

May 30, 2021

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

Dear Ms. Countryman:

Enclosed is a petition for a rulemaking on Black Lives Matter pledge disclosure authored by William Michael Cunningham Economist, Creative Investment Research and adjunct faculty member at Georgetown University.

The enclosed rulemaking petition:

- Calls for the Commission to initiate notice and comment rulemaking to develop a comprehensive framework requiring any public companies or issuers that have promised financial support for Black Lives Matter (“BLM Pledge”) to accurately disclose, on a timely basis, all activity related to that pledge;
- Lays out the statutory authority for the SEC to require BLM Pledge activity disclosure;
- Discusses the clear materiality of BLM pledges;
- Discusses the importance of BLM Pledge disclosure for companies and the competitive position of U.S. capital markets;
- Points to the growing cost of racial discrimination targeting African Americans and the role a BLM Pledge activity requirement might play in reducing that cost; and
- Points to the impact an observed decline in standards of ethical behavior might have on the truthfulness of voluntary BLM Pledge disclosures.

Legislative activity¹ on diversity issues related to African Americans highlights how these efforts suggest that it is time for the SEC to bring coherence to BLM Pledge activity, disclosure and reporting.

If the Commission or Staff have any questions, or if I can be of assistance in any way, please contact William Michael Cunningham Economist, Creative Investment Research. I can be reached at (202) 455-0430, or by electronic mail at info@creativeinvest.com

¹ H.R.2123 - Diversity and Inclusion Data Accountability and Transparency Act. Online at: <https://www.congress.gov/bill/117th-congress/house-bill/2123?s=1&r=61>
H.R. 2543, the “Federal Reserve Racial and Economic Equity Act” online at https://financialservices.house.gov/uploadedfiles/04.20.2021_bills-1172543ih.pdf and
H.R. 1277, the “Improving Corporate Governance Through Diversity Act” online at https://financialservices.house.gov/uploadedfiles/04.20.2021_bills-117hr1277ih.pdf



May 30, 2021

Ms. Vanessa Countryman
Secretary
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100 F Street, Northeast
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Dear Ms. Countryman:

I respectfully submit this petition for rulemaking pursuant to Rule 192(a) of the Securities and Exchange Commission’s (SEC) Rule of Practice.²

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Background of the Petitioner

William Michael Cunningham (“ WMC”) registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an impact research firm, Creative Investment Research. The firm creates impact investments and provides impact investing research services. Mr. Cunningham holds an MA in Economics and an MBA in Finance, both from the University of Chicago in Chicago, Illinois.

² Rulemaking: Issuance, Amendment and Repeal of Rules, Rule 192(a), By Petition, online at <https://www.sec.gov/about/rules-of-practice-2016.pdf>.

Mr. Cunningham's understanding of capital markets is based on firsthand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm. Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, he launched one of the first investment websites.

Mr. Cunningham has long been concerned with the integrity of securities markets. We note the following:

On July 3, 1993, Mr. Cunningham wrote to Mary Schapiro, the former Chair of the SEC, when she was a commissioner to notify the Commission about a certain, specific investing "scam." A timely warning was not issued to the investing public. That letter to the SEC described correspondence to Mr. Cunningham dated July 2, 1993 from an "officer" of the Nigerian Ministry of Finance. The SEC acknowledged receiving this warning, in a letter to Mr. Cunningham dated October 29, 1993. Several American citizens were, in the interim, "taken" by these scam artists. At least one U.S. citizen was killed when they went to the country in an attempt to retrieve their funds. In response to these and other complaints, the SEC launched retaliatory regulatory actions against Mr. Cunningham, culminating in the removal of his investment advisor registration. See: <https://www.creativeinvest.com/SECNigerianLetter.pdf>

Mr. Cunningham designed the first mortgage security backed by home mortgage loans to low- and moderate-income persons and originated by minority-owned institutions. (See: Security Backed Exclusively by Minority Loans, The American Banker. Friday, December 2, 1994. Online at <https://www.creativeinvest.com/mbsarticle.html>)

On November 16, 1995, Mr. Cunningham launched the first website devoted to minority economic education and empowerment. <https://www.creativeinvest.com/images/be1996.jpg>

On April 30, 1997, in Case 97-1256 at the US Court of Appeals for the DC Circuit, Mr. Cunningham opposed the merger of Citigroup and Travelers and the elimination of the Glass-Steagall Act.

