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CAN WE TALK CLIMATE? THE SEC DISCLOSURE RULE AND COMPELLED COMMERCIAL SPEECH

by Michael M. Choi and Michael Barsa

Michael M. Choi is a Law Clerk with Cravath, Swaine & Moore LLP. Michael Barsa is Professor of Practice and Co-Director of the Environmental Law Concentration at Northwestern Pritzker School of Law.

SUMMARY

The Securities and Exchange Commission's (SEC's) Climate Disclosure Rule has provoked heated controversy on many fronts. Several commenters have argued that the First Amendment precludes the SEC from demanding climate-related disclosures. This Article grapples with the unsettled state of "compelled commercial speech" doctrine, arguing that the rule's constitutionality should be scrutinized using the prevailing rational basis test, and that even under the intermediate scrutiny test, the rule should be upheld. The SEC has proffered copious evidence of the anticipated benefits, and has narrowly tailored the rule to achieve only the interests it asserts. Nevertheless, the Commission should be prepared to proffer additional justification for certain disclosure items, such as the scope 3 emissions reporting requirement and scenario analysis recommendation, to bolster the odds of the overall regulatory scheme being upheld.

Larry Fink, the chairman and chief executive officer (CEO) of BlackRock, the largest asset manager in the world with more than $10 trillion U.S. dollars of assets under management (AUM) as of early 2022,[1] famously declared in his 2020 letter to CEOs that "climate risk is investment risk."[2] Fink recognized early on that the various physical and transitional risks associated with climate change will inevitably and significantly impact investment returns.[3] Three years have passed since publication of the letter, but Fink still insists that companies reflect upon their businesses with an eye toward climate risks and provide more robust climate-related disclosures to their investors.[4] This sentiment has also resonated with the shareholders of public companies, evidenced by the most recent proxy season showing a meaningful uptick in shareholder proposals related to climate and other environmental, social, and governance (ESG) matters.[5]

Global and domestic interests in sustainable development and investment have also been on the rise.[6] As of December 2022, the United Nations-supported Principles for Responsible Investment (PRI) had 5,319 signatories representing $121.3 trillion U.S. dollars of AUM,

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1. BlackRock, 2022 Proxy Statement: Notice of Annual Meeting 8 (2022).
2. BlackRock, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter (last visited Oct. 5, 2023).
3. *Id.*
4. *See* BlackRock, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last visited Oct. 20, 2023) (Fink specifically notes the importance of meeting greenhouse gas reduction targets and issuing sustainability reports consistent with the recommendations of the Task Force on Climate-Related Financial Disclosures); *see also* BlackRock, *Larry Fink's Annual Chairman's Letter to Investors*, https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter (last visited Oct. 20, 2023) (In his letter published in 2023, Fink appears to have scaled back on his position for ESG investing, but still insists on his view that climate risk is an investment risk, especially as it relates to various impending transition risks that issuers will confront in the near future).
5. Press Release, As You Sow, Record Breaking Year for Environmental, Social, and Sustainable Governance Shareholder Resolutions (June 24, 2021), https://www.asyousow.org/press-releases/2021/6/24/record-breaking-year-for-environmental-social-and-sustainable-governance-shareholder-resolutions.
6. *See, e.g.*, United Nations Department of Economic and Social Affairs, *Transforming Our World: The 2030 Agenda for Sustainable Development*, https://sdgs.un.org/2030agenda (last visited Oct. 5, 2023).

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whose commitment involves integrating ESG factors into their investment and ownership decisions.[7] Moreover, in alignment with global trends to mitigate the harmful effects of climate change and bolster sustainable development through global partnerships, the United States rejoined the Paris Agreement on January 20, 2021, after having briefly left the agreement during the Donald Trump Administration.[8]

On May 20, 2021, President Joseph Biden issued Executive Order No. 14030 on Climate-Related Financial Risk, which recognized the intensifying impacts of the physical and transition risks associated with climate change and the dangers to the competitiveness of U.S. companies and markets imposed by the failure to adequately assess such risks.[9] In response to the Executive Order, the Financial Stability Oversight Council released a report that identified climate change as an emerging and increasing threat to U.S. financial stability for the first time since the creation of the council.[10] It further urged its member agencies, including the Securities and Exchange Commission (SEC), to take new actions on climate change data, disclosure, and scenario analysis.[11]

