Ms. Vanessa A. Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Supplemental Comments on *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (File No. S7-17-22)*

Dear Ms. Countryman:

The Investment Company Institute[1] and ICI Southwest are writing to supplement our comments on the ESG Fund and Adviser Proposal[2] in light of the recent adoption and subsequent stay of the Public Company Climate Rule.[3] We do so, recognizing and supporting the SEC's customary consideration of comments received after the close of formal comment periods.[4] This practice is particularly important in a case like this where two rule sets are so closely linked. Given this, we recommend that the SEC align any future requirements for a regulated investment company[5] to disclose its portfolio's carbon footprint and weighted average carbon intensity (WACI) with any

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $34.4 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $9.2 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs).

[2] *See Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices* Investment Company Act Release No. 34594, 87 Fed. Reg. 36654 (June 17, 2022) (ESG Fund and Adviser Proposal), *available at* https://www.sec.gov/rules/proposed/2022/33-11068.pdf.

[3] *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (Securities Act Release No. 11275 (Mar. 6, 2024) (Public Company Climate Rule) *available at* https://www.sec.gov/files/rules/final/2024/33-11275.pdf.

[4] *See e.g.,* Testimony of Chair Gary Gensler Before the United States House of Representatives Committee on Financial Services (April 18, 2023) ("With the closing of a formal comment period, staff begins its work to account for this important public input but continues to receive additional comments, which the Commission may consider. We greatly benefit from public input and consider adjustments that the staff, and ultimately the Commission, think are appropriate.").

[5] "Regulated investment company" includes any registered investment company or closed-end company that elects to be regulated under the Investment Company Act of 1940, hereinafter referred to as "fund."

greenhouse gas (GHG) emissions disclosure requirements ultimately required for public companies.[6] This makes eminent sense because of the importance of a fund having public company data in a regulatory report as a source to calculate, and provide in the fund's regulatory report, its carbon footprint and WACI. Given the linkage between the rules, funds clearly should be required to comply with any such new disclosure requirements only *after* public companies have to comply with their related requirements.[7]

For the avoidance of doubt, this letter is not meant to modify any of our other recommendations set forth in our prior letters on this proposal (*e.g.,* a fund only should be required to report aggregated GHG emissions data only if it can do so with respect to a minimum threshold percentage of the portfolio, such as 50%).[8]

We urge the Commission to adopt positions congruent with the final Public Company Climate Rule in any future ESG Fund and Adviser Rule. Doing so is necessary to accomplish the Commission's statutory mandate to protect investors and have information provided in a uniform and quantifiable manner that "promote[s] efficiency, competition, and capital formation"[9] and to comply with the Commission's obligations under the Administrative Procedure Act (APA). The APA requires that agencies "account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking."[10]

---

[6] Under the ESG Fund and Adviser Proposal, an ESG-Focused Fund that considers environmental factors (*i.e.*, environmental funds) would be required to use a hierarchy of data sources from which to calculate, and then subsequently report in the fund's annual report, the carbon footprint and WACI metrics utilizing Scopes 1 and 2 GHG emissions data in a tiered fashion, first using portfolio companies' regulatory reports, then, if unavailable, information publicly provided by the portfolio company, and, if such information is unavailable, a good faith estimate of the portfolio company's emissions. In addition, if a portfolio company reports its Scope 3 emissions in a regulatory report or provides it publicly, then an environmental fund also would be required to report separately the carbon footprint metric using the Scope 3 GHG emissions data.

[7] ICI commented comprehensively on both the ESG Fund and Adviser Proposal and the Public Company Climate Proposal. With respect to the ESG Fund and Adviser Proposal, *see* Letter from Eric J. Pan, President & CEO, and Annette M. Capretta, Associate General Counsel, ICI to Vanessa A. Countryman, Secretary, SEC (Aug. 16, 2022), *available at* https://www.sec.gov/comments/s7-17-22/s71722-20136279-307345.pdf; Supplemental Letters filed May 16, 2023, *available at* https://www.sec.gov/comments/s7-17-22/s71722-190239-374582.pdf; July 26, 2023 *available at* https://www.sec.gov/comments/s7-17-22/s71722-235999-492462.pdf; and Nov. 30, 2023 *available at* https://www.sec.gov/comments/s7-17-22/s71722-305579-785682.pdf. With respect to the Public Company Climate Proposal, *see* Letter from Eric J. Pan, President & CEO, and Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, ICI to Vanessa A. Countryman, Secretary, SEC, (June 16, 2022), *available at* https://www.sec.gov/comments/s7-10-22/s71022-20131852-302300.pdf.