On June 15, 2000, Mr. Cunningham testified before the House Financial Services Committee on H.R. 3703, the Housing Finance Regulatory Improvement Act. He testified on ways to improve the supervision and regulation of government sponsored enterprises, Fannie Mae and Freddie Mac, or GSE's.

In 2001, he helped design a refinancing plan for victims of predatory lending that led to the creation of targeted community development investments. (See: <https://www.creativeinvest.com/antipredatory.html>)

On December 22, 2003, statistical models created by Mr. Cunningham using the Fully Adjusted Return[®] Methodology signaled the probability of system-wide economic and market failure. (See page 6: <http://www.sec.gov/rules/proposed/s71903/wmccir122203.pdf>)

On Monday, April 11, 2005, Mr. Cunningham testified before Judge William H. Pauley III in the U.S. District Court for the Southern District of New York on behalf of the public and investors at a fairness hearing regarding the \$1.4 billion-dollar Global Research Analyst Settlement.

In 2005, Mr. Cunningham served as an expert witness for homeowners in a case against PMI Group, Credit Suisse First Boston, Moody's, Standard and Poor's, Fairbanks Capital Corporation, Select Portfolio Servicing, US Bank National Association, as Trustee of CSFB ABS Series 2002-HEI, et. al., in the New Jersey Superior Court Law Division - Monmouth County. His testimony sought to establish that the corporate parties listed above were in fact responsible for facilitating unfair and predatory lending practices.

On December 22, 2005, Mr. Cunningham met with Ms. Elaine M. Hartmann of the Division of Market Regulation at the U.S. Securities and Exchange Commission. At that meeting, he issued a strongly worded warning that system-wide economic and market failure was a growing possibility.

On February 6, 2006, statistical models created by WMC using the Fully Adjusted Return[®] Methodology confirmed that system-wide economic and market failure was a growing possibility. (See page 2: <http://www.sec.gov/rules/proposed/s71005/wcunningham5867.pdf>)

On April 7, 2006, Mr. Cunningham submitted a proposal to US Department of Housing and Urban Development (HUD) to create a collaborative, market-based approach to increase participation in HUD's Energy Efficient Mortgage (EEM) Program as an alternative to the predatory lending practices that Mr. Cunningham projected would damage the marketplace. The proposal, submitted to the Senior Energy Management Officer in the Office of Environment and Energy, identified a utility company willing to manage "the process of having energy ratings and evaluations done on properties," at no cost to the borrower. He identified a pension fund to purchase the resulting GNMA EEM pool. Rather than support the types of greed induced, faulty lending practices that are the subject of this case and that negatively impacted the mortgage market and the country, he proposed to develop green, socially responsible methods to enhance homeownership opportunities specifically benefiting minorities and women. This proposal was rejected by an incompetent, racially biased Agency in favor of the types of lending practices that severely damaged global and US markets.

On June 18, 2009, he testified before the House Ways and Means Select Revenue Measures Subcommittee at a joint hearing with the Subcommittee on Domestic Monetary Policy and Technology of the Financial Services Committee: Testimony on the New Markets Tax Credit Program. He suggested ways to improve the program.

On July 19, 2010, Mr. Cunningham testified on behalf of the public at the Joint Interagency Public Community Reinvestment Act (CRA) hearings: "The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency jointly held public hearings on modernizing the regulations that implement the Community Reinvestment Act (CRA)."

On January 25, 2012, WMC submitted a "Friend of the Court" brief in a case before the United States Court of Appeals for the Second Circuit (Case 11-5227). The case concerned the rejection, by a Federal Judge, of a settlement agreed to by the United States Securities & Exchange Commission (SEC) and Citigroup Global Markets Inc. (Citigroup). As a friend to the Court, Mr. Cunningham provided an independent, objective and unbiased view in support of broad public interests. The "Friend of the Court" brief concluded by noting that "markets have become less stable. Faulty regulatory practices and collusion have moved regulators and lawmakers..in the direction of supporting suppliers to the financial service marketplace. My economic models show the global economy remains at risk."