Against this backdrop of financial and regulatory impetus toward a better understanding of climate-related risks, the SEC published in March 2022 a rule titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (the Climate Disclosure Rule) that would require registrants to disclose various climate-related data associated with their business operations.[12] In accordance with the Commission's core mandate to protect investors, maintain fair, orderly, and efficient markets, and promote capital formation, the Climate Disclosure Rule seeks to promote "consistent, comparable, and reliable disclosures" among issuers that investors can use to assess material climate-related risks when making investment and voting decisions.[13] The rule, details of which will be discussed later, builds upon existing disclosure requirements under Regulations S-K and S-X, whereby a registrant must disclose various climate-related data—both qualitative and quantitative—specific to its business as part of its regular filing obligations with the SEC.[14]

Many critics, including a former commissioner of the SEC, have criticized the Climate Disclosure Rule as being the result of the Commission's overbroad interpretation of its core mandate despite its lack of expertise in the field of climate change.[15] Notwithstanding such criticisms, under the leadership of Chair Gary Gensler and former Commissioner Allison Herren Lee, the SEC moved forward with proposing the Climate Disclosure Rule based on the firm belief that climate change will generate financial consequences relevant for investors,[16] and that the existing voluntary disclosure regime that relies on "materiality" in the context of securities laws does not accurately capture decision-useful climate data for investors.[17]

Many commenters filed their comments with the SEC in response to former Commissioner Lee's invitation in March 2021 for public input on the Climate Disclosure Rule.[18] There were more than 600 comments filed in relation to the Climate Disclosure Rule.[19] Many commenters who approve of the rule do so because they believe climate change poses significant financial risks that registrants must disclose to their investors.[20] Others criticize the cur-

7. *See* PRI, Signatory Update: October to December 2022 (2023), https://www.unpri.org/download?ac=18057.
8. Press Statement, Secretary of State Antony J. Blinken, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/.
9. Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 20, 2021).
10. Press Release, U.S. Department of the Treasury, Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability (Oct. 21, 2021), https://home.treasury.gov/news/press-releases/jy0426.
11. *Id*.
12. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 11042, Exchange Act Release No. 94478, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022) [hereinafter Climate Disclosure Rule]; *see also* Richard Vanderford, *SEC Chair Gensler Declines to Give Timeline for Final Climate Disclosure Rule*, Wall St. J. (Sept. 12, 2023), https://www.wsj.com/articles/sec-chair-gensler-declines-to-give-timeline-for-final-climate-disclosure-rule-bd7028e0 (The SEC has yet to confirm the exact timeline for the final version of the Climate Disclosure Rule, but SEC Chair Gary Gensler has noted that the treatment of scope 3 greenhouse gas emissions has been an important issue for the SEC team); *see also* Client Memo, Cravath, Swaine & Moore LLP, *California Legislature Passes and Governor Newsom Signs Landmark California Climate Bills* (Oct. 9, 2023), https://www.cravath.com/a/web/six3CK8DdTjuJVQw19UvHP/8bGHSh/california-legislature-passes-and-governor-newsom-signs-landmark-california-climate-bills.pdf (In the meantime, California has passed two new climate bills that are comparable to the SEC Climate Disclosure Rule, and a similar law is in the pipeline at the New York state legislature).
13. *See* Climate Disclosure Rule, *supra* note 12, at 21337.
14. *Id*. at 21345.
15. *See* Hester M. Peirce, *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 (Commissioner Hester Peirce largely argues, inter alia, that the existing disclosure rules already cover material climate risks and that the SEC lacks the authority to propose such rule.).
16. *See, e.g.*, Network for Greening the Financial System, The Macroeconomic and Financial Stability Impacts of Climate Change—Research Priorities 4 (2020) ("More frequent or severe extreme weather events and/or a late and abrupt transition to a low-carbon economy could have significant impacts on the financial system, with potential systemic consequences.").
17. *See* Allison Herren Lee, Commissioner, SEC, Playing the Long Game: The Intersection of Climate Change Risk and Financial Regulation, Keynote Remarks at Practising Law Institute's 52nd Annual Institute on Securities Regulation (Nov. 5, 2020), https://www.sec.gov/news/speech/lee-playing-long-game-110520 (Commissioner Lee discussed the need for the SEC to address systematic risks posed by climate change, which requires complete, accurate, and reliable information about those risks.); *see also* Allison Herren Lee, Commissioner, SEC, Living in a Material World: Myths and Misconceptions About "Materiality," Keynote Remarks at the 2021 ESG Disclosure Priorities Event Hosted by the American Institute of CPAs and the Chartered Institute of Management Accountants, Sustainability Accounting Standards Board, and the Center for Audit Quality (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421 (Commissioner Lee contended that the concept of materiality *as is* under federal securities laws does not compel issuers to report climate and other ESG matters that are material information for investors.).
18. Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, SEC (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
19. SEC, *Comments on Climate Change Disclosures*, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last modified July 28, 2022).
20. *See, e.g.*, AllianceBernstein; Amalgamated Bank; Boston Common Asset Management, Public Comments on Proposed Climate Disclosure Rule (June 14, 2021); Solar Energy Industries Association, Public Comment on Proposed Climate Disclosure Rule (Nov. 23, 2021); PRI, Public Comment on Proposed Climate Disclosure Rule (Nov. 9, 2021) (on file with the SEC).

