



June 14, 2021

The Honorable Gary Gensler
Chair, U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Climate Change Disclosures – March 15, 2021 Request for Public Input

Dear Chair Gensler:

Democracy Forward appreciates the opportunity to provide this comment in response to the Securities and Exchange Commission’s (“SEC” or the “Commission”) March 15, 2021, Request for Public Input on Climate Change Disclosures.

We applaud the Commission’s efforts to evaluate its disclosure rules to facilitate the disclosure of consistent, comparable, and reliable information on climate change. Doing so is plainly permitted by the First Amendment. Given threatened litigation by the West Virginia Attorney General, however, we offer several considerations that may help fortify any new disclosure requirement against that or other such legal challenges. We will discuss the relevant First Amendment framework, provide suggestions as to how the Commission may ensure any new disclosure regime be easily found to be constitutional, and respond briefly to arguments made by the West Virginia Attorney General that climate change-related disclosures face constitutional obstacles.

The First Amendment Clearly Permits Tailored Regulation of Compelled Commercial Speech.

While the First Amendment generally requires strict scrutiny of content-based regulations of speech,¹ “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”² The First Amendment interest implicated in commercial speech is the free flow of information with which consumers can make decisions; therefore “there can be no constitutional objection” to regulation of speech “that do[es] not accurately inform the public about lawful activity.”³

¹ See e.g. *Nat’l Inst. of Family & Life Advocs. v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361, 2371 (2018).

² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980); see also *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464–65 (2018).

³ *Cent. Hudson*, 447 U.S. at 563.

Commercial speech is “usually defined as speech that does no more than propose a commercial transaction.”⁴ The doctrine includes both voluntary speech and compelled disclosures, although as discussed below, compelled disclosures typically receive less First Amendment protection than do restrictions on voluntary speech.⁵ In determining whether speech is commercial, courts view the “propose a commercial transaction” definition as “‘just a starting point,’ . . . and instead try to give effect to ‘a common-sense distinction between commercial speech and other varieties of speech.’”⁶ “[C]ommercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”⁷ As the D.C. Circuit has explained,

“[W]here speech cannot be characterized merely as proposals to engage in commercial transactions, it is nonetheless commercial in certain circumstances, for instance when it is an advertisement, refers to a specific product, and the speaker has an economic motivation for it. The combination of all these characteristics—undoubtedly present in this case—suffices to classify the speech as commercial speech.”⁸

Under this fact-driven analysis, numerous and varied disclosure regimes—including those required at the point of sale or elsewhere—have been considered under the commercial speech framework.⁹

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Supreme Court set forth a four-part test for the regulation of commercial speech.¹⁰ First, to qualify for protection, the speech must concern lawful activity and not be fraudulent or inherently misleading. Second, courts consider whether the government has asserted a “substantial” governmental interest, such as preventing consumer deception or protecting public health. Third, if so, courts consider whether the regulation “directly advances” the government’s asserted interest

⁴ *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

⁵ *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

⁶ *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (quoting *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

⁷ *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotation marks and citation omitted).

⁸ *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (internal quotations omitted) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

⁹ See *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (per curiam) (citing *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 796 (1988)) (“Defendants’ first argument, that the stand-alone corrective statements do not fall within the commercial speech doctrine because they are not attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden.”) See also Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 Ariz. L. Rev. 421, 427 (2016).

¹⁰ 447 U.S. at 566, 570; see also *Nicopure Labs, LLC v. Food & Drug Admin.*, 944 F.3d 267, 284 (D.C. Cir. 2019).

and, fourth, whether it is “more extensive than is necessary to serve that interest.” Regulation of commercial speech, then, so long as it is lawful and not misleading, is generally subject to intermediate scrutiny: it must be no more extensive than necessary to directly advance a substantial government interest¹¹—though this does not require a showing that the government applied the “least-restrictive-means” test.¹²