[8] *See* Letter from Eric J. Pan, President & CEO, and Annette M. Capretta, Associate General Counsel, ICI to Vanessa A. Countryman, Secretary, SEC at 28 (Aug. 16, 2022), *available at* https://www.sec.gov/comments/s7-17-22/s71722-20136279-307345.pdf.

[9] *See* 15 U.S.C. § 80a-2(c); *see also* ESG Fund and Adviser Proposal, 87 Fed. Reg. at 36743 (discussing the SEC's statutory mandate to protect investors and have information provided in a uniform and quantifiable manner not only for investors but for monitoring under the SEC's regulatory and examination program).

[10] *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011).

Commission Position #1

The Commission determined that public companies should not be required to report Scope 3 GHG emissions given "the potential costs and difficulties related to Scope 3 emissions reporting…."[11]

A fund therefore should not be required to include Scope 3 GHG emissions in its carbon footprint or WACI metrics.

Commission Position #2

The Commission stated that the Public Company Climate Rule is intended to "improve the consistency, comparability, and reliability of climate-related disclosures for investors."[12]

Any carbon footprint and WACI metrics required in a fund's regulatory report therefore should be required to be based on data that is mandated for the fund's portfolio companies to provide in their regulatory reports.[13] Unlike the proposal, any final rule should not require a fund to provide information provided by one of its portfolio companies outside of a regulatory report or to make a "good faith estimate" of the portfolio company's emissions. As we previously pointed out,

> good faith estimates by a fund of a portfolio company's Scopes 1 and 2 GHG emissions would be based on assumptions and methodologies that could differ significantly from those of another fund. As a result, differences between one fund's WACI and another fund's WACI may be based more on differences in assumptions and methodologies than the climate-related exposures. Accordingly, mandating the disclosure of aggregated GHG emissions data with respect to a fund's entire portfolio holdings would not necessarily enhance investors' understanding of the climate-related exposures of a fund's portfolio.[14]

Regarding sequencing more broadly, the Public Company Climate Rule has been challenged in the courts.[15] On April 4, 2024, the Commission stayed the Rule "pending the completion of

---

[11] *See* Public Company Climate Rule, *supra* note 3**Error! Bookmark not defined.**, at 256.

[12] *See* Public Company Climate Rule, *supra* note 3**Error! Bookmark not defined.**, at 46.

[13] This would include reporting by US large accelerated and accelerated filers required to report material emissions pursuant to the Public Company Climate Rule. It also could include non-US companies that report the data in a regulatory report of its own jurisdiction if the methodologies used to report the Scope 1 and Scope 2 GHG emissions data are the same as those required by the Commission under the Public Company Climate Rule.

[14] ESG Fund and Adviser Proposal Letter, *supra* note 7, at 17.

[15] *See, inter alia,* State of West Virginia v. U.S. Securities and Exchange Commission, No. 24- (11th Cir. filed Mar. 6, 2024); Liberty Energy Inc. et al v. U.S. Securities and Exchange Commission (5th Cir. filed Mar. 6, 2024); State of Louisiana et al v. U.S. Securities and Exchange Commission (5th Cir. filed Mar. 11, 2024); State of Iowa, et al v. U.S. Securities and Exchange Commission, No. 24-01522 (8th Cir. filed Mar.13, 2024); Sierra Club v. U.S. Securities and Exchange Commission, No. 24-1064 (D.C. Cir. filed Mar. 13, 2024); Ohio Bureau of Workers' Compensation, et al v. Securities and Exchange Commission, No. 24-03220 (6th Cir. filed Mar. 13, 2024); U.S. Chamber of Commerce et al v. U.S. Securities and Exchange Commission (5th Cir. filed Mar. 14, 2024) and Natural