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rent voluntary disclosure regime as insufficient to generate consistent, comparable, and reliable information for investors.[21] Those who oppose the Climate Disclosure Rule, on the other hand, do so because of the scientific uncertainties surrounding the estimation of climate risks that would render the rule ineffective in generating reliable disclosures.[22] Many others have commented on the SEC's overreach of its statutory authority by mandating climate disclosures.[23]

In the United States, the issue of climate change, as well as other ESG matters, has become a polarizing bipartisan issue. In the first quarter of 2023, the nation witnessed a "new wave of climate denialism" when Republicans proposed a bill to prohibit retirement funds from considering ESG matters, such as climate change, as part of their investment decisions.[24] President Biden issued the first veto of his presidency in response to this anti-ESG bill, further exemplifying the divisive attitude of American political institutions vis-à-vis ESG.[25] However, the immense buzz around the term "ESG" belies the incontrovertible financial relevance of factoring many crucial elements that constitute standard ESG metrics, such as material climate hazard, into investment decisions.[26]

Among the numerous comments that the SEC's Climate Disclosure Rule generated, there are several—both approving and disapproving of the rule—that have invoked First Amendment issues. Many commenters argued that the rule would not pose any constitutional problems related to the First Amendment.[27] On the other hand, some argued that the rule would have an undesired effect of compelling registrants to make commercial disclosures against their will, which is violative of fundamental First Amendment principles.[28] One of the rule's most vehement opponents, Patrick Morrisey, the attorney general of West Virginia, proclaimed that he would pursue legal actions against the SEC to strike the Climate Disclosure Rule on First Amendment grounds,[29] a politically charged cause that will likely be backed by the attorneys general of a considerable number of predominantly Republican states.[30]

Morrisey declared that the state of West Virginia "will not support efforts to allow 'mission creep' in all of the federal agencies simply to advance a President's political agenda."[31] With respect to the First Amendment, Morrisey argues that the Climate Disclosure Rule will not pass constitutional muster under the strict scrutiny test largely because the SEC lacks a sufficient government interest and the rule is not adequately related to advancing the purported interest.[32] However, his argument evinces a fundamental misunderstanding of the compelled commercial disclosure doctrine. Even conservative courts will likely apply the intermediate scrutiny standard rather than the strict scrutiny standard, given that the rule pertains to *commercial* speech, and *compels* rather than abridges speech.[33]

The unsettled landscape of the doctrine of compelled commercial speech in recent years presents an additional layer of complexities when it comes to the efforts to quash the Climate Disclosure Rule on First Amendment grounds. In the past 10 years, federal circuit courts have attempted to settle the doctrinal conundrum related to the state's compulsion of private actors to make certain commercial speeches. Two sources of confusion among courts have largely been on which subject matters constitute "commercial speech"[34] and "purely factual and uncontroversial" speech for purposes of applying the rational basis test to compelled commercial speech.[35] This Article will cover these two battlegrounds in its discussion of the potential outcomes of the First Amendment challenges of the Climate Disclosure Rule.

The Article will focus on the anticipatory First Amendment challenges of the Climate Disclosure Rule. More specifically, it will examine the Climate Disclosure Rule in the context of the compelled commercial speech doctrine, which has been in flux in recent years, to assess its legality

