indictment of the Carbon Majors; a Stark Warning to the Financial Sector; and a Vital New Tool for Courts and Human Rights Bodies* (May 2022), https://www.ciel.org/wp-content/uploads/2022/05/CIEL-Philippines-CHR-Roadmap-and-Initial-Reflections_May-2022.pdf.

[63] National Inquiry on Climate Change: Report, p. 108.

[64] *Id.*, at p. 115.

[65] *Id.*, at p. 110-113.

[66] See UN Guiding Principles on Business and Human Rights, *supra* note 54.

Given the rapid-rise of climate-related litigation, it is imperative that investors are equipped with the necessary information to accurately assess an entity's exposure to and ability to manage climate-related litigation risk. In addition to the disclosures already proposed in the draft Rule, **we propose that the registrant be required to disclose any active climate-related litigation facing the company; climate-related litigation outcomes during the reporting year that could materially impact the business; litigation risk that arises from its business operations, climate mitigation efforts or transition activities; projections on the financial costs of climate-related litigation and legal liability; and any exposure to litigation risks through their clients or business partners.**

5. Scope 3 disclosures

Applicable Questions: 98-107, 133, 135

Recommendation:

- **Scope 3 disclosures should be mandatory for large registrants and subject to reasonable assurance.**
- **Registrants should not be given a limited safe harbor from liability for fraudulent Scope 3 disclosures.**

Explanation:

As the SEC rightly recognizes, a registrant's GHG emissions are material to investment decision-making, but investors have been challenged by the "lack of consistency, comparability, and reliability in those data."[67] Scope 3 emissions constitute the vast majority of emissions for certain registrants, most notably for companies operating in the fossil fuel and petrochemical sectors, agribusiness companies with land-intensive commodity supply chains, the transportation sector, and the financial sector. Scope 3 emissions by such registrants are therefore material to investment decision-making and should be disclosed if investors are to understand the registrant's exposure to and management of climate-related risks, and transition risks in particular.

However, as demonstrated by the corporate climate-related disclosures pursuant to the SEC's 2010 Guidance Regarding Disclosure Related to Climate Change,[68] many companies - including high-emitters - are still avoiding making Scope 3 disclosures or targets. For example, JBS, the world's largest meat company, has so far failed to disclose or set targets for its Scope 3 emissions, which is said to constitute 97% of its total GHG emissions as a result of methane

[67] SEC Proposed Rule, *supra* note 1 at p. 161.

[68] Securities and Exchange Commission, 17 C.F.R. PARTS 211, 231 and 241, Commission Guidance Regarding Disclosure Related to Climate Change (February 8, 2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf. *See also* Soyoung Ho, *SEC Increases Focus on Climate Change Disclosures, Plans to Update Guidance*, Thomson Reuters (March 1, 2021), https://tax.thomsonreuters.com/news/sec-increases-focus-on-climate-change-disclosures-plans-to-update-guidance/.

emitted from livestock; emissions from deforestation, forest fires, and land conversion; and the production of animal feed, enteric fermentation, and the use of agrochemicals.[69] Oil major ExxonMobil recently began disclosing some of its Scope 3 emissions, but these disclosures are limited to fuel products combusted by the end-user and fail to account for the full lifecycle emissions associated with its growing plastic production business.[70] Scope 3 emissions reporting, including reporting for emissions over time, is especially critical in the context of financing for carbon capture or carbon removal schemes. For example, financing for a carbon dioxide pipeline as part of a carbon capture and storage project might appear carbon-negative if only Scopes 1 and 2 emissions are considered. The entire project, however, may increase emissions overall, if CCS extends the operating life of the emitting facility, if the captured carbon is used for enhanced oil recovery (a form of oil production), or both. Relying on a registrants' self-assessment of materiality to obtain relevant emissions data will therefore undermine the Commission's goal to secure consistent, comparable, and reliable information on climate-related financial risk for investors.

Given the importance of Scope 3 disclosures for understanding a registrants' climate risk, such disclosures should be mandatory. Mandating Scope 3 emissions disclosure, especially for large registrants, should not be unduly burdensome given that thousands of major companies across the world already use the GHG Protocol Scope 3 accounting and reporting standard.[71] Among those companies, 96% of SBTi companies with approved science-based targets, amounting to over 1000 companies, have targets covering scope 3 emissions.[72] There is precedent in the SEC mandating disclosures that do not rely on a company's self-assessment of materiality.[73]

Scope 3 disclosures should also be subject to reasonable assurance and not be given limited safe harbor from liability for fraudulent Scope 3 disclosures. Granting limited safe harbor from liability for fraudulent Scope 3 emissions disclosures will further disincentivize registrants from providing accurate disclosures and will deprive private actors of the ability to help enforce disclosure regulations. Additionally, limited assurance has a higher probability of overlooking

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[69] Institute for Agriculture and Trade Policy, Feedback, DeSmog, *Investors and supermarkets urged to drop JBS after shock rise in its climate emissions* (April 20, 2022), https://www.iatp.org/documents/investors-and-supermarkets-urged-drop-jbs-after-shock-rise-its-climate-emissions.

