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

Re: Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22) (RIN 3235-AM87)

Ms. Countryman:

The undersigned scholars appreciate the opportunity to comment on the Securities and Exchange Commission (SEC’s or Commission’s) recent Proposed Rule to require registrants to provide certain climate-related information in their statements and annual reports.¹ We are law professors with significant expertise in constitutional law, particularly regarding the First Amendment and securities disclosure laws. Collectively, we have published extensive analyses about First Amendment “coverage,” the constitutionality of mandatory commercial disclosures, and various related issues.

We write here to respond to a criticism that first appeared in Commissioner Peirce’s March 21, 2022, Statement² and was echoed in a few isolated comments responding to the SEC’s March 15, 2021, Request for Public Input: that the proposed disclosure requirements would violate the First Amendment.³ This criticism is wrong. The proposed disclosure requirements fall into three relevant categories: (1) information relevant to a registrant’s publicly set climate-related targets or goals; (2) material climate-related financial risks as assessed by a registrant, the registrant’s own processes for accounting for such risks, and how those risks affect its financial condition; and (3) greenhouse gas (GHG) emissions. Each fits squarely within accepted disclosure categories in First Amendment jurisprudence.

Our analysis below first outlines the law relevant to the proposed disclosure requirements, including the standards likely to apply for judicial review of any final rule. Rules of the kind proposed—i.e., securities disclosure requirements “as being necessary or appropriate in the public interest or for the protection of investors”⁴—do not normally trigger First Amendment

¹ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter Proposed Rule].

² Commissioner Hester M. Pierce, Statement: We Are Not the Securities and Environment Commission – At Least Not Yet, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321#_ftnref48.

³ See Proposed Rule, 87 Fed. Reg. at 21,339, n.45 (citing comments submitted by the West Virginia Attorney General, the Institute for Free Speech, and the Texas Public Policy Foundation).

⁴ Securities Act §§ 7 & 10(c), 15. U.S.C. §§ 77g & 77j(c); Securities Exchange Act §§ 12(b) & 14(a), 15. U.S.C. § 78l & 78n.

review. But if they did, they would be reviewed as compelled commercial speech subject to a deferential standard of review. Second, we explain that the proposed disclosure requirements easily satisfy those standards because their purpose is to inform investors of risk and to facilitate the efficient allocation of capital, purposes well within the SEC’s purview, and they do not burden other speech registrants might choose to make. We provide factual information relevant to this analysis, including concessions by SEC registrants and others that such information is relevant to a company’s financial condition. Lastly, we recommend steps that the SEC should take to make the constitutionality of the proposed requirements even more apparent.

I. Securities Law Has Traditionally Been Treated as Outside First Amendment Coverage.

The threshold question in any First Amendment analysis is whether the activity in question is “covered,” in other words whether it falls within the boundaries of the protections of “freedom of speech.” Many activities that might colloquially be considered “speech” are not covered by the First Amendment at all. For example, contracts, commercial fraud, perjury, conspiracy, malpractice, workplace harassment, the compelled speech of tax returns, criminal solicitation, antitrust regulation, and most of evidence law have all historically been treated as beyond the scope of the First Amendment.⁵

While the line between constitutionally salient and uncovered speech can be difficult to define, courts have found that the existence of an economic relationship or other relationship of trust between the speaker and the listener gives the government more constitutional room to regulate in order to protect listener interests.⁶ For example, contracts involve written promises, and the contracting parties are entitled to accuracy.⁷ Similarly, if a person relies on the advice of a doctor or the representations of a salesperson, the speaker cannot appeal to the First Amendment to avoid malpractice or fraud claims.⁸

The regulation of securities-related speech has likewise traditionally been treated as outside the scope of protected speech.⁹ The Supreme Court has repeatedly suggested in dicta that securities

⁵ Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318 (2018); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1767 (2004); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1271 (1995).

⁶ *Id.* at 344.

⁷ *Id.* at 349.

⁸ *Id.* at 350.

⁹ E.g., Sarah C. Haan, *The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule*, 2 (June 16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138712 (“Introducing First Amendment scrutiny to securities disclosure would be a radical departure from existing law, and an unprecedented step by the judiciary to interfere with markets and to distort market outcomes.”); Schauer, *supra* note 5, at 1770-71 (“[N]o First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional.”).

regulation is not covered by the First Amendment.¹⁰ Lower courts have gone on to rely on such dicta to treat government regulation of securities-related speech as outside traditional First Amendment review.¹¹ This exemption makes eminent sense because investors, the “listeners” in the securities context, are not only dependent on company “speakers” for information about the risks and value of their investments (and on consistent and comparable information so that they can efficiently allocate capital), but are also owners or potential owners entitled to information about economic transactions and to vote on certain company decisions, like director pay and significant corporate transactions. Securities disclosures (like those in the Proposed Rule) serve the important First Amendment function of allowing investors to incorporate consistent information into decisions on “how to value companies, whether to buy, hold, or sell securities . . . and how to participate in shareholder governance through voting and other expressive activities.”¹²

While the Supreme Court has never expressly held that securities regulation falls outside First Amendment coverage, it has indicated a willingness to treat as exempt “categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in [the] case law”¹³ so long as the government can identify a “long-settled tradition of subjecting that speech to regulation.”¹⁴ There is no question that there is a long tradition of mandating disclosures by public companies seeking investors. Long before the creation of the SEC, states regulated what sellers of securities may write or publish about their companies.¹⁵ In the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress expressly

¹⁰ *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 64 (1973) (“Neither the First Amendment nor ‘free will’ precludes States from having ‘blue sky’ laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.”) (citation omitted); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.”) (citation omitted); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (plurality opinion) (noting that regulation of securities-related speech is consistent with the First Amendment)

¹¹ *Bulldog Invs. Gen. P’ship v. Galvin*, No. 07-1261, 2007 WL 4647112, at *5 (Mass. Super. Dec. 26, 2007) (“[T]he United States Supreme Court has, on a number of occasions, cited the securities area as an example of speech regulation that does not violate the First Amendment.”); *S.E.C. v. Agora, Inc.*, 2007 WL 9725170, at *13 (D. Md. Aug. 3, 2007) (“Specifically, the government may regulate communications with regard to the ‘exchange of information about securities’ without offending the First Amendment.”).

¹² See Haan, *supra* note 9, at 2.

¹³ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (requiring “persuasive evidence . . . of a long (if heretofore unrecognized) tradition of proscription”).

¹⁴ *United States v. Stevens*, 559 U.S. 460, 471 (2010) (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. . . . We need not foreclose the future recognition of such additional categories.”).