21. *See, e.g.*, Amalgamated Bank; Bank of Finland, Public Comments on Proposed Climate Disclosure Rule (June 1, 2021) (on file with the SEC).
22. *See, e.g.*, American Enterprise Institute, Public Comment on Proposed Climate Disclosure Rule (June 10, 2021); Competitive Enterprise Institute, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021); Heritage Foundation, Public Comment on Proposed Climate Disclosure Rule (June 13, 2021) (on file with the SEC).
23. *See, e.g.*, Cato Institute, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021); Heritage Foundation, Public Comment on Proposed Climate Disclosure Rule (June 13, 2021); Patrick Morrisey, Attorney General of West Virginia, Public Comment on Proposed Climate Disclosure Rule (June 14, 2021) (on file with the SEC).
24. Amanda Chu, *Top Democrats Lash Out at "New Wave" of Republican Climate Denialism*, Fin. Times (Mar. 24, 2023), https://www.ft.com/content/96dc9972-6bfd-41c2-8c5d-5452ab7be8a4.
25. Clare Foran & Betsy Klein, *Biden Issues His First Veto on Retirement Investment Resolution*, CNN (Mar. 20, 2023), https://www.cnn.com/2023/03/20/politics/biden-first-veto/index.html.
26. *See* Chu, *supra* note 24 (John Podesta, President Biden's senior clean energy adviser, criticized anti-ESG bills as investors cannot de-risk their portfolio if they cannot factor material climate hazard into their investment decisions.).
27. *See, e.g.*, Natural Resources Defense Council, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021); R|K Invest Law; Democracy Forward Foundation, Public Comments on Proposed Climate Disclosure Rule (June 14, 2021) (on file with the SEC).
28. *See, e.g.*, U-Haul, Public Comment on Proposed Climate Disclosure Rule (June 9, 2021); Institute for Free Speech, Public Comment on Proposed Climate Disclosure Rule (June 10, 2021); Texas Public Policy Foundation, Competitive Enterprise Institute, and American Petroleum Institute, Public Comments on Proposed Climate Disclosure Rule (June 11, 2021); Williams Companies, Inc., Public Comment on Proposed Climate Disclosure Rule (June 12, 2021); Americans for Prosperity, Public Comment on Proposed Climate Disclosure Rule (June 13, 2021); Patrick Morrisey, Attorney General of West Virginia & Eric Schmitt, Attorney General of Missouri, Public Comments on Proposed Climate Disclosure Rule (June 14, 2021) (on file with the SEC).
29. *See* Letter from Patrick Morrisey, Attorney General of West Virginia, to Acting Chair Allison Herren Lee, SEC (Mar. 25, 2021) (on file with the Office of the Attorney General, state of West Virginia).
30. *See* Patrick Morrisey, Attorney General of West Virginia, Public Comment on Proposed Climate Disclosure Rule (June 14, 2021) (on file with the SEC) (Attorneys general of Alaska, Arizona, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and Wyoming are signatories to Morrisey's comment on the First Amendment challenges that the Climate Disclosure Rule will likely face in court upon enforcement.).
31. Letter from Patrick Morrisey, *supra* note 29, at 3.
32. Patrick Morrisey, Attorney General of West Virginia, Public Comment on Proposed Climate Disclosure Rule 3-4 (June 14, 2021).
33. *See infra* Part II.
34. *See, e.g.*, National Ass'n of Mfrs. v. Securities & Exch. Comm'n (*NAM*), 800 F.3d 518 (D.C. Cir. 2015); *see, e.g.*, Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).
35. *See, e.g.*, National Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

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and to predict its outcomes under the two controlling tests. Part I discusses the Climate Disclosure Rule in detail.

Part II discusses the aspects of the compelled commercial speech doctrine that are relevant to the anticipatory legal challenges of the rule. To that end, this part will lay out the two controlling tests under the doctrine: the rational basis test propounded in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, and the intermediate scrutiny test propounded in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. Part III analyzes the Climate Disclosure Rule under the two tests and predicts the outcomes in each scenario in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, which will likely serve as the venue for any anticipatory legal challenges to the rule. Part IV concludes.

I. The SEC's Climate Disclosure Rule

A. Context

In recent years, the corporate world has witnessed a significant interest among issuers in sustainability reporting and analysis. More and more companies are voluntarily preparing and publishing stand-alone sustainability reports for investors to guide their investment and voting decisions.[36] Against this backdrop, a key issue that investors are facing is a fragmented world of sustainability reporting in the United States (particularly reporting on climate-related risks) as a result of the proliferation of various third-party reporting frameworks.[37] The widespread nature of climate-related physical and transition risks, the likelihood that public companies are not disclosing enough about those risks, and the diffuse nature of the existing disclosures all contribute to systematic risks to the U.S. financial system that will likely grow unabated if left unaddressed.[38]

Further, without reliable and comparable information on climate-related risks and opportunities that some of the most prominent public companies are facing, investors and other market participants may end up making uninformed business decisions by failing to properly assess risks to firms, margins, cash flows, and valuations.[39] Consequently, this lack of access to reliable climate-related data may lead markets to misprice risks and misallocate capital.[40]

In addition to its adverse impact on market efficiency and capital allocation, the lack of reliable, comparable, and complete climate-related information may also lead to rampant greenwashing among corporate issuers.[41] Without proper disclosure of an issuer's use of any contractual arrangements to reduce its aggregate greenhouse gas (GHG) emissions, such as renewable energy certificates or carbon offsets, investors may not get the complete picture of the issuer's sincere efforts to reduce actual GHG emissions emitted from its directly owned operations.[42] Additionally, one commenter has called for a need to properly define what is "green" to help avoid greenwashing, limit efforts to apply ineffective offsets, and further the science-based targets under the Paris Agreement.[43]

