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June 14, 2021

Via email: rule-comments@sec.gov

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

Re: Response to Request for Comment on Climate Change Disclosure (March 15, 2021)

Dear Ms. Countryman:

We submit these comments as former members of the SEC staff who have worked with securities law disclosure issues and have defended the Commission's legal authority to authorize such disclosures much of our professional careers. We write to support the Commission's effort to promulgate more targeted ESG and climate-change disclosure because it is in the public interest and will help investors make informed investment decisions. Such disclosure, when duly authorized by the Commission in accordance with the procedural requirements of the Administrative Procedure Act, is fully consistent with First Amendment principles.

Some commentators have argued that disclosure targeted at climate change and ESG issues is barred by the First Amendment, stating that it constitutes impermissible "content regulation," even if the Commission concludes that such additional disclosure is appropriate and in the interest of investors.[1] That view represents a misreading of First Amendment case law, and does not present an accurate view of the Constitutional principles at issue. In refusing to consider the complete body of First Amendment case law, the writer improperly suggests that the Supreme Court has articulated a novel legal standard.[2] To accept that proposition would curb the ability of the Commission to require enhanced disclosure on new or different issues, as they evolve, that are important to investors and the investment community. As discussed below, the Supreme Court explicitly rejected that interpretation.

The Commission has a statutory mandate to decide what information securities registrants and persons raising money from investors must disclose for the protection of investors and to prevent fraud. This type of economic regulation is grounded in the First Amendment doctrine of commercial speech. There can be little question that the disclosure contained in periodic reports and information provided by persons raising money is commercial speech. As

[1] *See, e.g.*, Letter from Patrick Morrisey, Attorney General of West Virginia to Commissioner Lee, dated March 25, 2021.

[2] *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2014), and *Barr v. American Assn. of Political Consultants, Inc.*, 140 S.Ct. 2335 (2020).

the Supreme Court has explained, such statements "arise from commercial transactions."[3] In these instances, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. . . ." [4]

This type of economic regulation is precisely what the Commission rulemaking proposals seek to advance. The Commission seeks to engage in rulemaking to determine the scope of potential additional disclosure that should be required by registrants of interest to investors concerned about climate change and other ESG issues. And, as Commissioner Lee has recently stated, the Commission's disclosure authority is broad, and materiality can be both quantitative and qualitative.[5] But in the end the Commission's rulemaking authority itself is not limited by a materiality threshold. Instead, its rulemaking authority under both the 1933 Act and the 1934 Act is defined as that "necessary or appropriate in the public interest or for the protection of investors."[6]

Congress has delegated to the Commission authority to determine what type of disclosure is potential deceptive or misleading or in the public interest. Nothing in the First Amendment limits that judgment in the economic commercial speech of the marketplace to items of materiality. More importantly, the Supreme Court has recognized that the question of materiality itself, except in obvious situations, is a mixed question of law and fact on which courts would ordinarily defer to finders of fact.[7] In the rulemaking context, it is for the agency as part of its rulemaking responsibility to develop an administrative record and make judgments based on that record on the issue of what disclosure is appropriate as material in the public interest or for the protection of investors.

The recent Supreme Court First Amendment decisions cited by objectors do not undermine these principles and are inapposite. *Reed v. Gilbert*, for example, raised the issue of time-limit restrictions on displays of public notice signs inviting worshippers to attend church. The Court compared restrictions on the displays for religious purposes with broader limits on politically-based signs. The Court found that the regulation of speech in the form of signs was content-based and subject to strict scrutiny. *Barr* involved a challenge by political actors to the constitutionality of an exception to Robocall restrictions imposed by Congress in 2015 for

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[3] *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 728, 762 (1976).

[4] *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). *See also Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002), citing *Central Hudson Gas & Elec. Svc. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[5] Speech of Commissioner Allison Herron Lee, Living in a Material World: Myths and Misconceptions about "Materiality." May 24, 2021, available at https://www.sec.gov/news/speech/lee-living-material-world-052421.

[6] *See, e.g.,* Section 7(a) of the 1933 Act, 15 U.S.C. §77g(a).

[7] *See TSC Industries, Inc. v. Northway Inc.*, 426 U.S. 438, 450 (1976).

government debt-collection efforts. In a split plurality ruling, the Court ruled that the debt collection exception was a content-based restriction subject to strict scrutiny, in reliance on the rationale of *Reed.* But the Court in *Barr* took care to limit the reach of its decision: "Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity." *Barr,* 140 S.Ct. at 2347 (Kavanaugh, J., writing for the plurality).

The Court's intolerance for limits placed on political or religious speech have no parallel in the realm of commercial speech applicable to the Commission's regulatory mandate relating to economic regulation of the marketplace for securities. This was the distinction highlighted by Justice Kavanagh in the quoted passage.

The Commission's effort to craft new disclosure rules for climate change and other ESG concerns presents a very different question from the issue presented by the Commission's effort to regulate proxy advisers.[8] In that relationship, there is no marketplace and no commercial speech. The relationship involves advice from proxy advisers to their clients. Indeed, litigation against the Commission relating to the rules included a First Amendment challenge.[9] Interjecting the government into the proxy voting advice between a fiduciary and its client presents unique First Amendment challenges that go well beyond ordinary commercial speech concerns. In contrast, the government is permitted to mandate disclosure in the securities marketplace as part of the economic regulation expressly delegated to the Commission by Congress.

For these reasons, we see no constitutional barrier to the Commission's efforts to determine the appropriate scope of additional disclosure needed to meet the contemporary demands by investors and the investment community for more targeted disclosures on climate change and other ESG-related concerns.

Respectfully submitted,

Richard A. Kirby
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[8] The Commission has announced it would revisit its proxy adviser rule. *See* SEC Press Rel. 2021-99 SEC Announces Annual Regulatory Agenda. https://www.sec.gov/news/press-release/2021-99.

[9] *See* SEC Div. of Corp. Fin., Statement on Compliance with the Commission's 2019 Interpretation and Guidance regarding the applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b) and 14a-9 (June 1, 2021), available at: https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01