Further, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Supreme Court established an even more deferential level of review for some forms of compelled commercial speech (in contrast to limitations on voluntary disclosures).¹³ The Court explained, “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”¹⁴ Specifically, commercial disclosure regulations typically receive rational basis review when they apply to advertising or point-of-sale disclosures of factual, uncontroversial information, especially if they aim to prevent consumer deception.¹⁵ *Zauderer* addressed “the State’s interest in preventing deception of consumers”¹⁶; but other justifications for compelled speech in this context have been offered to and accepted by the Courts of Appeals.¹⁷ As the Ninth Circuit recently explained, “[o]ur sister circuits have thus held under *Zauderer* that the prevention of consumer deception is not the only governmental interest that may permissibly be furthered by compelled commercial speech. . . . We therefore hold that *the governmental interest in furthering public health and safety is sufficient under Zauderer so long as it is substantial.*”¹⁸

The D.C. Circuit has had the opportunity to opine on these issues recently. Sitting *en banc*, the Court upheld required disclosure of country-of-origin information on meat products, concluding that *Zauderer* applied and noting that “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of

¹¹ *Cent. Hudson*, 447 U.S. at 566.

¹² *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 469 (1989). The requirement that the regulation be no more extensive than necessary requires “only that the regulation not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Id.* at 478 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

¹³ 471 U.S. at 651.

¹⁴ *Id.* (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in not providing any particular factual information in his advertising is minimal.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001); *Am. Meat Inst. v. U.S. Dep’t of Agric.* (“AMI”), 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*) (“The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception.”).

¹⁸ *CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019) (emphasis added) (citations omitted).

the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”¹⁹ In upholding the country-of origin requirements, the court explicitly extended the logic of *Zauderer* “beyond problems of deception, sufficiently to encompass the disclosure mandates at issue here.”²⁰

Thereafter, as the Commission is aware, a divided panel of the Court declined to apply *Zauderer*’s deferential standard to an SEC-required disclosure regarding conflict minerals.²¹ In that case, *National Association of Manufacturers v. SEC*, the divided panel stated that *Zauderer* is limited to disclosures in voluntary advertising.²² As pointed out in dissent, however, to the extent it relied on this reasoning, *NAM* is in tension with the D.C. Circuit’s *en banc* decision in *AMI*;²³ and it is inconsistent with an another D.C. Circuit panel decision that applied *Zauderer* to commercial speech unattached to advertisements.²⁴ At the end of the day, even the *NAM* panel majority recognized the “uncertainty” associated with its analysis limiting *Zauderer*, and rested its decision equally on the alternate ground that, even if *Zauderer* controlled, the required disclosures did not satisfy its level of scrutiny because the Commission could not show that disclosure directly advanced the stated humanitarian goal.²⁵ Of course, any future D.C. Circuit panel will be bound to follow the *en banc* decision.²⁶

First Amendment Considerations for the Commission’s Formulation of Climate Change Disclosure Requirements.

Given the foregoing, we make several recommendations for how the Commission could insulate any climate change disclosure regime from legal challenge under the First Amendment. The Commission would make resolution of any legal challenge straightforward if it: (1) makes clear that the disclosure requirements are demonstrably commercial; (2) explicitly states the purpose of the disclosures—such as to correct deception or confusion, or otherwise advance the Commission’s mission; and (3) shows how the required disclosures do so, emphasizing the factual and noncontroversial nature of the disclosures.

¹⁹ *AMI*, 760 F.3d at 22 (quoting *Zauderer*, 471 U.S. at 650).

²⁰ *Id.* at 20; *see id.* at 23.

²¹ *Nat’l Ass’n of Mfrs. v. SEC* (“*NAM*”), 800 F.3d 518 (D.C. Cir. 2015).

²² *Id.* at 522-23.

²³ *Id.* at 534 (Srinivasan, J. dissenting); *see also* Rebecca Susko, *The First Amendment Implications of A Mandatory Environmental, Social, and Governance Disclosure Regime*, 48 *Env’tl. L. Rep. News & Analysis* 10989 (2018).

²⁴ *United States v. Philip Morris USA, Inc.*, 566 F.3d at 1143. The panel in that case thereafter continued to apply *Zauderer*’s deferential standard to required disclosures outside the advertising and point of sale context. *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017).