In this context, the SEC proposed the Climate Disclosure Rule, which seeks to compel the U.S. public companies that have reporting obligations with the Commission to generate climate-related disclosures that are "consistent, comparable, and reliable" and "decision-useful" for investors.[44] In proposing the Climate Disclosure Rule, the SEC drew its authority from its broad mandate to promulgate rules that are "necessary or appropriate in the public interest."[45] Further, in accordance with its statutory mandate, the SEC considered whether the climate-related disclosures would not only protect investors, but also "promote efficiency, competition, and capital formation."[46]

The SEC is an agency whose rulemaking authority has evolved over time in accordance with the changing realities of the world. In 1979, the SEC was able to ward off pressures from some outside organizations that petitioned to expand securities disclosure regimes to include information on certain employment practices and environmental policies.[47] The SEC's reasoning for refusal at the time was that the ability to compel such disclosures went beyond the Commission's mandate to protect investors.[48] However, times have changed drastically since then. There is

36. *See* Task Force on Climate-Related Financial Disclosures, 2022 Status Report 16 (2022) [hereinafter TCFD 2022 Status Report].
37. There are many existing sustainability reporting frameworks, including but not limited to the Global Reporting Initiative, Carbon Disclosure Project, Climate Disclosure Standards Board, Value Reporting Foundation, and TCFD.
38. Market Risk Advisory Committee, U.S. Commodity Futures Trading Commission, Managing Climate Risk in the U.S. Financial System 26-27 (2020) [hereinafter MRAC Report].
39. *Id*. at 87-88.
40. *Id*.
41. *See, e.g.*, Dimensional Fund Advisors, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021); BNP Paribas, Public Comment on Proposed Climate Disclosure Rule (June 15, 2021) (on file with the SEC); *see, e.g.*, Ruoke Yang, *What Do We Learn From Ratings About Corporate Social Responsibility? New Evidence of Uninformative Ratings*, 52 J. Fin. Intermediation 100994 (2022).
42. *See, e.g.*, James Temple & Lisa Song, *The Climate Solution Actually Adding Millions of Tons of CO_2 Into the Atmosphere*, MIT Tech. Rev. (Apr. 29, 2021), https://www.technologyreview.com/2021/04/29/1017811/california-climate-policy-carbon-credits-cause-co2-pollution/; *see, e.g.*, Grayson Badgley et al., *Systematic Over-Crediting of Forest Offsets*, CarbonPlan (Apr. 29, 2021), https://carbonplan.org/research/forest-offsets-explainer; *see, e.g.*, Matthew Brander et al., *Creative Accounting: A Critical Perspective on the Market-Based Method for Reporting Purchased Electricity (Scope 2) Emissions*, 112 Energy Pol'y 29 (2018).
43. BNP Paribas, Public Comment on Proposed Climate Disclosure Rule 5 (June 15, 2021) (on file with the SEC).
44. *See* Climate Disclosure Rule, *supra* note 12, at 21335.
45. *Id.*; *see also* Securities Act of 1933 §2(b), Securities Exchange Act of 1934 §3(f); *see also* MRAC Report, *supra* note 38, at 1-2 (Community Futures Trading Commission argues that advancements in climate-related risk management will ultimately benefit the American people).
46. Climate Disclosure Rule, *supra* note 12, at 21335.
47. Natural Res. Def. Council v. Securities & Exch. Comm'n, 606 F.2d 1031, 1036, 9 ELR 20367 (D.C. Cir. 1979) (The D.C. Circuit approved the SEC's denial of the petition from the Natural Resources Defense Council and the Project on Corporate Responsibility for expanded disclosure regime to include information on employment practices and the environment. The court reversed the lower court's holding that the SEC's denial of the petition was arbitrary and capricious.).
48. *Id*.

