KNIGHT
FIRST AMENDMENT
INSTITUTE at
COLUMBIA UNIVERSITY

475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
info@knightcolumbia.org

June 17, 2022

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

Re: File No. S7-10-22
Climate-Related Disclosures for Investors

Dear Chair Gensler,

We write on behalf of twelve First Amendment scholars regarding proposed rules that would require public companies to provide certain climate-related information in their registration statements and periodic reports. The Commission has received several comments raising concerns that the proposed rules violate the First Amendment.[1] The undersigned believe that those concerns are misplaced. The proposed rules seek to protect investors by providing them with information about climate-related financial risks and metrics associated with securities that are sold to the public. Disclosure requirements of this kind do not ordinarily raise First Amendment concerns. To the contrary, they have long been understood to be an integral part of the regulation of securities. If the proposed rules trigger First Amendment scrutiny at all, they should be evaluated under the deferential standard of review that applies to compelled disclosures of factual information in the commercial context. The proposed rules appear to easily satisfy that standard.

[1] *See, e.g.*, Comment Letter of State Attorneys General on Proposed Climate Change Disclosures (Jun. 14, 2021), https://perma.cc/Y5RD-MH2K; Institute for Free Speech, Comment Letter on Proposed Climate Change Disclosures (Jun. 10, 2021), https://perma.cc/55CF-48BM; Sean J. Griffith, Comment Letter on Proposed Climate-Related Disclosures (Jun. 1, 2022), https://perma.cc/Q6CN-TT8H.

I. Disclosure requirements that inform and protect investors do not ordinarily raise First Amendment concerns.

As one SEC report notes, "[d]isclosure is and has from the outset been a central aspect of national policy in the field of securities regulation." SEC, *Disclosure to Investors–A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts* (The Wheat Report) 10 (1969); *see also SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 186 (1963) (noting that the "fundamental purpose" of federal securities legislation is to "substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry"). The Securities Act of 1933 requires companies offering securities to the public to disclose truthful information about these securities and the risks associated with investing in them. Securities Act of 1933, 15 U.S.C. § 77e. The Securities Exchange Act of 1934 requires companies with publicly traded securities to periodically report certain information on an ongoing basis. Securities Exchange Act of 1934, 15 U.S.C. §§ 78m–78n. This includes annual and quarterly information about a company's business and financial conditions, and current information about major events relevant to shareholders. *Id.*

The main purpose of these laws is to protect investors from information asymmetries, and capital markets from inefficiency and instability. Disclosure reduces information asymmetries among investors, and between investors and the issuers of securities, by arming all potential investors with information that is material to investment and voting decisions. *See* The Wheat Report 10 (describing the purpose of the '33 and '34 Acts as "seeing to it that investors and speculators had access to enough information to enable them to arrive at their own rational decisions"). Addressing information asymmetries can, in turn, improve the price-setting function of the market by empowering investors to better assess and price risk. *See* H.R. Rep. No. 95-910, vol. 1, at 562–63 (1977) (noting that the Acts were "founded on the theory that informed investors seeking to maximize their own investment needs and objectives resulted in the most efficient allocation of capital," and that the "competing judgments of informed buyers and sellers as to the value of a security in a free and open securities market reflected fair values for that security").

Historically, disclosure mandates that seek to inform and protect investors have not been required to satisfy First Amendment scrutiny. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1778 (2004). Although the Supreme Court has not squarely addressed the issue, it has repeatedly suggested that the regulation of information about securities does not raise First Amendment concerns. For example, in *Ohralik v. Ohio State Bar Association*, the Court

observed that "[n]umerous examples can be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, [and] corporate proxy statements," and that "[e]ach of these examples demonstrates 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." 436 U.S. 447, 456 (1978) (cleaned up); *accord Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 n.5 (1985). Similarly, in *Paris Adult Theatre I v. Slaton*, the Court remarked: "[N]either 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." 413 U.S. 49, 64 (1973).

The underlying rationale for this rule is clear: generally speaking, securities laws regulate information about securities not as speech, but rather incidentally, as part of a broader regulatory scheme aimed at securities dealing. As the Supreme Court has repeatedly explained, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *accord Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2373 (2018); *cf. United States v. O'Brien*, 391 U.S. 367 (1968). This is especially true when a restriction is part of a finely reticulated regulatory scheme. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (citing antitrust and labor laws as examples); *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding a compelled subsidy for speech in the context of a broader regulatory system). Thus, in *SEC v. Wall Street Publishing Institute*, the D.C. Circuit observed that the government's power to impose securities disclosure requirements on public companies derives from its "broad powers" to regulate securities markets. 851 F.2d 365, 372 (D.C. Cir. 1988); *see also Bangor & A. R. Co. v. Interstate Com. Comm'n.*, 574 F.2d 1096, 1107 (1st Cir. 1978) (similar). "In areas of extensive federal regulation," the court said, "we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme." *Wall St. Publ'g Inst.*, 851 F.2d at 373. This is true of the detailed regulatory scheme that governs securities disclosures. *Id.*[2]