²⁵ *NAM*, 800 F.3d at 524.

²⁶ *Ranger Cellular v. FCC*, 348 F.3d 1044, 1049 (D.C. Cir. 2003).

First, the regulatory regime requiring disclosures should clearly situate them in the commercial speech context. To this end, it is important to demonstrate the relevance of climate information to the commercial value of securities: doing so goes a long way towards classifying the disclosures as commercial speech, and towards showing the connection to advertising and sale relevant to *Zauderer*'s deferential standard of review.²⁷ Because companies themselves are the products when it comes to securities regulation, company communications, such as shareholder statements and annual reports, concerning certain company practices and policies are exactly the information investors need to participate in the market—precisely the informational value that underpins commercial speech doctrine.²⁸ As Commissioner Lee explained, “investors . . . have been overwhelmingly clear in their views that climate risk and other ESG matters are material to their investment and voting decisions.”²⁹

Second, under any degree of scrutiny, it is helpful to state the purpose of the required disclosures clearly—again, presumably to improve investor protection and other direct economic benefits, and to demonstrate the regulation's relationship thereto thoroughly—with a record showing the relationship between climate information and investor decision-making.³⁰ As part of this showing, the Commission would be well-served to make clear that the disclosures cannot be

²⁷ *Philip Morris*, 566 F.3d at 1143 (“In addition to information related to proposing a particular transaction, such as price, [examples of commercial speech] can include material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product.”).

²⁸ Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 872–73 (2015) (citations omitted) (“The Court has made clear since the beginning that commercial speech is to be ‘constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the ‘free flow of commercial information.’ The authoritative case of *Central Hudson Gas & Electric Corp. v. Public Service Commission* affirms that ‘the First Amendment's concern for commercial speech is based on the informational function of advertising.’ From the Court's point of view, the constitutional value of commercial speech lies in the information which such speech conveys to an audience.”).

²⁹ Speech of Commissioner Allison Herren Lee, SEC Comm'r, Keynote Remarks at the 2021 ESG Disclosure Priorities Event, *Living in a Material World: Myths and Misconceptions about “Materiality,”* SEC (May 24, 2021), available at <https://www.sec.gov/news/speech/lee-living-material-world-052421>.

³⁰ In applying *Central Hudson*'s intermediate scrutiny standard, the Supreme Court has noted that the party seeking to uphold a restriction on commercial speech must justify that burden, which is “not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). See also *AMI*, 760 F.3d at 26 (Under *Zauderer*'s rational basis review, “such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.”).

mischaracterized as merely prophylactic (e.g., designed to remedy a “purely hypothetical” harm) or unduly burdensome.³¹

In so doing, the Commission can promulgate a disclosure requirement that is readily distinguishable from the one that the panel majority found problematic in *NAM*.³² An important insight from *NAM* is that a new rule will be more likely to survive challenge if the Commission can demonstrate, as should be the case here, that the rule produces direct benefits to investors or issuers, and if it advances market functioning or investor protections that are typically a purpose of SEC rulemaking. Regardless of any anticipated humanitarian benefits of climate change disclosures, the Commission should focus on how any required disclosures align with its “mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.”³³ The SEC will also be more likely to satisfy any First Amendment concerns if it sets forth in the record analysis the expected benefits of the disclosure to investors and “demonstrat[es] that the measure it adopted would ‘in fact alleviate’ the [identified] harms it recited ‘to a material degree.’”³⁴

Relatedly, as set for in *Zauderer*, a straightforward justification for compelled commercial disclosure in any context is correcting consumer confusion or deception. (Of course, as *AMI* clarified, this is a starting point, not a limit: “*Zauderer* in fact does reach beyond problems of deception.”³⁵). Various climate change-related disclosures undoubtedly accomplish this goal, such as disclosures designed to elicit climate-related facts that are material to the long-term financial health of the corporation, and accordingly relevant to well-informed investment decisions, but that may be unknown to investors.³⁶ Where appropriate, we encourage the Commission to identify

³¹ *NIFLA*, 138 S. Ct. at 2377 (“Even under *Zauderer*, a disclosure requirement cannot be unjustified or unduly burdensome.”).