¹⁵ Haan, *supra* note 9, at 3-4 (The “long American tradition of mandatory securities disclosure . . . dates back at least to the mid-1800s.”).

empowered the SEC to compel corporate disclosures “as necessary or appropriate in the public interest or for the protection of investors.”¹⁶ And, as detailed further below, in the 89 years since the birth of the SEC,¹⁷ the SEC has continuously mandated both general and specific disclosures on a wide variety of topics, ranging from giving or receiving technical or financial advice¹⁸ to executive compensation¹⁹ to environmental risks.

If, as these cases and authorities suggest, securities regulation remains outside the First Amendment coverage, then the Proposed Rule’s disclosure requirements would not be subject to First Amendment review at all. This is because, as explained in more detail below, the disclosures proposed are merely standard securities disclosures, designed to inform investors with consistent information and facilitate the efficient formation of capital.²⁰

II. Even if Securities Regulation Is Covered by the First Amendment, the First Amendment Permits Compelled Commercial Disclosures that Advance a Legitimate Government Interest.

If the Proposed Rules’ disclosure requirements are not treated as entirely outside the First Amendment, that does not mean that the intensive form of review known as strict scrutiny would apply, as some critics contend. At the most, the proposed disclosures should be treated as regulation of commercial speech, which is subject to a lesser degree of scrutiny.²¹

Commercial speech is speech that is germane to commercial activity, where the speaker has an economic incentive and the interchange is relevant to a business or commercial relationship.²² Commercial speech is often “defined as speech that does no more than propose a commercial

¹⁶ Securities Exchange Act §§ 12(b) & 14(a), 15. U.S.C. § 78l & 78n; Securities Act §§ 7 & 10(c), 15. U.S.C. §§ 77g & 77j(c); *see also* Securities Exchange Act § 13(a), 15. U.S.C. § 78m (requiring issuers to make disclosures in accordance with rules promulgated by the SEC “as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security”); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1204-05 (1999).

¹⁷ 15 U.S.C. § 77aa, Schedule A (West 1998).

¹⁸ *Id.* at Schedule A (24).

¹⁹ *Id.* at Schedule A (14).

²⁰ Indeed, the current lack of consistent and comparable information on climate risk has led to a market disfunction where climate-related risks are not being accurately incorporated into asset prices. *See generally*, Madison Condon, *Market Myopia’s Climate Bubble*, 1 Utah L. Rev. 63 (2022).

²¹ *S.E.C. v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D. C. Cir. 1988) (“If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible, and that result has long since been rejected. . . . Speech relating to the purchase and sale of securities, in our view, forms a distinct category of communications in which the government’s power to regulate is at least as broad as with respect to the general rubric of commercial speech.”).

²² *Edenfield v. Fane*, 507 U.S. 761, 766 (1993).

transaction,”²³ but it extends to other commercial activity, such as “when it is an advertisement, refers to a specific product, and the speaker has an economic motivation for it.”²⁴

Government regulation of commercial speech is not just common but also pervasive. Environmental regulation, food labeling and safety, and drug and medical device regulation all depend on compelled commercial disclosures. Indeed, the entire regime of securities regulation could not exist without SEC-mandated disclosures. Numerous and varied disclosure regimes have been considered under the commercial speech framework.²⁵ Securities-related speech has been treated as commercial speech by the Tenth Circuit because it enables the public offering of securities products and informs current or potential investors (i.e., part owners) about the value of the company.²⁶

Contrary to statements by opponents of the Proposed Rule, commercial speech regulations are not subject to strict scrutiny.²⁷ “The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”²⁸ In this regard, the two seminal Supreme Court cases setting forth the tests for First Amendment challenges to commercial speech regulation are *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*²⁹ and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.³⁰

Under *Zauderer*, the government may compel a disclosure that is “factual and uncontroversial” so “long as disclosure requirements are reasonably related to the [government] interest” at issue and is not unduly burdensome.³¹ The Court described the commercial speaker’s constitutional

²³ *U. S. 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).

²⁴ *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)).

²⁵ *See U.S. v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (per curiam) (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 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).

²⁶ *See U.S. v. Wengler*, 427 F.3d 840 (10th Cir. 2005) (holding that section 17b of the Securities Act regulated commercial speech). The D.C. Circuit has also treated an SEC rule as compelled commercial speech, but that case did not determine that *securities disclosures* are covered by the First Amendment because, as discussed more below, the court (and the SEC) treated the rule at issue as a consumer protection regulation rather than a standard securities disclosure. *Nat’l Ass’n of Mfrs. v. S.E.C. (“NAM”)*, 800 F.3d 518 (D.C. Cir. 2015).

²⁷ *See e.g., Nat’l Inst. of Fam. & Life Advocs. v. Becerra (“NIFLA”)*, 138 S. Ct. 2361, 2371 (2018).

²⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

²⁹ *Zauderer v. Off. of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

³⁰ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562-3.

³¹ *Zauderer*, 471 U.S. at 651.

interest in non-disclosure as “minimal.”³² Lower courts have treated *Zauderer*’s focus on avoiding falsity or misleadingness as an example of a legitimate government interest justifying mandatory disclosure but not the only example. *Zauderer*’s reasoning is based on the commercial speaker’s lack of an interest in avoiding truthful, relevant disclosures in the absence of an undue burden on further speech. Thus, lower courts have held that compelled disclosures may be used to improve the information environment for consumers, as in *American Meat Institute v. U.S. Department of Agriculture (AMI)* (en banc).³³ *Zauderer* is particularly appropriate where a commercial speaker seeks an economic relationship with the listener. Having, for example, chosen to publicly list stock in order to further its own commercial interests, a company has no legitimate interest in refusing to give additional information that would help potential investors assess the value of the stock.

As explained in more detail in the next section, if speech is at issue here, the *Zauderer* standard would apply to the disclosure requirements in the Proposed Rule because they compel disclosure of factual and uncontroversial information. In the unlikely scenario that *Zauderer* would not apply, however, *Central Hudson* would provide the operative test. Under *Central Hudson*, the regulation or restriction of truthful, non-misleading commercial speech is acceptable if it: (1) furthers a substantial government interest, (2) directly advances that interest, and (3) is not more extensive than necessary to serve that interest.³⁴ The *Central Hudson* test is not equivalent to the strict scrutiny “least-restrictive means” test.³⁵ It merely requires a “fit” between the government end and the means chosen to accomplish that end, “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”³⁶

The takeaway for the SEC’s Proposed Rule is that, in a First Amendment challenge, a Court would consider the following factors:

- Whether the disclosures are “purely factual” and “uncontroversial” (to determine if *Zauderer* applies);
- Whether the SEC’s interest in the disclosure requirements is adequate (under *Zauderer*) or, at the very most, substantial (if under *Central Hudson*);

³² *Id.* (reviewing requirement that attorneys advertising for contingency cases specify that the client may have to bear certain expenses).