[2] A securities disclosure might nevertheless raise First Amendment concerns if it "poses the danger that 'speech deserving of greater constitutional protection [will] be inadvertently suppressed.'" *See Wall St. Publ'g Inst.*, 851 F.2d at 374 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring)). The proposed rules do not pose that danger. *See infra* Part III (explaining that the rules do not appear to chill protected speech).

II. At most, the proposed rules should be evaluated under *Zauderer*'s lenient standard of review.

We understand that the proposed rules seek to further the purposes of securities regulation by protecting both investors and capital markets. The proposed rules would require public companies to include certain climate-related disclosures in their registration statements and periodic reports, including "information about climate-related risks that are reasonably likely to have material impacts on [their] business or consolidated financial statements, and [greenhouse gas] emissions metrics that could help investors assess those risks." The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,345 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249). Underlying this requirement is a recognition that climate change creates financial risk for companies, as well as for capital markets as a whole, and that existing disclosures of climate-related risks "do not adequately protect investors." *Id.* at 21,335. The proposed rules seek to standardize these disclosures to reduce information asymmetries—both among investors and between investors and firms—thus empowering investors "to make more informed investment and voting decisions" in line with their risk preferences. *Id.* at 21,413. The idea is that this, in turn, would enable climate-related risks to be "more fully incorporated into asset prices," contributing to a more efficient allocation of capital. *Id.*

Protecting investors and capital markets is an entirely traditional function of securities laws, and an important objective of regulatory policy in a market society. Congress vested the SEC with broad authority to mandate disclosures that are "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §§ 78l, 78m, 78o. The Commission has routinely used this authority to modify the disclosure regime in light of changes in the economy and capital markets. For example, in 2014, the Commission adopted new rules requiring the disclosure of information about asset-backed securities because "the financial crisis highlighted that investors and other participants in the securitization market did not have the necessary information and time to be able to fully assess the risks underlying asset-backed securities and did not value asset-backed securities properly or accurately." Asset-Backed Securities Disclosure and Registration, 79 Fed. Reg. 57,184, 57,186 (Sept. 24, 2014). In 2020, the Commission adopted rules requiring companies to disclose detailed information about their workforces in the recognition that "human capital accounts for and drives long-term business value much more so than it did 30 years ago." Remarks of Chair Jay Clayton, *Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures* (Aug. 26, 2020), https://perma.cc/R3DF-MJXF. The proposed rules seek to reflect the impacts of climate-related risks on

individual businesses and the financial system overall. 87 Fed. Reg. at 21,336. Accordingly, they fall squarely within this tradition.[3]

If the rules trigger First Amendment scrutiny at all, they should be evaluated under the framework that the Supreme Court established in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In *Zauderer* and its progeny, the Court has made clear that, in the commercial context, compelled disclosures of "purely factual and uncontroversial" information that relate to the good or service offered by the regulated party should be assessed less stringently than compelled disclosures of other forms of protected speech. *Zauderer*, 471 U.S. at 651; *see also NIFLA*, 138 S. Ct. at 2372. The reason is that commercial speech is protected primarily because of its informational function—"the value to [listeners] of the information such speech provides"—and compelling disclosures about commercial goods and services can serve this function by increasing the flow of information to an audience. *Id.*; *see also Cent. Hudson*, 447 U.S. at 562–62 n.5 (noting that commercial speech "link[ing] a product to current public debate" is not entitled to greater protection because "many, if not most, products may be tied to public concerns"). Thus, although *Zauderer* itself concerned a law intended to address deception in commercial advertising, its reasoning applies more broadly, as every court of appeals to consider the question has recognized. *See NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1227 (11th Cir. 2022); *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases from other circuits); *see also NIFLA*, 138 S. Ct. at 2376 (noting that "health and safety warnings" have "long [been] considered permissible," as have "purely factual and uncontroversial disclosures about commercial products"); *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717–18 (2022) (order vacating stay of preliminary injunction) (Alito, J., dissenting) (suggesting that *Zauderer* may apply to disclosure requirements on social media companies).