WMCs December 26, 2016 forecast stated that: "Under any conceivable scenario, the current situation is very bad, and I mean toxic, for democratic institutions in general and for people of color specifically. Bottom line: our Fully Adjusted Return Forecast** indicates that, over time, things will get much, much worse....." From: Trumpism: <https://www.linkedin.com/pulse/trumpism-william-michael-cunningham-am-mba/>

The Petitioner's concern remains the public interest.

Introduction

In an interview with Pulitzer Prize-winning journalist Stephen Henderson titled "Some Companies Have Done Better Than Others Keeping Racial Justice Pledges³" on NPR's Detroit Today dated May 28, 2021, the petitioner stated that:

"Last year, after the murder of George Floyd, 251 American companies vowed to combat systemic racism within their own organizations. In aggregate, these companies pledged \$65 billion to bolster their diversity and equity initiatives. One year later, only \$500 million has been allocated toward these efforts.

American companies have the resources to honor these pledges, but structural and cultural problems, as well as a lack of accountability, are hindering their ability to follow through on their promises."

This follows the publication of a series of articles covering this subject and analysis on the part of the petitioner.⁴ Petitioner has constructed a BLM Pledge Tracker to monitor activity in this sector.

³ Online at: <https://wdet.org/posts/2021/05/28/91024-some-companies-have-done-better-than-others-keeping-racial-justice-pledges/>

⁴ See: BLACK LIVES MATTER: CORPORATE AMERICA HAS PLEDGED \$1.678 BILLION SO FAR. June 10, 2020. <https://www.blackenterprise.com/black-lives-matter-corporate-america-has-pledged-1-678-billion-so-far/>

Six Companies Account for 70% of Corporate Black Lives Matter Pledges. <https://youtu.be/t7aqn7oGGj0>

Developments in Corporate Governance

Recently, signal institutional and retail investors have demanded and received significant corporate governance-related changes at major energy corporations.⁵ These activities show that investors are now more effectively using new information on a range of issues, many of which are focused on uncovering and understanding long-term performance and risk management factors impacting public-reporting companies. Clearly, norms of business reporting activities are changing rapidly in response to new social concerns.

So it is with issues regarding African Americans and corporate performance, perhaps the most contentious of social factors impacting shareholder value. To lower the discomfort (and subsequent defensiveness) many whites experience when confronted by information about African American inequality and injustice, discussions around race are now known as “Diversity-related” issues and have been expanded to include additional racial groups, like Asian and Hispanics, gender related factors and sexual preference/behavior related issues.⁶

Public companies offer additional information to address Diversity-related investor preferences and regulatory requirements. The Congress of the United States has recognized that adequate diversity related data reporting standards do not exist.⁷

Many, but not all public companies are voluntarily producing “diversity reports” to meet the requests from investors for information related to company performance in these areas. Despite having laws in

\$50 Billion And A Year Later the World Still Searches for Accountability After George Floyd’s Death.
<https://tpinsights.com/2021/05/24/50-billion-and-a-year-later-the-world-still-searches-for-accountability-after-george-floyds-death/>

American companies pledged \$50 billion to Black communities. Most of it hasn’t materialized.
<https://fortune.com/2021/05/06/us-companies-black-communities-money-50-billion/>

Are CEOs living up to the pledges they made after George Floyd’s murder?
<https://creativeinvest.com/FinTimesMay2021.pdf>

It Turns Out, All Those 'Woke' White Allies Were Lying <https://www.theroot.com/it-turns-out-all-those-woke-white-allies-were-lying-1846959017>

⁵ According to NBC News, “Exxon Mobil lost at least two board seats to an activist hedge fund and shareholders at Chevron endorsed a call to further reduce its emissions.” See: “Climate activists score wins against Exxon, Shell and Chevron.” Online at: <https://www.nbcnews.com/business/energy/climate-activists-score-wins-against-exxon-shell-chevron-n1268705>

⁶ The nature of white supremacy is to use a “divide and conquer strategy to maintain the strongest possible hold on power. The dilution of diversity efforts is a real-world example of how this is done.

