June 15, 2022

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

Re: File Number S7-10-22. The proposed rules supporting the Enhancement and Standardization of Climate-Related Disclosures for Investors are consistent with the First Amendment

Dear Ms. Countryman:

We support the Commission's efforts to promulgate enhanced climate-change disclosure because it is in the public interest and will help investors make informed investment decisions.[1] The proposed disclosure initiative, which is duly authorized by statute and will be promulgated 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 risks is barred by the First Amendment, wrongly concluding that it constitutes impermissible "content regulation," even if the Commission concludes that such additional disclosure is appropriate and in the interest of investors.[2] That view represents a misreading of First Amendment case law, and does not present an accurate view of the Constitutional principles at issue when the government regulates economic transactions in the marketplace.[3]

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[1] We submit these comments on behalf of R|K Invest Law, PBC. Richard Kirby is a former principal of K&L Gates and a retired principal of Baker McKenzie, and was a senior member of the SEC's Office of the General Counsel, Appellate Litigation. Beth-ann Roth is a former staff attorney in the District Court and Appellate Litigation groups, later serving in the rulemaking section of the Division of Corporation Finance. Mr. Kirby and Ms. Roth represented the Commission in litigation to which the SEC was a party in federal district and courts of appeals and in the U.S. Supreme Court, and as *amicus curiae* in private litigation to help resolve issues under the federal securities laws. Over the course of more than a decade, Mr. Kirby briefed and/or argued more than 100 cases on behalf of the SEC. In our post-SEC careers as in-house, boutique firm, and AmLaw100 principals and counsel, we have provided Securities Act, Exchange Act and 1940 Acts disclosure, governance, general counsel and compliance advice, and have served as counsel in SIPC cases and SEC enforcement matters.

[2] *See, e.g.*, Letter from 22 Law and Finance Professors, dated April 25, 2022; Letter from Professor Sean J. Griffith, dated June 1, 2022.

[3] *See, e.g.*, a draft article entitled " What's 'Controversial' About ESG? A Theory of Compelled Commercial Speech under the First Amendment," authored and cited by Sean Griffith in his

In refusing to consider the complete body of First Amendment case law, the writers improperly suggest that the Supreme Court has articulated a novel legal standard.[4] To accept that proposition would be to curb the ability of the federal government, through the Commission, to require enhanced disclosures on new or different issues as they evolve. The government would be proscribed from regulating pursuant to its mission even where, as here, the Commission has concluded that such enhanced disclosure is necessary to protect investors and is in the public interest "to improve the consistency, comparability, and reliability of climate-related disclosures."[5] As discussed below, the Supreme Court has explicitly rejected an interpretation of the First Amendment that would restrict the SEC's ability to mandate such disclosure in the interest of the investing public.

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 permitted by the First Amendment doctrine of commercial speech. As the Supreme Court has explained, commercial speech is "expression related solely to the economic interests of the speaker and its audience,"[6] and statements that "arise from commercial transactions" are commercial speech.[7] The government is "free to prevent the dissemination of commercial speech that is false, deceptive, or

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comment letter dated June 1, 2022, on the proposed rule. In the article he cites *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988), as representing a First Amendment restriction on the SEC's authority to mandate disclosure.

The DC Circuit in fact came to the opposite conclusion, supporting the position I briefed and argued to the court on behalf of the SEC. Specifically, the decision upheld the Securities Act Section 17(b) anti-touting rule, concluding that if an issuer pays someone to tout its security, the SEC may require that the distributor of the information disclose the fact of payment because it would be misleading not to know that the company paid for the statement. The D.C. Circuit relied on *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626 (1985), stating that there is no First Amendment restriction. If a statement has the potential to be misleading, it is legitimate for the SEC to require disclosure in order to prevent deception.

[4] The writers cite to *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), claiming that those cases support their conclusion. Neither case does so.

[5] Proposed Rule Rel. at 8.

[6] *Central Hudson Gas & Elec. Svc. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

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

misleading...."[8] As such, an SEC disclosure mandate designed to elicit information for purposes of preventing false and misleading statements in periodic reports and disclosures by registrants raising money from the public is permissible as commercial speech.

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 additional disclosure that should be required by registrants due to interest by investors concerned about increased risks to company operations. The SEC's efforts in this regard are based on policies in place since the 1970s,[9] as well as its conclusion that climate-related guidance put in place in 2010 is not by itself adequate to meet the needs of investors in light of the increasing financial risks that climate change presents to issuers.[10] As explained by the Commission:

> Since [2010], as climate-related impacts have increasingly been well-documented and awareness of climate-related risks to businesses and the economy has grown, investors have increased their demand for more detailed information about the effects of the climate on a registrant's business and for more information about how a registrant has addressed climate-related risks and opportunities when conducting its operations and developing its business strategy and financial plans.[11]

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[8] *Zauderer*, 471 U.S. at 638. *See also Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002), citing *Central Hudson*, 447 U.S. at 566.