³³ *Am. Meat Inst. v. U.S. Dep’t of Agric (“AMI”)*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) (en banc) (upholding requirement for country-of-origin labeling on meat); see also *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (Compelled commercial disclosures “further[], rather than hinder[], the First Amendment goal[s].”); *Borgner v. Brooks*, 284 F.3d 1204, 1214-15 (11th Cir. 2002) (disclaimer an effective means to convey necessary information to the public about services being advertised).

³⁴ *Cent. Hudson*, 447 U.S. at 559, 566, 570 (reviewing a ban of promotional advertising by a utility).

³⁵ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 469, 476-480 (1989) (holding that the D.C. Circuit erred below for applying the least-restrictive means test to commercial speech restriction).

³⁶ *Id.* at 80 (internal quotation marks omitted).

- Whether the disclosure requirements are reasonably tied to that interest (under *Zauderer*) or, at the very most, directly advance that interest (if under *Central Hudson*);
- Whether the disclosure requirements are not unduly burdensome (under *Zauderer*) or, at the very most, are no more extensive than necessary (if under *Central Hudson*).

Opponents of climate-related disclosures arguing that a higher standard governs have done so by relying on cases that cannot be stretched to deliver their desired meaning. The West Virginia Attorney General, for example, has pointed to concurrences by retiring Justice Breyer in *Reed v. Town of Gilbert*³⁷ and *Barr v. American Association of Political Consultants*.³⁸ Neither case is relevant to the Proposed Rule. *Reed* concerned a restriction on voluntary, non-commercial speech: meeting signs by non-profit groups.³⁹ *Barr* was a challenge to an exception to a robocall ban for government backed debt collectors in which political robocalls were otherwise restricted.⁴⁰ In both cases, Justice Breyer’s concurrences merely cautioned that despite the majorities’ emphases on strict scrutiny for content-based restrictions, various types of content-based speech, including securities regulation, are subject to lesser scrutiny.⁴¹

The West Virginia Attorney General has also relied on *NIFLA v. Becerra* for the principle that strict scrutiny applies to any content-based compelled speech, in that case mandatory notices at crisis pregnancy centers.⁴² That case, however, expressly recognized the continuing validity of *Zauderer* and its lower threshold for compelled commercial disclosures.⁴³ *Zauderer* did not apply to one of the types of compelled speech at issue there because the required disclosure was not about the service being offered by the clinics but about services provided by others (e.g., state-sponsored services, including abortions).⁴⁴ In addition, because the clinics were not selling their services, the speech at issue was not commercial. The other kind of compelled speech at issue did not fall under *Zauderer* because, although factual, it was about “abortion, anything but an ‘uncontroversial’ topic.”⁴⁵ Indeed, 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

³⁷ *Reed v. Town of Gilbert*, 576 U.S. 155, 177 (2015) (Breyer, J., concurring).

³⁸ *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335 (2020) (Breyer, J., concurring in part and dissenting in part).

³⁹ *Reed*, 576 U.S. at 155.

⁴⁰ *Barr*, 140 S. Ct. at 2343.

⁴¹ *Reed*, 576 U.S. at 177 (Breyer, J. concurring); *Barr*, 140 S. Ct. at 2360 (Breyer, J., concurring in part and dissenting in part).

⁴² *NIFLA*, 138 S. Ct. at 2371.

⁴³ *Id.* at 2377.

⁴⁴ *Id.* at 2372.

⁴⁵ *Id.*

question[ing] the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”⁴⁶

As an example of how the commercial speech tests play out in practice, consider the proposed disclosure requirements at issue in *AMI*: a rule issued by the Department of Agriculture requiring country-of-origin labeling on meat products.⁴⁷ An en banc panel of the D.C. Circuit applied the *Zauderer* test and upheld the rule. The information was “purely factual” and was not controversial “in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”⁴⁸ The long history of country-of-origin disclosures, combined with consumer desire for the information and market impact that can arise in the event of food-borne illness, was sufficient to create an adequate government interest.⁴⁹ As for the link between the government interest and the disclosure mandate, the court considered “evidentiary parsing” to be “hardly necessary.”⁵⁰ Explaining the relationship between *Zauderer* and *Central Hudson*, the court explained that “the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose ‘purely factual and uncontroversial information’” relevant to the product or service being offered.⁵¹ Finally, the court found no undue burden—despite the sometimes extensive efforts necessary to compile country-of-origin data—on protected speech because the information itself was easy to disclose and did not restrict speech.⁵²

Some critics have highlighted *National Association of Manufacturers (NAM) v. SEC*, often referred to as the “conflict free minerals case,” as a case in which the compelled speech at issue was invalidated.⁵³ *NAM* involved a challenge to an SEC rule requiring publicly traded companies to disclose on their websites whether they could confirm that their minerals were “DRC [Democratic Republic of the Congo] conflict free.”⁵⁴ But *NAM* did not decide the level of scrutiny given to securities regulations directed at investor-consumers (or even whether such regulations are covered by the First Amendment). That is because, although the rule was issued by the SEC, the D.C. Circuit treated it as a consumer protection regulation because it sought to inform ordinary consumers of end products produced by securities issuers, rather than to inform investors.⁵⁵ The court declined to apply *Zauderer* and instead applied *Central Hudson* because the speech the rule compelled was a statement of value or opinion;⁵⁶ in other words, it did not

⁴⁶ *Id.* at 2372, 2376.

⁴⁷ *AMI*, 760 F.3d at 20.

⁴⁸ *Id.* at 27.

⁴⁹ *Id.* at 23-24.

⁵⁰ *Id.* at 26.

⁵¹ *Id.*

⁵² *Id.* at 27.

⁵³ See 800 F.3d 518 (D.C. Cir. 2015).

⁵⁴ *Id.*

⁵⁵ *Id.* at 158, 161.

⁵⁶ *Id.* at 163-64.

require a statement of fact but an expression of moral culpability.⁵⁷ The court went on to find that the government interest—ameliorating the humanitarian crisis in the DRC—was sufficient, but that any link between the interest and the rule was purely speculative.⁵⁸

III. The SEC’s Proposed Disclosure Requirements Easily Satisfy the Tests for Compelled Commercial Disclosures.

The disclosure requirements in the Proposed Rule fall into three categories relevant to First Amendment review: (1) information relevant to a registrant’s publicly set climate-related targets or goals; (2) climate-related financial risks as assessed by a registrant, the registrant’s own processes for accounting for such risks, and how those risks affect its financials; and (3) greenhouse gas emissions.⁵⁹ Even assuming securities regulation receives First Amendment coverage, each of the proposed disclosure requirements would likely receive *Zauderer* review. Further, the relevant caselaw indicates that, under any potentially applicable standard, the proposed disclosure requirements would survive a hypothetical First Amendment challenge. Below, we outline the relevant analysis and the correct result under that analysis.

a. The requirement that registrants disclose information about their publicly set climate goals falls squarely under *Zauderer* because it prevents misrepresentation.