³² In *NAM*, the D.C. Circuit relied upon the SEC’s determination that the regulations were “‘directed at achieving overall social benefits,’ that the law was not ‘intended to generate measurable, direct economic benefits to investors or issuers,’ and that the regulatory requirements were ‘quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve.’” The Court also relied upon the SEC’s determination that “‘unlike in most of the securities laws, Congress intended the Conflict Minerals Provision to serve a humanitarian purpose[.]” *NAM*, 800 F.3d at 521–22 & n.7 (citations omitted).

³³ See, e.g., SEC, *What We Do*, <https://www.sec.gov/about/what-we-do>. As the D.C. Circuit has explained, Congress “has seen fit to delegate broad rulemaking authority to the SEC[.]” and that “(t)he Commission is given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors.” *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1050–51 (D.C. Cir. 1979).

³⁴ *NAM*, 800 F.3d at 527 (citations omitted).

³⁵ *AMI*, 760 F.3d at 20.

³⁶ The same logic that *Zauderer* applied to conclude that “there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse” may be applied to securities, which are similarly complex and diverse. *Zauderer*, 471 U.S. at 674.

specifically any consumer confusion, possible deception, or need for information to make well-informed investment decisions that the required disclosure would address. Support in the record for the Commission's findings regarding consumer confusion, deception, or other need for information will, of course, further substantiate this analysis.

Third, the Commission may further align itself with the reasoning of *Zauderer* and distinguish any required disclosures from *NAM* by making clear that the information required to be disclosed is factual and not controversial. While courts have interpreted *Zauderer*'s reference to "factual and uncontroversial" disclosures in various ways, the Commission would be most protected from litigation risk if it makes clear that any required disclosures focus on factual accuracy.³⁷ Regardless of any public disagreement about climate change policy, the uniform data that the Commission may require to be disclosed would be fundamentally factual,³⁸ and the Commission would do well to reinforce that conclusion through its explanation and record. As the Ninth Circuit has observed:

[M]ost disclosure requirements . . . are designed to remedy information asymmetries and potentially alter individuals' behavior as they become more well-informed market participants. As long as those who are compelled to disclose are not required to endorse the possible result of a better-informed market . . . the fact that legislators may desire the resulting behavior is irrelevant. In such cases, the disclosing party is required only to provide *the raw facts* that others may use to make their own decisions.³⁹

Similarly, while doing so should not be deemed constitutionally necessary, the Commission may reinforce the conclusion that its required disclosures are constitutionally sufficient by avoiding disclosures that could be deemed stigmatizing.⁴⁰ It would be safer to avoid normative judgments about climate change through the disclosures, and instead require companies to provide investors with the "raw facts" from which to draw their own conclusions.

Finally, given the possibility of legal challenge, the Commission should also consider explicitly stating that certain disclosures may be severed and retained in the event of a successful challenge to other disclosures.

³⁷ *AMI*, 760 F.3d at 27 (controversial commercial speech is speech that "communicates a message that is controversial for some reason other than [a] dispute about simple factual accuracy"); *see also American Beverage Ass'n v. City and Cty. of San Francisco*, 871 F.3d 884, 895 (9th Cir. 2017).

³⁸ *See, e.g. Comm'r Lee, Living In A Material World*, *supra* note 29.

³⁹ *Jerry Beeman & Pharm. Servs. Inc. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1101 n.16 (9th Cir. 2011) (emphasis added), *reh'g en banc granted*, 661 F.3d 1199 (9th Cir. 2011), question certified by 682 F.3d 779 (9th Cir. 2012) (certifying the question of whether the California disclosure requirement violated the California state constitution to the state supreme court), *vacated*, 741 F.3d 29 (9th Cir. 2014).

⁴⁰ *NAM*, 800 F.3d at 530.

The First Amendment Arguments Advanced by the West Virginia Attorney General Are Without Merit.