⁷ See: H. R. 2123 - To amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to require regulated entities to provide information necessary for the Offices of Women and Minority Inclusion to carry out their duties...Online at: <https://www.congress.gov/117/bills/hr2123/BILLS-117hr2123ih.pdf>

place⁸ to support corporate reporting in this area, when it comes to Blacks, substantial issues and problems with the nature, timing, and extent of these voluntary diversity disclosures remain. Thus, we respectfully ask the Commission to engage in notice and comment rule-making to develop a comprehensive framework for clearer, more consistent, more complete, and more easily comparable information relevant to companies' long-term performance as it relates to African Americans, specifically BLM Pledge "commitments". Such a framework would better inform investors, and would provide clarity to America's public companies on providing auditable information to investors.

The SEC has Absolute Statutory Authority to Require Disclosure of BLM Information

As has long been acknowledged, the authority of the US Securities and Exchange Commission to require disclosure is absolute. Congress, in both the Securities Act and the Exchange Act, "authorize[d] the Commission to promulgate rules for registrant disclosure 'as necessary or appropriate in the public interest or for the protection of investors.'"⁹

The Commission itself acknowledged this in 1978:

"The legislative history of the federal securities laws reflects a recognition that disclosure, by providing corporate owners with meaningful information about the way in which their corporations are managed, may promote the accountability of corporate managers. . . . Accordingly, although the Commission's objective in adopting these rules is to provide additional information relevant to an informed voting decision, it recognizes that disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct. This sort of impact is clearly consistent with the basic philosophy of the federal securities laws."¹⁰

The only question is whether or not the SEC considers disclosure with respect to African Americans to be in the public interest. Based on our experience with the agency, we know that this is problematic. The agency has a history of discriminating against African Americans, both with respect to policy and with respect to employment.

The Public Interest and Fair Markets

The overriding public interest is in fair, efficient, fully functioning markets. Fully functioning markets minimize informational asymmetries. Indeed, free, clear, and fully functioning markets operate as price discovery mechanisms via "the process of determining the price of an asset in the marketplace via the interactions of informed, rational buyers and sellers." Hiding or providing less than accurate information

⁸ Section 342(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5452(b)).

⁹ Sections 7, 10, and 19(a) of the Securities Act of 1933, 15 U.S.C. §§ 77g(a)(10), 77j, and 77s(a); and Sections 3(b), 12, 13, 14, 15(d), and 23(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78c(b), 78l, 78m(a), 78n(a), 78o(d), and 78w(a).

¹⁰ Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 15,384, 16 Docket 348, 350 (Dec. 6, 1978).

on corporate performance with respect to BLM Pledges, prevents accurate valuation. This leads to an undisclosed and elevated risk of loss, especially should information concerning the lack of corporate performance become public and lower corporate valuation.

Enhancing the global competitiveness of America’s public companies and the U.S. capital markets

Lack of performance with respect to BLM pledges will impair the competitiveness of U.S. capital markets and America’s public companies by showing that they are untrustworthy. Thus, requiring additional BLM Pledge disclosure will enhance competitiveness.

Disclosure and the Free Rider Problem

Enforcing standardized reporting requirements will also serve to reduce or eliminate the “free rider” problem. Public firms making significant BLM pledges typically spend a great deal of effort, time and money to develop meaningful pledges. We have observed, however, a number of organizations who have made inauthentic BLM promises but received the same positive regard granted to other, more serious and significant BLM pledge efforts. This “positive regard” increases long term shareholder value. A consistent BLM Pledge reporting taxonomy will allow for the analysis of BLM “commitments” and pledges, and, hopefully, help reveal which pledges are sincere and which are not.

The Cost of White Supremacy and Racism

White supremacy and racism impose massive costs on the market and on the economy.¹¹ Paradoxically, in the two group Black/White case, most of the damage from racism is imposed on white people, not Black people.