judicial review."[16] Given the Commission's stay, any requirement that funds be required to report aggregated GHG emissions data of portfolio companies likewise must be, at a minimum, suspended pending judicial review of the Public Company Climate Rule. If the Public Company Rule's disclosure requirements are overturned by the courts, any requirement that funds report aggregated GHG emissions data of portfolio companies must be eliminated. Moreover, if compliance with the Public Company Climate Rule is delayed due to such litigation, our recommendation remains the same: compliance for public companies with the final Public Company Climate Rule must be required and available to funds *before* funds are required to report their portfolios' carbon footprint or WACI. Otherwise, funds will incur unnecessarily high costs to calculate carbon footprint and WACI metrics, costs which were not adequately addressed in the ESG Fund and Adviser Proposal.[17]

* * * *

We appreciate the SEC's consideration of these comments.

Sincerely,

Investment Company Institute ICI Southwest

Appendix (Order Issuing Stay in the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors)

cc: The Honorable Chair Gensler

Resources Defense Council, Inc. v. U.S. Securities and Exchange Commission, No. 24-707 (2nd Cir. filed Mar. 15, 2024).

[16] Stay Order at 3, *In re Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22 (SEC Apr. 4, 2024), https://www.sec.gov/files/rules/other/2024/33-11280.pdf. The Commission's full stay order can be found in the appendix to this letter.

[17] The SEC's cost analysis for the ESG Fund and Adviser Proposal assumes that funds will incur less costs once public companies are required to comply with the Public Company Climate Rule, since funds could then rely on public companies' self-reporting of their emissions instead of having to make their own good-faith estimates. *See* ESG Fund and Adviser Proposal, 87 Fed. Reg. at 36,714-16 & n.426. The SEC's conclusion that the eventual effect of the Public Company Climate Rule will be to reduce funds' potential compliance costs assumes that the Public Company Climate Rule will survive legal challenge. That assumption is speculative, and if the Public Company Climate Rule falls, that would severely undermine the SEC's economic analysis on any final ESG Fund and Adviser Rule.

The Honorable Commissioner Peirce
The Honorable Commissioner Crenshaw
The Honorable Commissioner Lizárraga
The Honorable Commissioner Uyeda

Natasha Vij Greiner, Director
Sarah ten Siethoff, Deputy Director and Associate Director, Rulemaking
Division of Investment Management

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 11280 / April 4, 2024

SECURITIES EXCHANGE ACT OF 1934
Release No. 99908 / April 4, 2024

File No. S7-10-22

In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors	**ORDER ISSUING STAY**

On March 6, 2024, the Commission promulgated amendments to its rules that will require registrants to provide certain climate-related information in their registration statements and annual reports ("Final Rules").[1] Between March 6 and March 14, 2024, petitions seeking review of the Final Rules were filed in multiple courts of appeals.[2]

On March 8, 2024, petitioners Liberty Energy Inc. and Nomad Proppant Services LLC filed a motion in the Fifth Circuit seeking an administrative stay and a stay pending judicial review of the Final Rules. On March 15, 2024, the Fifth Circuit issued an administrative stay.

On March 19, 2024, the Commission filed a Notice of Multicircuit Petitions for Review with the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 2112(a)(3). On March 21, 2024, the Judicial Panel on Multidistrict Litigation issued an

[1] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Rel. Nos. 33-11275, 34-99678 (Mar. 6, 2024), 89 Fed. Reg. 21,668 (Mar. 28, 2024).

[2] *Nat. Res. Def. Council, Inc. v. SEC*, No. 24-707 (2d Cir. filed Mar. 12, 2024); *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. filed Mar. 6, 2024); *Louisiana v. SEC*, No. 24-60109 (5th Cir. filed Mar. 7, 2024); *Tex. All. of Energy Producers v. SEC*, No. 24-60109 (5th Cir. filed Mar. 11, 2024); *Chamber of Commerce of U.S. of Am. v. SEC*, No. 24-60109 (5th Cir. filed Mar. 14, 2024); *Ohio Bureau of Workers' Comp. v. SEC*, No. 24-3220 (6th Cir. filed Mar. 13, 2024); *Iowa v. SEC*, No. 24-1522 (8th Cir. filed Mar. 12, 2024); *West Virginia v. SEC*, No. 24-10679 (11th Cir. filed Mar. 6, 2024); *Sierra Club v. SEC*, No. 24-1067 (D.C. Cir. filed Mar. 13, 2024).