As an initial matter, the proposed requirement that registrants disclose specific information about their publicly set climate-related targets or goals prevents misrepresentation to investors and, therefore, falls under *Zauderer* (again assuming First Amendment coverage). As explained above, *Zauderer* expressly held that the more deferential standard applies to compelled disclosures intended to correct speech that is otherwise false or misleading.

This requirement merely ensures that investors have access to whether, and how, registrants that have voluntarily disclosed their climate-related goals are actually meeting those goals. The problem of “greenwashing”—where an entity publicly misrepresents or exaggerates its positive environmental impact—is well documented.⁶⁰ Many SEC registrant companies claim that they

⁵⁷ *Id.* at 167.

⁵⁸ *Id.* at 166-67.

⁵⁹ Proposed Rule, 87 Fed Reg. at 21,345.

⁶⁰ Amanda Shanor & Sarah Light, *Greenwashing and the First Amendment*, 122 Colum. L. Rev. (forthcoming 2022).

will reach “net zero” or become “carbon neutral.”⁶¹ Large banks,⁶² large asset managers,⁶³ Google and Microsoft,⁶⁴ BP and Shell,⁶⁵ and Alcoa⁶⁶ have all made climate pledges. Experts have warned that such claims cannot be taken at face value.⁶⁷ Indeed, many such claims have led to litigation, such as a complaint filed with the Federal Trade Commission against Chevron, contending that Chevron overstated the firm’s efforts to reduce greenhouse gas emissions.⁶⁸

The proposed requirement would merely ensure that registrants that already voluntarily publicize or promote themselves as taking certain climate-related steps are not misleading investors about the nature or extent of those steps. Therefore, it would be subject to only limited review under *Zauderer*.

b. The proposed disclosures are factual and non-controversial under *Zauderer*.

All three categories of proposed disclosures are factual and uncontroversial in the *Zauderer* sense. To be factual simply means that the disclosure requires a statement of objective fact, rather than, say, a statement of opinion. Each of the proposed requirements would compel purely factual statements. They would require registrants to disclose objective facts about their own activities: how they are meeting their own publicly stated climate goals, what climate-risks they

⁶¹ Thomas Murray, *Net zero is THE new business imperative*, EDF+BUSINESS (Sept. 24, 2020) <https://business.edf.org/insights/net-zero-emissions/> (The “number of net zero pledges has doubled in less than a year.”).

⁶² Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 Colum. L. Rev. 1895 (2021); Avery Ellfeldt, *Citi Goes Net Zero. Who’s Next?*, ClimateWire (Mar. 2, 2021), <https://www.eenews.net/climatewire/2021/03/02/stories/1063726339?>

⁶³ *Leading Asset Managers Commit to Net Zero Emissions Goal with Launch of Global Initiative*, Ceres (Dec. 11, 2020), https://www.ceres.org/news-center/press-releases/leading-asset-managers-commit-net-zero-emissions-goal-launch-global?gclid=CjwKCAjwqauVBhBGEiwAXOepkX1ABr2yToagbphgk18_Q-BNpseGt_F2wHFLlgCd6hQUataQblacKR0CbokQAvD_BwE.

⁶⁴ *Sustainability*, Google, <https://sustainability.google/commitments/#leading-at-google> (last visited June 16, 2022) (pledging to be carbon-free by 2030); Brad Smith, *Microsoft Will be Carbon Negative by 2030*, Official Microsoft Blog (Jan. 16, 2020), <https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/>.

⁶⁵ *BP Sets Ambition for Net Zero by 2050, Fundamentally Changing Organization to Deliver*, BP (Feb. 12, 2020), <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bernard-looney-announces-new-ambition-for-bp.html>.

⁶⁶ *Alcoa States Its Ambition to Reach Net Zero Greenhouse Gas Emissions by 2050*, Alcoa (Oct. 4, 2021), <https://news.alcoa.com/press-releases/press-release-details/2021/Alcoa-States-Its-Ambition-to-Reach-Net-Zero-Greenhouse-Gas-Emissions-by-2050/default.aspx>.

⁶⁷ Tim Quinson, *Al Gore Warns Greenwashing May Stop the Climate Fight in its Tracks*, Bloomberg Green (July 13, 2021), <https://www.bloomberg.com/news/articles/2021-07-13/al-gore-warns-greenwashing-may-stop-climate-fight-in-its-tracks-green-insight>.

⁶⁸ Myles McCormick, *Chevron Accused of ‘Greenwashing’ in Complaint Lodged with FTC*, Financial Times (Mar. 16, 2021), <https://www.ft.com/content/2985e18a-fdcb-4cd2-ae3-d5a0fe4cdab2>; Corey Paul, *Environmental Groups Accuse Chevron of ‘Greenwashing’ in FTC Complaint*, S&P Global Market Intelligence (Mar. 16, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/environmental-groups-accuse-chevron-of-greenwashing-in-ftc-complaint-63206914>.

have identified, how they are accounting for climate risks in their financials, and how much GHG (which the SEC has defined to mean the seven specific gases reported under the GHG Protocol's Corporate Accounting and reporting Standard) they use in their operations. A registrant could conclude that it bears no climate-related risk and still be in compliance.

Purely factual statements are generally also treated as “uncontroversial.” For example, a purely factual statement about the country-of-origin of meat was presumed uncontroversial in *AMI*.⁶⁹ Even though people can have different opinions on *whether anyone ought to care* about the national origin of meat, that does not make the disclosure of the actual country of origin of meat itself a controversial fact. If controversiality were, instead, measured by whether there are disputes over the importance or value of the general topic, then every disclosure would be rendered infirm once someone sues over the disclosure or makes it a subject of public dispute; a focus on the factuality of the disclosure avoids self-contradiction in the standard. Indeed, then-Judge Kavanaugh opined in his *AMI* concurrence that the standard was easily met there “given the factually straightforward, evenhanded, and readily understood nature of the information, as well as the historical pedigree of this specific kind of disclosure requirement.”⁷⁰

A statement of fact does not become controversial simply because it “can be tied in some way to a controversial issue”⁷¹ or because a *listener* may use the fact to inform an opinion. It becomes controversial when it forces the *speaker* to take sides in some way.⁷² For example, in *NIFLA*, the state required a clinic whose purpose was to oppose abortion to provide information on state-sponsored abortion services, a message fundamentally at odds with its mission.⁷³ And in *NAM*, the rule required companies to post a statement about whether its products are “DRC conflict free,” an ideological statement that conveys moral responsibility for the situation in the Democratic Republic of the Congo, effectively requiring a company to “confess blood on its hands.”⁷⁴

The information required here is nothing like the “DRC conflict free” disclosures mandated in *NAM*. Rather, the SEC's proposed disclosure requirements are factually straightforward, evenhanded, and readily understood. They do not force companies to take sides on controversial topics, like climate change regulation, nor do they entail an inherent statement of morality or culpability. They require only disclosure of objective facts that the market has already shown are relevant to investors and asset valuation.⁷⁵ Have the registrants identified climate risks to their operations or not? How much greenhouse gases do their operations objectively emit? Requiring such factual statements about one's own operations does not compel a stand about morality or

⁶⁹ 760 F.3d at 27.