White people’s preference for discrimination contributes to this outcome. People and institutions discriminate because they have a preference (taste) for it.¹² They understand there is a cost, and are willing to pay it.

For example, consider the economic crisis¹³ of 2006 to 2016, which resulted in the loss of millions of jobs, cost thousands of lives and imposed \$19.2 trillion¹⁴ in actual losses, according to the US Department of the Treasury. It led¹⁵ to the election, in 2016, of a true demagogue as president and the

¹¹ See: <https://www.impactinvesting.online/2019/03/the-economic-and-social-cost-of-racism.html>

¹² Gary S. Becker (1957, 1971, 2nd ed.). The Economics of Discrimination. Chicago, University of Chicago Press.

¹³ Global Market Turmoil Graphic and Financial Crisis Calendar Graphic, Creative Investment Research, November, 2009.

¹⁴ Financial Crisis Response in Charts. US Dept. of Treasury. April 13 2012. Online at: http://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf

⁵ "Why Trump Will Win" June 11, 2016. <https://www.linkedin.com/pulse/why-trump-win-william-michael-cunningham-am-mba>
www.creativeinvest.com
info@creativeinvest.com

imposition of additional¹⁶ social costs. The 2008 and 2020 downturns were entirely predictable¹⁷ and preventable. They were facilitated by racially biased, incompetent¹⁸ product development and distribution strategy that insured the public, starting with Black people but moving rapidly to whites, would be damaged. Financial marketplace institutions did so, in part, because they were allowed to do so by federal regulators captured by the financial services industry¹⁹ and incapable of competently protecting the public interest.

Further costs are imposed on racist whites by their need to continually monitor the relative economic positions of various racial groups and to act out based on the information revealed. The January 6, 2021 insurrection at the US Capitol is but one example of this.

Other costs include the need to lie and expenditures related to covering up various illegal behaviors.

The petitioner believes disclosure will, over time, reduce the cost of racism and discrimination.

Lack of Ethics in the Marketplace

A growing lack of ethics in the marketplace means relying on voluntary disclosures is unwise and likely inefficient. We have described several cases where public company corporate management unfairly transferred value from outsider to insider shareholders.²⁰ These abuses have been linked to an abandonment of ethical principles.

Faulty market practices mask a company's true value and misallocate capital by moving investment dollars from deserving companies to unworthy companies. (BLM pledges are made with the hope of enhancing a company value. False statements hide true value) Market institutions cannot survive continuously elevated levels of fraud.

⁶ U.S. COVID deaths as of May 30, 2021: 594,300. <https://coronavirus.jhu.edu/us-map>

¹⁷ See: Supreme Court of the United States. No. 97-5066. William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. Decided April 30, 1997.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 98-1459 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. October, 1998. Also, see: This Week in Socially Responsible Investing, October 3, 2011. (Published October 2, 2011) <http://eepurl.com/gage9>

¹⁸ Document 45, filed 09/24/2013. Opinion and Order, US v. Wells Fargo. 12 Civ, 7527 (JMF)

¹⁹ George Stigler, "The Theory of Economic Regulation," Bell Journal of Economics, 2, 1971:3-21.

²⁰ See: [Comment Letter \(sec.gov\)](#) and see Amicus Brief filed by William Michael Cunningham in City of Oakland v. Wells Fargo. Court of Appeals for the Ninth Circuit. Case number 19-15169.

<https://creativeinvest.com/WellFargoNinthCir.pdf>



Conclusion

We respectfully request the Commission to promptly initiate rulemaking to develop mandatory rules for public companies to disclose high-quality, comparable, decision-useful information concerning BLM Pledge fulfillment.

If the Commission or Staff have any questions, or if I can be of assistance in any way, please contact William Michael Cunningham at (202) 455-0430, or by electronic mail at info@creativeinvest.com

Sincerely,

William Michael Cunningham

CC:

Chair Gary Gensler - Chair@sec.gov

Allison Herren Lee - CommissionerLee@sec.gov

Hester M. Peirce - CommissionerPeirce@sec.gov

Elad L. Roisman - CommissionerRoisman@sec.gov

Caroline A. Crenshaw - CommissionerCrenshaw@sec.gov