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now a greater interest among investors in ESG information of public companies, including their climate-related risks and opportunities. Investors increasingly need decision-useful information about issuers' climate-related physical and transition risks, as such risks are prevalent in the capital markets but are not properly factored into the current mainstream processes of financial decisionmaking.[49]

Before proposing the Climate Disclosure Rule, however, the SEC had endorsed a voluntary disclosure regime for climate-related topics. In 2010, the Commission issued "Commission Guidance Regarding Disclosure Related to Climate Change" (2010 Climate Change Guidance), an interpretive guidance on existing disclosure requirements as they pertain to a registrant's business or legal developments vis-à-vis climate change.[50] Notwithstanding the SEC's initiative and the increasing awareness of the ubiquity of climate risks, many companies have failed to report meaningful information for investors, such as quantitative data about the anticipated magnitude and costs of climate risks.[51] Moreover, many companies used boilerplate language, which was unquantified and not specific to the company.[52] The "gap between the economy-wide risk of climate change and the low-quality disclosure from the United States' largest companies" evinces the limitations of the 2010 Climate Change Guidance in eliciting decision-useful disclosures for investors.[53] Taking into consideration the shortcomings of the 2010 Climate Change Guidance and the reliance on materiality alone, the SEC decided to take a step further to create an affirmative duty to disclose climate-related information.[54]

B. *The Climate Disclosure Rule*

Proposed in March 2021, the Climate Disclosure Rule largely draws its inspiration from two existing framework providers: the global Task Force on Climate-Related Financial Disclosures (TCFD) and the Greenhouse Gas Protocol (GHG Protocol). The SEC's reliance on existing popular frameworks is a strategic one, as it serves to "mitigate both the compliance burden for issuers and any burdens faced by investors in analyzing and comparing the new proposed disclosures."[55] Additionally, adopting such globally accepted reporting frameworks has the added benefit of aligning the domestic disclosure regime with international disclosure regimes.[56]

In April 2015, a group of 20 finance ministers directed the Financial Stability Board to assess ways in which the financial sector could tackle climate-related concerns.[57] The result was creation of the TCFD, an industry-led task force charged with promoting well-informed investment, credit, and insurance underwriting decisions.[58] The TCFD comprises 32 global members representing a broad range of economic sectors and financial markets, as well as a balanced ratio of users and preparers of climate-related financial disclosures.[59]

After two years of research and deliberations, the TCFD developed a climate-related reporting framework in 2017 (TCFD Framework), which has since become widely accepted by both issuers and investors around the world.[60] The TCFD Framework places an emphasis on the assessment and disclosure of climate-related risks and opportunities that have projected short-, medium-, and long-term financial impacts on an issuer's business.[61] In drafting the Climate Disclosure Rule, the SEC adopted the four core disclosure themes that undergird the TCFD Framework: *governance*, *strategy*, *risk management*, and *metrics and target*.[62]

In 1997, the World Resources Institute and the World Business Council for Sustainable Development collaborated to create the GHG Protocol. The objective was to create a standardized GHG accounting and reporting methodology to be used by companies emitting any of the following seven GHGs covered by the Kyoto Protocol: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride. To that end, the GHG Protocol's Corporate

49. *See* BlackRock, Getting Physical: Scenario Analysis for Assessing Climate-Related Risks 3 (2019) (BlackRock conducted a study showing that climate-resilient utilities traded at a slight premium, while those most vulnerable carry a slight discount. This indicates that climate risks are real, but not priced in.); *see also* MRAC Report, *supra* note 38, at 26 ("An emerging body of research suggests that climate risk is currently underpriced in some markets, and that climate-exposed financial assets may be overvalued.").
50. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61469, 75 Fed. Reg. 6290 (proposed Feb. 8, 2010) [hereinafter 2010 Climate Change Guidance] (The guidance underscored the importance of including disclosures of climate-related factors that have a material impact on a firm's financial condition under current Items 101, 105, or 303 of Regulation S-K.).
51. SASB Standards, Climate Risk Technical Bulletin 8 (2022):

    > SASB research demonstrates that 68 out of 77 industries in SASB's Sustainability Industry Classification System (SICSTM) are significantly affected in some way by climate risk. This equates to US$45.2 trillion, or 89 percent, of the market capitalization of the S&P Global 1200 and represents a systematic risk that cannot be diversified away.

52. *Id*. at 9.
53. Cynthia A. Williams, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 Tex. L. Rev. 1453, 1476-77 (2021); *see also* Anita Foerster et al., *Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia*, 35 Co. & Sec. L.J. 154, 175-77 (2017) (noting the limited longer-term impact of the 2010 Climate Change Guidance due to inadequate compliance activity and minimal efforts of the SEC to enforce the guidance).
54. *See supra* note 17.
55. Climate Disclosure Rule, *supra* note 12, at 21346.
56. *See id*. at 21347 (An additional benefit of a universal reporting framework is lowering the barrier to entry for foreign issuers to enter the U.S. capital markets, thereby promoting a fluid capital inflow.).
57. TCFD, Recommendations of the Task Force on Climate-Related Financial Disclosures 1 (2017) [hereinafter TCFD Report].
58. *Id*. at 3.
59. *Id*.
60. Climate Disclosure Rule, *supra* note 12, at 21343; *see also* TCFD 2022 Status Report, *supra* note 36, at 1 (more than 3,800 companies have implemented TCFD-aligned reporting).
61. *See* TCFD Report, *supra* note 57, at 5-11 (The SEC has generally adopted the TCFD's definitions and concepts of climate risks, including physical risks and transition risks, and financial impacts on revenues, expenditures, assets and liabilities, and capital and financing.).
62. *See infra* note 78 and accompanying text.