The proposed rules satisfy the predicates for *Zauderer* review because they require the disclosure of factual and uncontroversial information about the risks associated with securities that companies offer to the investing public. *Cf. Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1104, 1109 (D.C. Cir. 2011) (applying *Zauderer* to uphold a securities provision that required an institutional investment manager to submit to the SEC "among other things, the names, shares, and fair market value of the securities over which the institutional manager[] exercise[d] control"); *United States v. Wenger*, 427 F.3d 840, 848–51

[3] *See* Comment Letter of Securities Law Scholars on Climate-Related Disclosures at 7 (Jun. 6, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4129614; Georgiev, George S., *The SEC's Climate Disclosure Proposal: Critiquing the Critics* (March 27, 2022), Emory Legal Studies Research Paper 22-8 at 4–5, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068539.

(10th Cir. 2005) (applying *Zauderer* to uphold a provision that required persons promoting or publicizing stock for compensation to disclose that fact along with the amount of payments received).

That the information concerns the impacts of *climate*-related risks does not render the proposed disclosures controversial. The Ninth Circuit's decision in *CTIA* is instructive. In that case, the Ninth Circuit upheld a city ordinance requiring cell phone retailers to provide prospective cell phone purchasers with information about federal radio-frequency radiation exposure guidelines regarding cell phone use. The court evaluated the ordinance under *Zauderer* because it compelled the disclosure of "purely factual and uncontroversial" information about a commercial product. *CTIA*, 928 F.3d at 846–48. Although the court recognized that there is a "controversy" concerning whether radio-frequency radiation can be dangerous to cell phone users, it did not consider the required disclosure controversial for this reason. *Id.* at 848. The court distinguished *NIFLA* because in that case the relevant disclosure required clinics to wade into a "heated political controversy"—namely, abortion—and to convey a message that was not only "fundamentally at odds with [their] mission," but that also did not relate to a service they provided. *CTIA*, 928 F.3d at 845. In the court's view, the cell phone disclosure did no such thing. *Id.*

Neither do the proposed rules. Although the general issue of climate change might be controversial, the rules do not require companies to convey a message to which they are morally or religiously opposed, or to make an admission of moral culpability. *Cf. Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (explaining that the label "DRC conflict free" is "hardly factual and non-ideological" because it is "a metaphor that conveys moral responsibility for the Congo war" and is tantamount to "compelling an issuer to confess blood on its hands"); *but see id.* at 538–39 (Srinivasan, J., dissenting) (describing the label as uncontroversial because the question whether a product contained conflict minerals originating in the DRC merely "call[ed] for a 'factual' response"). Nor do the rules require companies to disclose information that is unrelated to their products or services. They merely require companies to disclose certain factual information about climate-related risks and metrics that may affect *their* financial performance. 87 Fed. Reg. at 21,462. Disclosure requirements of this kind have long been understood to be an integral part of the regulation of securities.

III. The proposed rules appear to easily satisfy *Zauderer*'s standard of review.

Under *Zauderer*'s deferential standard of review, compelled disclosures of commercial information are constitutional so long as they are "reasonably related" to a legitimate government interest and are not "unjustified or unduly burdensome." 471 U.S. at 651; *see also*

NIFLA, 138 S. Ct. at 2372. The proposed rules appear to easily satisfy these requirements.

First, the proposed rules further legitimate government interests. As we understand it, the main purpose of the proposed rules is to "provide consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments." 87 Fed. Reg. at 21,335. The proposed rules also seek to improve the efficiency of capital markets by enabling this information "to be more fully incorporated into asset prices." *Id.* at 21,445. These interests are manifestly important. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (describing as "significant" the government's interest in "better inform[ing] consumers about the products they purchase"); *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 540 (D.C. Cir. 2020) (describing as "legitimate" the government's interest in "promoting price transparency and lowering healthcare costs"); *cf. Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (finding "substantial" the government's interest in country-of-origin labeling because the labels "enable[d] consumers to choose American-made products," responded to consumer interest in such labeling, and addressed "individual health concerns and market impacts" arising from food-borne illness outbreaks).[4]

Second, the proposed rules appear to be "reasonably related" to the government's interests. The SEC has identified a gap in investment- and voting-relevant information being provided to investors, and the proposed rules would fill that gap by requiring disclosure of such information. *See Wenger*, 427 F.3d at 851 (holding that a rule requiring those paid to promote securities to disclose the amount of compensation they received was reasonably related to the SEC's goals of preventing deception and increasing investment-relevant information to "promot[e] open capital markets"). This "fit" between ends and means makes the proposed rules categorically different from the conflict-mining rule invalidated in *National Association of Manufacturers v. SEC*, which required companies to disclose whether or not their products were "DRC conflict free." 800 F.3d at 518. In that case, a divided panel of the D.C. Circuit assumed that the SEC's stated interest of "ameliorating the humanitarian crisis in the DRC" would be sufficient if *Zauderer* governed, but found that the rule would fail *Zauderer*'s "reasonably related" test because neither the SEC nor Congress demonstrated that the compelled disclosure was likely to be "effective[]" in "achieving" that interest. *Id.* at 524–25. The court