[9] Proposed Rule Rel. at 13. Contrary to a statement on page 8 of the April 25, 2022, letter from the group of professors, the SEC staff in 2021 did not announce a "new approach" to evaluating climate-related proposals with respect to the ordinary business exclusion set forth in Rule 14a-8. Rather, via Staff Legal Bulletin 14L (Nov. 3, 2021), the staff reversed novel, newly implemented Trump-era procedures, and reiterated the Commission's commitment to longstanding SEC policy - enunciated in 1976 - that if a shareholder proposal raises an issue of "broad social significance," it will not be deemed to relate to "ordinary business." In that instance, a company will be required by law to include the proposal in its proxy statement. *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,997 (1976). To suggest that "[t]he SEC and the Proposal are ... at war with themselves" demonstrates a lack of awareness of longstanding Commission policy and pronouncements. The same section of the letter similarly ignores the fact that a large number of successful corporate-shareholder engagements take place outside the annual meeting shareholder proposal process.

[10] See, *e.g.*, Proposed Rule Rel. at 13-14.

[11] *Id.* at 14 (footnotes omitted).

The Commission's disclosure authority is broad, and materiality can be both quantitative and qualitative.[12] Nevertheless, the Commission's rulemaking authority is not limited by a materiality threshold. Instead, its rulemaking authority under both the Securities Act and the Exchange Act is defined as that "necessary or appropriate in the public interest or for the protection of investors."[13]

Congress has delegated to the Commission authority to determine what type of disclosure is potentially 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. The standard of materiality is well-established.[14] 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.[15]

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 in the public interest or for the protection of investors. Contrary to what has been stated in some of the comment letters, materiality is not just a quantitative measure. Rather, as Commissioner Lee stated and as the Commission has long recognized, there is a qualitative dimension to materiality if a reasonable investor would find the information important. The key is for the Commission to make an assessment and include as part of its rule-making record that, in its judgment based on the substantial evidence in the administrative record, the additional qualitative information significantly alters the "total mix" of information available to a reasonable investor.

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 government debt-collection efforts. In a split plurality, the Court ruled, in reliance on the

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[12] 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.

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

[14] *Basic v. Levinson*, 485 U.S 224, 231-32 (1988) ("there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"), quoting from *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

[15] *See TSC v. Northway*, 426 U.S. at 450.

rationale of *Reed*, that the debt collection exception was a content-based restriction subject to strict scrutiny.

The Court in *Barr* took care to limit the reach of its decision. Indeed, the Supreme 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. Justice Kavanagh highlighted the distinction, stating that "[o]ur 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).

It is squarely within the Commission's statutory mandate to adopt standardized disclosure rules designed to address the financial risks associated with climate change. The Supreme Court has repeatedly recognized that government disclosure rules anchored in the need to prevent false or misleading statements are outside First Amendment proscriptions relating to compelled speech.[16] Likewise, the Commission's proposed requirement that issuers apply uniform standards to present climate risks is not, as some have suggested, arbitrary compelled disclosure. Rather, it constitutes an effort by the Commission to require registrants to employ accepted uniform frameworks for climate-related disclosure principles to avoid confusion, promote standardization, and to avoid misleading investors. As explained by the Commission:

> By requiring comprehensive and standardized climate-related disclosures along several dimensions, including disclosure on governance, business strategy, risk management, financial statement metrics, GHG emissions, and targets and goals, the proposed rules would provide investors with climate-related information that is more comparable, consistent, and reliable and presented in a centralized location.[17]

Even if such economic disclosure requirements were deemed to be outside the broad mandate of the Commission to avoid misleading disclosure (which it is not), requiring registrants to employ uniform frameworks for disclosure is well within the boundaries for regulation of commercial speech under the principles established by the Supreme Court under *Central Hudson*. The first principle is that the state must advance a "substantial interest" to be achieved by the disclosure.[18] The recommendation by the Commission that registrants employ established frameworks for climate risk disclosure meets that test. Such a practice is functionally no different in concept than the long-established Commission requirement that registrants' financial accounting disclosures conform to generally accepted accounting principles.

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[16] *Central Hudson*, 447 U.S. at 563 ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"); *Zauderer*, 471 U.S. at 651-52 (upholding state requirement to disclose additional information necessary to avoid misleading the public).

[17] Proposed Rule Rel. at 345.

[18] *Central Hudson*, 447 U.S. at 564.

Contrary to assertions by dissenters that such disclosure is "controversial," the adoption of an established framework for climate risk disclosure – while perhaps novel to the reader who first encounters it – is hardly controversial. The standards created under the auspices of the Financial Stability Board and other frameworks-based bodies are subject to rigorous professional oversight and frequently a public comment process before they are adopted.[19] Indeed, the process is not unlike how FASB came into existence and continues to undergo updates as needed in the interest of standardization. Thus, by looking to an established framework for disclosing climate-related risks, the Commission is advancing a substantial interest relating to uniformity of risk disclosure.

The next inquiry is that the disclosure mandate be "narrowly drawn."[20] As explained by the Court in *Central Hudson*, validity of the mandate depends on "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[21] The adoption of established disclosure frameworks for standardizing climate-related risk disclosure advances the state's interest in simplifying the disclosure obligations and burdens on registrants, while satisfying the demand of investors for better metrics for comparison of registrants' climate-related risks.

For these reasons, there is no Constitutional barrier to the Commission's proposed rules. The SEC is empowered to determine the appropriate scope of additional disclosures that meet the contemporary needs of investors and the public interest for more targeted information relating to the risks of climate change.

Respectfully submitted,

Richard A. Kirby

Beth-ann Roth

on behalf of
R|K Invest Law, PBC

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[19] *See* Task Force on Climate-Related Financial Disclosures (TCFD), https://www.fsb-tcfd.org/.

[20] *Central Hudson*, 447 U.S. at 565.

[21] *Id.* at 566.