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Accounting and Reporting Standard (GHG Protocol Standard) provides uniform methods to measure and report the emissions of the seven GHGs. In particular, the "scope" framework, which measures direct and indirect GHG emissions of a company, has become a leading accounting and reporting framework for GHG emissions data.[63] This scope framework provides the conceptual foundation for the GHG emissions data disclosure in the SEC's Climate Disclosure Rule.[64]

In partnership with the four largest accounting firms in the world, the World Economic Forum published a proposal for "a common, core set of metrics and recommended disclosures that [the World Economic Forum International Business Council (IBC)] members could use to align their mainstream reporting and, in so doing, reduce fragmentation and encourage faster progress towards a systemic solution."[65] The proposal specifically recommends that companies align their disclosures with the TCFD Framework and the GHG Protocol Standard.[66] The World Economic Forum made this recommendation to all the Members of the IBC, which comprises more than 140 CEOs around the world.

Notwithstanding global awareness of the climate-related risks to businesses, there are many who are still pessimistic about the viability of the existing frameworks. The opponents range from those who flat-out deny the harmful effects of climate change[67] to those who are skeptical about the reliability of data on climate-related risks, which they find to be riddled with uncertainties.[68] In this context, the SEC's Climate Disclosure Rule, which relies heavily on the TCFD Framework and GHG Protocol Standard, will likely face anticipatory First Amendment challenges.[69]

The Climate Disclosure Rule takes the form of several amendments to the SEC's existing disclosure regime. The proposed amendments to Regulation S-K govern the largely qualitative aspects of the climate-related disclosures and disclosures related to a registrant's GHG emissions (Subpart 1500 of Regulation S-K).[70] Pursuant to the amendments, the Climate Disclosure Rule will "require a registrant to disclose certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and GHG emissions metrics that could help investors assess those risks."[71] Additionally, a registrant is encouraged, but not required, to include disclosures about its climate-related opportunities.[72]

The largely quantitative aspects of the climate-related disclosures are governed by the proposed amendments to Regulation S-X (Article 14 of Regulation S-X).[73] Pursuant to these amendments, the Climate Disclosure Rule would "require certain climate-related financial statement metrics and related disclosure to be included in a note to a registrant's audited financial statements."[74]

The decision to build the Climate Disclosure Rule into existing disclosure rules (i.e., Regulations S-K and S-X) was a strategic one that is designed to alleviate the compliance burden among registrants. The SEC determined that "the required disclosure is fundamental to investors' understanding the nature of a registrant's business and its operating prospects and financial performance, and therefore, should be presented together with other disclosure about the registrant's business and its financial condition."[75] The new climate-related disclosures are then not only substantively related to the existing disclosure contents, but they are also qualified by the same materiality standard that governs the rest of the SEC's reporting obligations.[76] According to the SEC, the familiarity that registrants have with respect to the existing disclosure rules and the materiality standard will play an integral role in mitigating compliance burdens overall.[77]

C. Subpart 1500 of Regulation S-K: Qualitative Disclosures and GHG Emissions Disclosures

In accordance with the TCFD Framework, the seven main disclosure categories required by Subpart 1500 of Regulation S-K revolve around the four core themes of *governance*, *strategy*, *risk management*, and *metrics and target*.[78]

The Climate Disclosure Rule requires the following disclosures regarding *governance*: "The oversight and governance of climate-related risks by the registrant's board and management."[79]

The Climate Disclosure Rule requires the following disclosures regarding *strategy*:

> How any climate-related risks identified by the registrant have had or are likely to have a material impact on its busi-