⁷⁰ *Id.* at 34 (Kavanaugh, concurring).

⁷¹ *CTIA – The Wireless Ass'n* 928 F.3d at 845.

⁷² *Id.*

⁷³ *Id.* (discussing *NIFLA*).

⁷⁴ 800 F.3d at 530.

⁷⁵ See Condon, *supra* note 21.

even about the world at large but only disclosure of policies and data as collected by the commercial entity itself.⁷⁶

Neither does registrant opposition or the politics of greenhouse gas regulation suffice to make the proposed disclosure requirements controversial. The content of a mandated disclosure does not become controversial simply because regulated parties oppose it, because the need for the disclosure is hotly debated, or even because the disclosure may be related in some way to a political debate. Every compelled disclosure ultimately confirmed in court has had its own set of opponents, as in *Zauderer* itself. Indeed, at the time that the Supreme Court reviewed the attorney advertising rules at issue in *Zauderer*, “the bar [was] hopelessly divided on the issue of *any* advertising.”⁷⁷ What matters here is that the proposed requirements would not compel registrants to endorse any political position, take any steps to reduce their greenhouse gas emissions or otherwise ameliorate climate change, or even to conclude that they have any climate risks. They would compel only objective statements of fact that will protect investors. Investors may choose to question whether the disclosures reveal poor management or investment risks, but that is the very purpose of SEC disclosure requirements.

The West Virginia Attorney General has argued that such information *could be used* to advance prejudice and animus toward companies based on those disclosures. But the fact that third parties could conceivably use the information for another purpose—such as “buy American meat” campaigns, in *AMI*—does not make the compelled speech itself controversial. Whether the disclosure is controversial depends on the “factual accuracy of the compelled disclosure, not [on] its subjective impact on the audience,” much less a third party.⁷⁸ For example, information *about* a company’s internal policies and data is “purely factual and uncontroversial,”⁷⁹ even though the substantive content of those policies—*should* Facebook ban pictures of breastfeeding that expose a nipple? *Should* a particular post have 1 million views?⁸⁰—can become controversial. The disclosures proposed by the SEC are intended to inform *investors* about the value and risks of their investments or potential investments. They may use the information in deciding whether to invest or divest or how to participate in company management. All of this is well within the rights of investors and well within the role of the SEC.

Moreover, as in *AMI*, there is a long historical pedigree of disclosure requirements about financial risks to public companies, including environmental risks, undermining any suggestion that such disclosures are controversial. In 1933, Congress gave the SEC authority to issue

⁷⁶ See *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1127 (11th Cir. May 23, 2022) (Requiring disclosure of social media content standards, changes in terms, provision of free advertising to political candidates, and view counts of individual posts would “provide users with helpful information that prevents them from being misled about platforms’ policies.”).

⁷⁷ Dorothy Virginia Kibler, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision*, 65 N.C. L. Rev. 170, 193 (1986).

⁷⁸ *CTIA—The Wireless Ass’n*, 854 F.3d at 1117 (vacated for other reasons).

⁷⁹ *Netchoice*, 134 F.4th at 1227.

⁸⁰ See *id.*

regulations “in the public interest or for the protection of investors” and to facilitate capital formation, among other things.⁸¹ Since that time, the SEC has continuously mandated that registrant companies disclose information the SEC has determined to be “necessary or appropriate in the public interest or for the protection of investors.”⁸² “[D]ecade after decade,” the SEC has built out a regime compelling disclosures that were aimed at protecting investors from the business risks and concerns of the day.⁸³ These mandates have included such specific items as executive compensation, related-party transactions, and industry-specific items.⁸⁴ The SEC has often updated its disclosure requirements in response to emerging market threats, like Y2K,⁸⁵ pandemic,⁸⁶ or war.⁸⁷ Requiring disclosures related to potential existential threats to businesses, such as climate-related risks and transition risks, continue this tradition.

Indeed, the SEC has been expressly addressing disclosure of material environmental issues since the early 1970’s, starting with an interpretive release stating that companies should consider the financial impact of environmental laws, and that continued through rules and other efforts exploring the need for more specific disclosure requirements.⁸⁸ Registrants have accordingly been including environmental risks in their SEC disclosures for decades, treating this as material to financial performance. For example, General Motors has long disclosed the various applicable environmental regulations and how those regulations impact its business.⁸⁹ Lockheed Martin not only discloses its environmental liabilities but also its environment-related business opportunities.⁹⁰ Although the information has thus far been inconsistent, some companies have already disclosed climate-related risks, implicitly acknowledging that such risks are relevant to

⁸¹ Securities Act of 1933, 15 U.S.C. § 77b(b).

⁸² Securities Act §§ 7 & 10(c), 15 U.S.C. §§ 77g & 77j(c); Securities Exchange Act §§ 12(b), 14(a), 15 U.S.C. § 78l & 78n; George Georgiev, *The SEC’s Climate Disclosure Proposal: Critiquing the Critics*, Emory L. Stud. Rsch. Paper 22-8, 4 (2022), <https://ssrn.com/abstract=4068539> (quoting Section 7(a)(1) of Schedule A of the Securities Act).

⁸³ *Id.* at 5.

⁸⁴ *Id.*

⁸⁵ See Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers, 63 Fed. Reg. 41,394 (Aug. 4, 1998) (to be codified at 17 C.F.R. pts. 231, 241, 271, 276).

⁸⁶ See *COVID-19*, SEC, <https://www.sec.gov/corpfin/corporation-finance-covid-19> (Jan. 8, 2022) (listing 15 guidance documents, statements, and interpretations by the Commission in connection with the Covid-19 crisis).

⁸⁷ *Sample Letter to Companies Regarding Disclosures Pertaining to Russia’s Invasion of Ukraine and Related Supply Chain Issues*, SEC, <https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine> (May 3, 2022).

⁸⁸ Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293-95 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, 241).

⁸⁹ *E.g.*, *Form 10-K*, Gen. Motors Co., (2009), available at <https://investor.gm.com/static-files/5e83ec62-dde5-40b4-95ce-f97a5ab94880>.