[4] The Ninth Circuit has held that the government interest justifying a compelled disclosure must be "substantial—that is, more than trivial." *See CTIA*, 928 F.3d at 844. The Supreme Court has not yet resolved the question whether the state's interest must be "substantial" or "legitimate," but the SEC's interests appear to easily satisfy either description.

reasoned that the idea that this disclosure "will decrease the revenue of armed groups in the DRC and [that] their loss of revenue will end or at least diminish the humanitarian crisis there" was "entirely unproven and rests on pure speculation." *Id.* at 525.[5] The proposed disclosures at issue here, by contrast, appear to be much more tightly connected to the government's interests. *See Am. Hosp. Ass'n*, 983 F.3d at 540–41 (explaining that strict "evidentiary parsing" is not required when "the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait" (cleaned up)).

Third, the proposed rules do not appear to be unjustified. Unlike the disclosure at issue in *NIFLA*, the proposed rules here seek to "remedy a harm that is potentially real[,] not purely hypothetical." *NIFLA*, 138 S. Ct. at 2377 (cleaned up). The SEC and others have documented that "climate-related risks have present financial consequences that investors . . . consider in making investment and voting decisions." 87 Fed. Reg. at 21,335–36; *see also id.* at nn.10–11; U.S. Gen. Acct. Off., *Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* 9–13 (2020); Cynthia Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 Tex. L. Rev. 1453, 1453–54 (2021). As the SEC notes, investors have "increased their demand for more detailed information" about these risks as a result. 87 Fed. Reg. at 21,337. The current regime of largely voluntary climate-related disclosures has not met this demand, however, because voluntary disclosures "provide different information, in varying degrees of completeness," and are "not subject to the full range of liability and other investor protections that help elicit complete and accurate disclosures by public companies." 87 Fed. Reg. at 21,335. Given the SEC's documentation of a currently existing gap in necessary investor information, the proposed rules appear to directly address a harm that is "real" and not merely "hypothetical."

Finally, the proposed rules do not appear to be unduly burdensome in the relevant sense—that is, they do not appear to chill protected speech. *See Zauderer*, 471 U.S. at 651; *see also Am. Hosp. Ass'n*, 983 F.3d at 541 (making clear that "to prevail" under *Zauderer*, the challenger "must demonstrate a burden on *speech*" rather than a financial one). The proposed rules do not interfere with any expression companies wish to convey. *Cf. Ibanez v. Fla. Dep't of Bus. & Prof. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (holding that a disclosure was "unduly burdensome" when it "effectively rule[d] out" the regulated entity's ability to speak). They simply require that certain factual climate-related information be included in "registration statements" and "Exchange Act annual reports" in "separate, appropriately captioned

[5] Because the panel concluded that *Zauderer* did not apply, its application of *Zauderer* was an "alternative ground for [its] decision." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524.

section[s]," as well as "in a note to the [company]'s audited financial statements." 87 Fed. Reg. at 21,345–46. Because the proposed rules neither require companies "to endorse a particular viewpoint nor prevent[] them from adding their own message" in those statements or other reports they wish to publish, *Am. Hosp. Ass'n*, 983 F.3d at 541, it is unlikely that they would unduly burden companies' protected speech.

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Thank you for your consideration of these comments.

/s/ Ramya Krishnan
Ramya Krishnan
Stephanie Krent
Alyssa Morones
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
ramya.krishnan@knightcolumbia.org

Signatories listed alphabetically

Vincent Blasi
Corliss Lamont Professor of Civil Liberties
Columbia Law School

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley, School of Law

evelyn douek
Assistant Professor of Law (as of July 1, 2022)
Stanford Law School

Genevieve Lakier
Professor of Law
University of Chicago Law School

Lawrence Lessig
Roy L. Furman Professor of Law and Leadership
Harvard Law School

Helen Norton
University Distinguished Professor and Rothgerber Chair in Constitutional Law
University of Colorado School of Law

Robert Post
Sterling Professor of Law
Yale Law School

Francesca L. Procaccini
Assistant Professor of Law (as of Fall 2022)
Vanderbilt Law School

Amanda Shanor
Assistant Professor
The Wharton School
University of Pennsylvania

Geoffrey R. Stone
Edward H. Levi Distinguished Service Professor of Law
University of Chicago Law School

Nadine Strossen
John Marshall Harlan II Professor of Law
New York Law School

David C. Vladeck
A.B. Chettle, Jr., Chair in Civil Procedure
Georgetown University Law Center

Laura Weinrib
Fred N. Fishman Professor of Constitutional Law
Harvard Law School