[70] ExxonMobil, *Advancing Climate Solutions - 2022 Progress Report*, p.48, https://corporate.exxonmobil.com/-/media/Global/Files/Advancing-Climate-Solutions-Progress-Report/2022/ExxonMobil-Advancing-Climate-Solutions-2022-Progress-Report.pdf. *See also* Center for International Environmental Law, *Plastic & Climate: The Hidden Costs of a Plastic Planet* (May 2019), https://www.ciel.org/reports/plastic-health-the-hidden-costs-of-a-plastic-planet-may-2019/; Ocean Conservancy et al, *Reliable Scope 3 Emissions Disclosures are Key to Addressing Climate-Related Financial Risks: A Plastics Industry Case Study* (April 2022), https://oceanconservancy.org/wp-content/uploads/2022/04/Scope-3-Plastics-Industry-White-Paper_OC-AFR-PC-Apr-2022.pdf.

[71] *See* CDP, *CDP reports record number of disclosures and unveils new strategy to help further tackle climate and ecological emergency* (October 14, 2021), https://www.cdp.net/en/articles/media/cdp-reports-record-number-of-disclosures-and-unveils-new-strategy-to-help-further-tackle-climate-and-ecological-emergency.

[72] Science-Based Targets Initiative, *SBTi Progress Report 2021: Scaling Urgent Corporate Climate Action Worldwide*, https://sciencebasedtargets.org/reports/sbti-progress-report-2021.

[73] Commissioner Allison Herren Lee, "Living in a Material World: Myths and Misconceptions about 'Materiality'," May 24, 2021. https://www.sec.gov/news/speech/lee-living-material-world-052421

material misstatements and will do little to ensure the accuracy of disclosures. Given the central role of Scope 3 emissions in many registrants' climate risk exposure, Scope 3 disclosures should not be given differential treatment, as doing otherwise will compromise the accuracy of the disclosures, remove the incentive to improve disclosures over time, and further facilitate greenwashing.

6. Fiduciary duty of corporate directors to manage climate risks

Applicable questions: 34-41

Recommendation:

- **Registrants should provide detailed disclosures on the process by which their Boards assure the accuracy of climate-related information that is disclosed;**
- **Registrants should disclose any conflicts of interest within the Board that may compromise climate-risk addressing activities.**

Directors of companies will increasingly be held to account for their oversight of climate-related risks facing the company. Directors' oversight liability might arise if they "1) fail to consider or oversee the implementation of climate-related legal risk controls; 2) fail to monitor mission-critical regulatory compliance, either specific climate change-related regulations or existing regulations which require consideration or disclosure of climate change risks…; or 3) fail to monitor climate-related mission-critical operational and business risks."[74]

The proposed Rule rightly seeks disclosure of how the Board fulfills its fiduciary and oversight responsibilities. However, it could be further strengthened by seeking more detailed disclosures on the process by which the Board assures the accuracy of climate-related information that is disclosed, and any conflicts of interest within the Board that may compromise climate-risk addressing activities.

The importance of disclosing conflicts of interest can be demonstrated by the effort to oust former Exxon CEO Lee Raymond from his position as Chairman of the Board for JPMorgan Chase. Given widespread perception that his role on the Board was blocking effective climate action, investors used sustained pressure to successfully demote him from his position as Chairman, and he eventually retired from the Board at the end of 2020.[75] Registrants should disclose any Director affiliations with carbon-intensive industries, so that investors are able to evaluate the risk of any conflicts of interest that could undermine the proper management of climate-related financial risks.

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[74] Cynthia A. Williams et al, *Directors' Fiduciary Duties and Climate Change: Emerging Risks* (December 8, 2021), https://corpgov.law.harvard.edu/2021/12/08/directors-fiduciary-duties-and-climate-change-emerging-risks/.

[75] Robert Armstrong, *Former Exxon Chief Lee Raymond to Retire from Board of JPMorgan Chase*, Financial Times (December 18, 2020), https://www.ft.com/content/71dd311c-f77a-4deb-9ae4-e9719a0ac7cd.