The West Virginia Attorney General claims in a comment that climate change disclosure requirements would likely violate the First Amendment.⁴¹ This argument relies on the incorrect assertion that the law requires “federal securities regulations that compel speech to withstand strict scrutiny under the First Amendment.”⁴² There is no legal support for this proposition. On the contrary, even the *NAM* majority stopped short of adopting the strict scrutiny standard.⁴³ Further, given the fact-bound nature of commercial speech analysis, the level of scrutiny will vary depending on the content and purpose of the disclosures.

Contrary to the comment’s argument, nothing in recent Supreme Court precedent has overruled the framework for analyzing commercial speech restrictions set forth in *Central Hudson* and *Zauderer*. Instead, the comment cites dicta from a solo concurrence by Justice Breyer in *Reed v. Town of Gilbert* for the proposition that all content-based regulations, including securities regulations, are subject to strict scrutiny.⁴⁴ But *Reed* concerned restrictions on the ability of non-profit groups to post meeting signs—a restriction on voluntary non-commercial speech, not compelled commercial speech. Justice Breyer’s concurrence merely cautioned that, despite the majority’s emphasis on content-based restrictions, various types of speech are subject to different First Amendment frameworks, noting that “a strong presumption against constitutionality has *no place* [in] governmental regulation of securities.”⁴⁵

Similarly, the West Virginia Attorney General’s argument relies on *NIFLA v. Becerra* for the principle that strict scrutiny applies to content-based compelled speech (in that instance, mandatory notices for crisis pregnancy centers).⁴⁶ This is inaccurate, as *NIFLA* explicitly recognized the continuing validity of *Zauderer* and its lower threshold for required commercial disclosures.⁴⁷ Nor are the facts of *NIFLA* analogous to required disclosure of certain climate

⁴¹ Patrick Morissey, W. Va. Att’y Gen., *Reply to SEC’s Request for Comment*, “Re: March 15, 2021 Remarks for the Center for American Progress Regarding Compulsory Environmental, Social, and Governance Statements” (Mar. 25, 2021), available at <https://www.sec.gov/comments/climate-disclosure/cll12-8563794-230748.pdf>.

⁴² *Id.* at 2.

⁴³ *NAM*, 800 F.3d at 524 (“As we ruled in our initial decision, we need not decide whether ‘strict scrutiny or the *Central Hudson* test for commercial speech’ applies . . . the SEC’s ‘final rule does not survive even *Central Hudson*’s intermediate standard.”).

⁴⁴ 576 U.S. 155, 177 (2015) (Breyer, J., concurring).

⁴⁵ *Id.* (emphasis added).

⁴⁶ 138 S. Ct. at 2371.

⁴⁷ *Id.* at 2377. Indeed, in *NIFLA*, the Court cited *Zauderer* and other cases to explain that its “precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech,’” and that it was “not question[ing] the legality of health and safety warnings, long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” *Id.* at 2372, 2376.

information regarding particular securities. As the Supreme Court explained, one of the types of compelled speech at issue in *NIFLA* was unrelated to the services being offered by the speaker (the clinic), as would be required for *Zauderer* to apply, and instead required representations about services provided by others (e.g. state-sponsored services, including abortion).⁴⁸ While the other type of compelled speech at issue did provide factual information about the services offered by the clinic, even analyzed under *Zauderer*, the Court found it to be unduly burdensome because there was no justification for it that was non-hypothetical.⁴⁹ Contrary to the West Virginia Attorney General's argument, therefore, by providing concrete justifications supported by analysis of the efficacy of any required disclosures, the Commission will undoubtedly be able to craft a climate change disclosure regime that would be evaluated under *Zauderer* and easily be held consistent with the First Amendment.

Thank you for the opportunity to engage with you on this important topic, and for your attention to all facets of the issue. Please feel free to contact [REDACTED] [REDACTED] if you would like to discuss any of the issues raised herein further.

Respectfully submitted,

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⁴⁸ *Id.* at 2372 (explaining why *Zauderer* did not apply to the compelled speech at issue).

⁴⁹ *Id.* at 2377–78.