⁹⁰ *E.g.*, *Form 10-K*, Lockheed Martin, 26, 55-56 (1995), available at <https://www.lockheedmartin.com/content/dam/lockheed-martin/co/documents/annual-reports/1995-annual-report.pdf>.

their financial picture. For example, Adobe,⁹¹ Alphabet,⁹² and Chevron⁹³ all extensively discuss in their annual reports their anticipated climate-related risks, as well as climate-related opportunities.

The deferential standard in *Zauderer* should, therefore, apply to each disclosure requirement.

c. The SEC has a substantial interest in protecting investors, and the proposed disclosures directly advance that interest.

There is no question that the SEC has a substantial government interest in ensuring that investors are adequately informed about climate-related financial risks to publicly traded companies. The SEC is charged with protecting investors and facilitating capital formation, among other things.⁹⁴ Protecting investors means, at minimum, ensuring that they have sufficient and consistent information about emerging risks to public companies. Climate risks that companies may face include catastrophic weather events, supply chain disruptions, changing demand, and regulatory and transition costs. “In the last two years alone, the U.S. suffered more than 40 weather disasters that inflicted at least \$1 billion in economic damage each.”⁹⁵ A 2019 study found that 215 of the world’s biggest global companies have nearly \$1 trillion at risk from climate impacts, “with many likely to hit within the next 5 years.”⁹⁶ Knowing which companies face which risks will help investors efficiently allocate capital.

As the SEC noted in the Proposed Rule, investors have been demanding climate-related information.⁹⁷ Thousands of investors managing hundreds of trillions of dollars have urged disclosure of climate-related information by signing such initiatives as the Global Investor Statement to Governments on Climate Change, the UN Principles for Responsible Investment, the Net Zero Asset Managers Initiative, and the Climate Action 100+.⁹⁸ Investors want

⁹¹ *E.g.*, Form 10-K, Adobe Inc., 27-28, 34 (2022), available at <https://www.adobe.com/pdf-page.html?pdfTarget=aHR0cHM6Ly93d3cuYWVYmUyY29tL2NvbnRlbnQvZGFtL2NjL2VuL2ludmVzdG9yLXJlbGF0aW9ucy9wZGZzL0FEQkUtMTBLLUZZMjEtRklOQUwucGRm>.

⁹² *E.g.*, Form 10-K, Alphabet, Inc., 12-13 (2022), available at https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf?cache=fc81690.

⁹³ *E.g.*, *Accelerating Progress: 2021 Annual Report*, Chevron, 32 (2021), <https://www.chevron.com/-/media/chevron/annual-report/2021/documents/2021-Annual-Report.pdf>.

⁹⁴ Securities Act of 1933, 15 U.S.C. § 77b(b).

⁹⁵ Michael Panfil & David G. Victor, *Climate change creates financial risks. Investors need to know what those are*, Brookings (Mar. 29, 2022), <https://www.brookings.edu/blog/planetpolicy/2022/03/29/climate-change-creates-financial-risks-investors-need-to-know-what-those-are/>.

⁹⁶ *World’s biggest companies face \$1 trillion in climate change risks*, CDP Disclosure Insight Action (June 4, 2019), <https://www.cdp.net/en/articles/media/worlds-biggest-companies-face-1-trillion-in-climate-change-risks>.

⁹⁷ 87 Fed. Reg. at 21,340, 21,446.

⁹⁸ 87 Fed. Reg. at 21,340-41.

information on climate risk because it is seen as a risk to asset allocation.⁹⁹ For example, one study found that nearly 93% of institutional investors with \$12.75 trillion under management “view climate change as an investment risk that has yet to be priced in by all the key financial markets globally.”¹⁰⁰ Investors have particularly requested clearer, more consistently presented, and more comparable information,¹⁰¹ and evidence is growing that climate risks are not being accurately and consistently incorporated into asset prices.¹⁰² And yet, the SEC has found that registrant companies do not currently provide consistent, comparable information that is “decision-useful” to investors.¹⁰³

Specifically, the proposed requirement that registrants provide information related to their publicly stated climate goals is relevant to company marketing practices and consumer appeal, which may in turn be relevant to investors’ assessment of investment risk. It is also relevant to potential litigation costs because companies overstating their environmental bona fides may be subject to litigation risk. For example, in 2021, a complaint was filed with the Federal Trade Commission alleging that Chevron overstated its efforts to reduce its greenhouse gas emissions.¹⁰⁴ Such cases can be costly and can erode a company’s customer base.

The proposed requirement that registrants explain the climate-related risks they have independently identified, how they address those risks, and how those risks affect financials is relevant to whether the company is being under- or over-valued and whether the investment is risky and will provide investors with consistent, comparable, and useful information.

The proposed requirement that registrants disclose their greenhouse gas emissions is relevant to transition risks as the world moves away from fossil fuels. Investors may use that objectively verifiable information to assess how consumers or governments will treat the companies based on their emissions. Investors may also want to know how companies will fare in the transition to a lower carbon economy. Indeed, that transition has already begun and may already be affecting company performance. For instance, some states have GHG emission reduction programs,¹⁰⁵ and

⁹⁹ *Climate change and artificial intelligence seen as risks to investment assets allocation, finds new report by BNY Mellon Investm*, Bloomberg Business (Sept. 16, 2019), <https://www.bloomberg.com/press-releases/2019-09-16/climate-change-and-artificial-intelligence-seen-as-risks-to-investment-asset-allocation-finds-new-report-by-bny-mellon-investm>.

¹⁰⁰ *Id.*

¹⁰¹ Cynthia A. Williams & Donna Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 Tex. L. Rev. 1453-85 (2021).

¹⁰² See Condon, *supra* note 21.

¹⁰³ 87 Fed. Reg. at 21,335.

¹⁰⁴ McCormick, *supra* note 69; see also *Jacob v. Bloom Energy Corp.*, 2021 WL 733438, at *1 (Del. 2021) (shareholder suit seeking to inspect books to investigate potential greenwashing).

¹⁰⁵ Eleven states participate in the Regional Greenhouse Gas Initiative, a regional cap-and-trade initiative. See The Regional Greenhouse Gas Initiative, rggi.org (last visited June 6, 2022). California also has a cap-and-trade program. See Center for Climate and Energy Solutions, <https://www.c2es.org/content/california-cap-and-trade/> (last visited June 16, 2022).

EPA has issued rules to limit certain GHG emissions.¹⁰⁶ The extent to which a company’s operations rely on the emissions of GHGs affects the real value of the company, whether the company is properly accounting for the costs of transitioning to a lower carbon economy, and even its viability. This is true just as much for “Scope 3” emissions (emissions arising out of a firm’s value chain, including from upstream suppliers) as for “Scope 1 and 2” emissions (emissions from direct company operations and from electricity purchased)—the extent to which the company’s suppliers rely heavily on GHGs indicates the direction that future supply costs will trend. And GHG emissions can be relevant to a company’s litigation risk, such as the multiple lawsuits faced by certain fossil fuel companies related to their marketing practices and contribution to climate change.¹⁰⁷

Zauderer requires no factual record support to explain how the mandated disclosures advance the interest, but an application of *Central Hudson* would require the SEC to produce a factual record and not rely on “speculation or conjecture.”¹⁰⁸ In a final rule, therefore, the SEC should explain and cite evidence establishing how and why the final disclosure requirements would protect and empower investors. Some of this evidence can be found in what public companies and opponents of the Proposed Rule themselves have said in proceedings regarding greenhouse gas regulations.