order consolidating the petitions for review in the U.S. Court of Appeals for the Eighth Circuit.[3] On March 22, 2024, the Fifth Circuit dissolved its administrative stay.[4]

On March 26, 2024, Liberty Energy Inc. and Nomad Proppant Services LLC filed a letter in the Eighth Circuit noting the pendency of their motion for an administrative stay and a stay pending judicial review. Also on March 26, 2024, the Chamber of Commerce of the United States of America, the Texas Association of Business, and the Longview Chamber of Commerce filed a motion in the Eighth Circuit seeking a stay pending judicial review. On March 29, 2024, recognizing the efficiencies for the parties and the Court, the Commission filed a motion to establish a consolidated briefing schedule encompassing all motions seeking a stay of the Final Rules pending judicial review.[5] On April 1, thirty-one petitioners opposed the Commission's motion to establish a consolidated briefing schedule and urged the Court to instead expedite briefing on the "already-filed and imminently forthcoming emergency stay motions."[6]

Pursuant to Exchange Act Section 25(c)(2) and Section 705 of the Administrative Procedure Act, the Commission has discretion to stay its rules pending judicial review if it finds that "justice so requires."[7] The Commission has determined to exercise its discretion to stay the Final Rules pending the completion of judicial review of the consolidated Eighth Circuit petitions.

In issuing a stay, the Commission is not departing from its view that the Final Rules are consistent with applicable law and within the Commission's long-standing authority to require the disclosure of information important to investors in making investment and voting decisions. Thus, the Commission will continue vigorously defending the Final Rules' validity in court and looks forward to expeditious resolution of the litigation. But the Commission finds that, under the particular circumstances presented, a stay of the Final Rules meets the statutory standard. Among other things, given the procedural complexities accompanying the consolidation and litigation of the

---

[3] On March 21, 2024, an additional petition for review was filed in the Fifth Circuit. *Nat'l Legal & Pol'y Ctr. v. SEC*, No. 24-60147 (5th Cir. filed Mar. 21, 2024). That petition was transferred to and consolidated in the Eighth Circuit on April 1, 2024. *Nat'l Legal & Pol'y Ctr. v. SEC*, No. 24-1685 (8th Cir. docketed Apr. 1, 2024).

[4] ECF No. 87, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 22, 2024).

[5] On March 28, 2024, Liberty Energy Inc. and Nomad Proppant Services LLC also filed a complaint challenging the Final Rules in the Northern District of Texas. *Liberty Energy Inc. v. SEC*, No. 3:24-cv-00739-G (N.D. Tex. filed Mar. 28, 2024).

[6] ECF No. 5379427, at 3, *Iowa v. SEC*, No. 24-1522 (8th Cir. filed Apr. 1, 2024).

[7] 15 U.S.C. § 78y(c)(2) ("Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires."); 5 U.S.C. § 705.

large number of petitions for review of the Final Rules, a Commission stay will facilitate the orderly judicial resolution of those challenges and allow the court of appeals to focus on deciding the merits. Further, a stay avoids potential regulatory uncertainty if registrants were to become subject to the Final Rules' requirements during the pendency of the challenges to their validity. The Commission has previously stayed its rules pending judicial review in similar circumstances. *See Rule 610T of Regulation NMS*, Rel. No. 34-85447 (Mar. 28, 2019); *Facilitating Shareholder Director Nominations*, Rel. Nos. 33-9149, 34-63031, IC-29456 (Oct. 4, 2010).

Accordingly, it is ORDERED, pursuant to Exchange Act Section 25(c)(2) and Administrative Procedure Act Section 705, that the Final Rules are stayed pending the completion of judicial review of the consolidated Eighth Circuit petitions.[8]

By the Commission.

Vanessa A. Countryman,
Secretary

[8] The stay issued by this Order is limited to the Final Rules that have been challenged in the consolidated Eighth Circuit petitions. It does not stay any other Commission rules or guidance. *See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change*, Rel. Nos. 33-9106; 34-61469 (Feb. 2, 2010), 75 Fed. Reg. 6290 (Feb. 8, 2010).