Statements from Registrants and Others Demonstrating the SEC’s Interest in Mandating Climate-Related Disclosures (Carbon Dioxide Regulation Litigation)

Ever since the Supreme Court held in *Massachusetts v. EPA*¹⁰⁹ that EPA must regulate greenhouse gases, companies have been on notice that regulation of carbon dioxide and other GHGs is imminent. Yet, after EPA issued the Clean Power Plan¹¹⁰—which sought to regulate carbon dioxide pollution from power plants—certain SEC registrant companies admitted in surrounding litigation that the regulation would severely affect their financials, sometimes even their viability. For example:

¹⁰⁶ *E.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (EPA’s “Clean Power Plan,” currently stayed and under litigation).

¹⁰⁷ *E.g.*, Compl., *Vermont v. Exxon Mobil Corp.*, No. 2:21-cv-00260-wks (S. Vt. filed Oct. 22, 2021) (suit for failure to disclose causal connection between their products and climate change); Compl., *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932-TJK (D.D.C., filed July 17, 2020) (suit for misleading consumers about “the central role their products play in causing climate change”); Compl., *In re Exxon Mobil Corp. Derivative Litigation*, No. 3:19-cv-01067 (N.D. Tex. filed May 2, 2019) (shareholder derivative suit for misleading shareholders about climate change and its impacts on Exxon’s business).

¹⁰⁸ *NAM*, 800 F.3d at 526.

¹⁰⁹ 549 U.S. 497 (2007). *Massachusetts v. EPA* held that, under the Clean Air Act, EPA must regulate greenhouse gases if it determines that greenhouse gases “may reasonably be anticipated to endanger public health or welfare.” *Id.* at 532-33. EPA made an endangerment finding with respect to six greenhouse gases, including carbon dioxide and methane, in 2009. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

¹¹⁰ 80 Fed. Reg. at 64,662.

- Murray Energy Corporation said that EPA’s “mandate imminently threatens to result in the shuttering or conversion of coal-fired power plants and thereby imminently threatens Murray Energy’s core business – the mining of coal supplied to those power plants.”¹¹¹ It went on to say that “Murray Energy Corporation and its employees depend upon the presence of a stable and continuing domestic market for coal. Every coal fired power plant that is shut down (or converted) affects the financial bottom line of Murray Energy Corporation and enough shutdowns threaten the existence of Murray Energy.”¹¹²
- Westmoreland Mining Holdings said that the Clean Power Plan “substantially threatens Westmoreland’s business” and that analyses “demonstrated its potential threats to Westmoreland’s largest domestic customer, the coal power plant in Colstrip which has always been exclusively supplied by Westmoreland’s Rosebud mine.”¹¹³
- Basin Electric Power Cooperative said that the Clean Power Plan “would have imposed significant compliance burdens on it and would have forced it to prematurely shut down some of its units.”¹¹⁴
- A brief submitted by the National Rural Electric Cooperative Association, among others, admitted that “most cooperative[.]” power plants “do not have the infrastructure needed to shift generation sources without massive new investments.”¹¹⁵

The Chamber of Commerce, which represents many SEC registrant companies, admitted in litigation that any regulation that leads to “changes in the electricity sectors that shift production away from certain fossil-fuel-fired power plants” would directly impact the financial circumstances of power companies and indirectly impact companies that depend on large amounts of electricity, such as manufacturers.¹¹⁶ “In the case of heavy manufacturing and other energy-intensive industries, electricity costs are among the most significant expenses. Regulations such as the [Clean Power Plan] that increase electricity costs and potentially reduce the reliability of the electricity grid directly harm those members and reduce their competitiveness in the global marketplace.”¹¹⁷

West Virginia, whose Attorney General has publicly opposed the Proposed Rule, similarly agreed that the costs of transition to a lower carbon energy supply would affect the costs and viability of many companies. It recently argued that the Clean Power Plan “would have forced some operators into new lines of business, cutting existing operations and investing in alternate

¹¹¹ Mot. of Murray Energy to Intervene 22, *Am. Lung Ass’n, v. EPA*, No. 19-1140 (D.C. Cir.).

¹¹² *Id.* at 27.

¹¹³ Westmoreland Mining Holdings LLC Unopposed Mot. for Leave to Intervene 2, *Am. Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir.).

¹¹⁴ Unopposed Mot. of Basin Electric Power Cooperative for Leave to Intervene in Support of Respondents 8, *Am. Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir.).

¹¹⁵ Br. of *Amici Curiae* South Texas Electric Cooperative, Inc., et al. 28, *West Virginia v. EPA*, No. 20-1530 (S. Ct.).

¹¹⁶ Mot. of Chamber of Commerce of the U.S. for Leave to Intervene 10, *American Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir.).

¹¹⁷ *Id.* at 13.

generation types instead. . . And economic realities as they were, some plants would have closed.”¹¹⁸

Basin Electric explained in litigation surrounding the Clean Power Plan that resource planning for some companies “is, in part, an exercise of predicting short- and long-term trends in federal regulations, and choosing options that are most likely to be (a) permitted under the regulations, and (b) built in a timely way to meet changing generation and transmission resource needs.”¹¹⁹ Investors should be able to learn whether publicly traded companies have identified such transition risks and how they have planned for them.

Statements from Registrants and Others Demonstrating the SEC’s Interest in Mandating Climate-Related Disclosures (Methane Regulation Litigation)

Another source of evidence can be found in litigation surrounding the Bureau of Land Management’s (BLM’s) 2016 regulation of methane, another greenhouse gas.¹²⁰ While the BLM rule was eventually vacated by a district court,¹²¹ companies continue to have reason to anticipate methane regulations, as EPA recently proposed emission standards that would curb methane.¹²²

In the litigation, the American Petroleum Institute (API), which represents hundreds of oil and gas companies, many of which are SEC registrants, argued that BLM’s 2016 rule would have cost the natural gas industry “almost \$319 million, or approximately \$110,000 per well.”¹²³ API explained that the rule requiring capture of methane would have required operators of natural gas pipelines to “either heavily invest in trying to build the necessary infrastructure to capture and flare or market gas at a loss (while also paying royalties on that production), or cease operations and shut in.”¹²⁴

In another example, the Western Energy Alliance and the Independent Petroleum Association of America, which represent hundreds of oil and gas companies, said that the 2016 BLM rule would

¹¹⁸ Br. for Petitioners 8-9, *West Virginia v. EPA*, No. 20-1530 (S. Ct.).

¹¹⁹ Br. of Respondent Basin Electric Power Cooperative in Support of Petitioners 24, *West Virginia v. EPA*, No. 20-1530 (S. Ct.).

¹²⁰ See Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170). The BLM rule was temporarily revised by a 2018 revision, which was later vacated by a district court. *California v. Bernhardt*, No. 4:18-cv-05712, 2020 WL 4001480 (N.D. Cal. July 15, 2020).

¹²¹ *Wyoming v. DOI*, Case No. 2:16-cv-00285-SWS (D. Wyo. filed Nov. 18, 2016).

¹²² See Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021) (to be codified at 40 C.F.R. pt. 60).

¹²³ [Proposed] Intervenor-Defendant American Petroleum Institute Opposition to Plaintiffs’ Mots. For Prelim. Injunction 13, *California v. Zinke*, No. 3:17-cv-7187 (N.D. Cal. filed Dec. 19, 2017).

¹²⁴ *Id.* at 13-14.

have cost the oil and gas industry over \$155 million, “resulted in a reduction of 1,800 potential new (or capped) oil wells,” and forced some companies to “incur[] a financial penalty in the form of additional royalty obligations” on lost gas.¹²⁵

The SEC can rely on such statements, along with other information at its disposal, to support its view that the proposed disclosure requirements would further the goal of informing investors of financial risks and facilitating the efficient formation of capital.

d. The disclosure requirements are not unduly burdensome on further speech and are no more extensive than necessary.

Finally, the proposed disclosure requirements are not unduly burdensome within the meaning of *Zauderer*, which requires a burden on *speech*.¹²⁶ The proposed requirements would not burden registrants’ protected speech in any way. Registrants would be free to supplement their statements, claim that they do not face climate-related risks, or even to identify climate-related opportunities.

Moreover, most of the proposed disclosure requirements require no more than a description of risks the company identifies, what the company is doing about it, and how those risks affect the company’s financials. Companies that have publicly touted their climate-related goals should have no trouble explaining what they have done to meet those goals. Companies that have identified climate-related risks should be able to explain whether they have incorporated those risks into their financials, etc. Many, though not all, companies have already taken steps to identify their greenhouse gas emissions under the voluntary Task Force on Climate-related Financial Disclosures (TCFD) framework¹²⁷ or the CDP disclosure system.¹²⁸ For those that have not previously identified their emissions, the accounting system for doing so already exists under the Greenhouse Gas Protocol.¹²⁹ By basing the emissions reporting framework on an existing methodology, the SEC has significantly simplified the burden to registrants. This burden to registrants would be reasonable under the circumstances and not more extensive than necessary.

Compare this, for example, to the discussion in *AMI*. There, the D.C. Circuit noted that collecting sufficient information to be able to accurately report meat country-of-origin required a

¹²⁵ Mem. in Support of Mot. for Prelim. Injunction or Vacatur of Certain Provisions of the Rule Pending Admin. Review 6-8, *Wyoming v. DOI*, No. 2:16-cv-00285 (D. Wyo. filed Nov. 18, 2016).

¹²⁶ See *Am. Hosp. Ass’n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020) (“To prevail in a First Amendment challenge, however, the Association must demonstrate a burden on speech, and it has pointed to no such burden. The rule neither requires hospitals to endorse a particular viewpoint nor prevents them from adding their own message on the same website or even in the same file.”).

¹²⁷ *About Us*, Task Force on Climate-Related Disclosures, <https://www.fsb-tcfd.org/about/> (last visited June 16, 2022).

¹²⁸ See *Who we are*, CDP Disclosure Insight Action, <https://www.cdp.net/en/info/about-us> (last visited June 16, 2022).

¹²⁹ 87 Fed. Reg. at 21,344 (relying on Greenhouse Gas Protocol framework).

substantial investment in creating new processing flows, including documenting where the animal was born, raised, and slaughtered.¹³⁰ Nonetheless, the court did not consider that unduly burdensome for First Amendment purposes. The relevant point was that the burden of *disclosure*, not the burden of *generating the information required by the disclosure*, was simple and did not restrict any additional speech the regulated party chose.¹³¹ Similarly, mere requirements that restaurants disclose the calorie content of menu items, while not barring disclosure of other nutritional information, do not offend the First Amendment.¹³² Contrast those cases to a Ninth Circuit holding that a requirement that soda ads contain a warning that covered 20% of the advertisement *did* unconstitutionally burden speech.¹³³ There, the required warning label (the compelled speech) had the effect of restricting additional speech because it “drown[ed] out Plaintiffs’ messages and effectively rule[d] out the possibility of having [an advertisement] in the first place.”¹³⁴ The SEC’s proposed disclosures are not unduly burdensome because there are no market or space constraints on other things a registrant may want to say on the topic, such as qualifying the mandated disclosures or identifying climate opportunities.

IV. The SEC Should Expressly Identify the Government Interest at Issue and Identify the Record Supporting the Mandated Disclosures.

Lastly, to make the constitutionality of a final rule even more apparent, we suggest that the SEC expressly explain that the disclosure requirements are standard securities disclosures, that they fit neatly within the long history of rules intended to protect investors by making relevant information consistently available to financial investors, and that the disclosures fall outside First Amendment coverage. The SEC need not predict which legal framework would apply if a court assessed the rule under the First Amendment. However, we recommend that the SEC provide sufficient record information to illustrate that any potentially applicable standard would be met, as we have done here. The SEC should expressly articulate that the disclosures are factual and uncontroversial. It should explain that the disclosures are intended to inform investors and facilitate efficient capital formation, rather than for any other purpose suggested by critics.¹³⁵ The SEC could list any evidence at its disposal supporting the view that the required information is relevant to a company’s financials and needed by investors, including the information provided here. And the SEC could explain its efforts to ensure that the burden to registrants is low and that the rule is not intended to restrict any additional speech.

* * *

¹³⁰ *AMI*, 760 F.3d at 20.

¹³¹ *Id.* at 27.

¹³² *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134, 136-37 (2d Cir. 2009).

¹³³ *Am. Bev. Ass’n v. City of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc).

¹³⁴ *Id.* (internal quotation marks omitted).

¹³⁵ *AMI*, 760 F.3d at 25 (majority), 32 (Kavanaugh, concurring); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

We encourage the SEC to finalize the Proposed Rule as soon as feasible, to respond directly to the First Amendment criticisms, and to expressly reference the facts and record that may become relevant in litigation. If you have any questions or would like to discuss the information in this comment, please contact Samara Spence, Counsel for the undersigned scholars, at [REDACTED].

Respectfully submitted,

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