63. *See, e.g.*, U.S. Environmental Protection Agency Center for Corporate Climate Leadership, *Scope 1 and Scope 2 Inventory Guidance*, https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance (last updated Aug. 21, 2023).
64. *See infra* Section I.C.
65. World Economic Forum, Toward Common Metrics and Consistent Reporting of Sustainable Value Creation 5 (2020).
66. *Id.* at 17-18.
67. *See* Life:Powered, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021) (on file with the SEC).
68. *See* Peirce, *supra* note 15 (Commissioner Peirce notes the difficulty of generating proper quantification of risks based on "highly unreliable" climate data.); *see also* American Enterprise Institute, Public Comment on Proposed Climate Disclosure Rule (June 10, 2021) ("Estimation of climate 'risks' by public companies would be futile, politicized, distorted by an imperative to avoid regulatory and litigation threats, and largely arbitrary, and thus would not serve the traditional goal of the provision of material information to investors.").
69. *See infra* Part III.
70. *See* proposed 17 C.F.R. §§229.1500-.1507.
71. Climate Disclosure Rule, *supra* note 12, at 21345.
72. *Id.*
73. *See* proposed 17 C.F.R. §§210.14-01, 210.14-02.
74. *See* Climate Disclosure Rule, *supra* note 12, at 21345.
75. *Id.* at 21348.
76. *See* 17 C.F.R. §229.303(a) ("The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.").
77. *See* Climate Disclosure Rule, *supra* note 12, at 21352.
78. *See* proposed 17 C.F.R. §§229.1500-.1507; *see also* TCFD Report, *supra* note 57, at iii-v.
79. *See* proposed 17 C.F.R. §229.1501.

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> ness and consolidated financial statements, which may manifest over the short-, medium-, or long-term;[80] . . . [and h]ow any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook.[81]

The Climate Disclosure Rule requires the following disclosures regarding *risk management*: "The registrant's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes."[82]

The Climate Disclosure Rule requires the following disclosures regarding *metrics and target*:

> Scopes 1 and 2 GHG emissions metrics, separately disclosed, expressed: [b]oth by disaggregated constituent greenhouse gases and in the aggregate, and [i]n absolute and intensity terms;[83] [and] Scope 3 GHG emissions and intensity, if material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions;[84] and [t]he registrant's climate-related targets or goals, and transition plan, if any.[85]

An important task underlying all the above-referenced disclosure categories is the identification of "climate risks"—divided into physical risks and transition risks—that may have a material impact on a registrant's business. Physical risks encompass acute risks that are driven by extreme weather events, such as cyclones, hurricanes, or floods, and chronic risks that are driven by longer-term shifts in climate patterns, such as sustained higher temperatures that may cause sea-level rise or chronic heat waves.[86] Transition risks encompass risks that a registrant may be exposed to as a result of the transition to a lower carbon economy, and such risks may be manifested in policy risks, legal risks, technology risks, market risks, and reputation risks.[87] The Climate Disclosure Rule underscores the importance of linking any identified climate risk to cognizable financial impacts, making the resultant information decision-useful for investors who are concerned with the impact of climate change on the financial performance and financial position of issuers.[88]

One area where the Climate Disclosure Rule diverges from the TCFD Framework, however, is in its treatment of "climate-related opportunities." These represent new business opportunities that a registrant may encounter in its transition to a lower carbon economy, such as positive impacts associated with resource efficiency, cost savings, adoption of low-emission energy sources, development of new products and services, access to new markets, and building resilience along the supply chain.[89] While the TCFD Framework recommends making disclosures about both climate-related risks *and* opportunities, the SEC has chosen to *only* mandate disclosures related to climate-related risks.[90] The Commission's rationale for the selective mandate was to "allay any anti-competitive concerns that might arise from a requirement to disclose a particular business opportunity."[91]

Other instances of the SEC's strategic customizations of the TCFD Framework are present in the *strategy* portion of the required climate-related disclosure. First, the SEC gives registrants leeway in determining what constitutes short-, medium-, and long-term horizons.[92] This provides flexibility to registrants who may define the time horizons that are most appropriate for their unique circumstances.

Second, the SEC closely mirrors, but tweaks, the test used by the U.S. Supreme Court when determining what constitutes "material" climate-related risks. Regarding the materiality of a potential future event, the Supreme Court has required an assessment of both the probability of the event occurring and its potential magnitude, or significance to the registrant.[93] In the context of the Climate Disclosure Rule, the SEC advises registrants to balance the *likelihood* and *impact* when determining the materiality of a climate-related risk.[94]

Third, contrary to the recommendation of the TCFD Framework, the SEC is not mandating "scenario analysis" at this time. Given the highly variable nature of the effects of climate change, the TCFD recommends that all organizations exposed to climate-related risks conduct scenario analyses to help inform investors of their strategic and financial planning processes and to disclose how resilient their strategies are to a range of plausible climate-related scenarios.[95] However, the SEC has determined that compelling all registrants to conduct scenario analysis to demonstrate the resilience of their businesses against climate change would be too burdensome.[96]

Lastly, the SEC has also extended safe harbor to a registrant's forward-looking statements about the material impact of any climate-related risks, as well as scenario analyses, if any.[97] Safe harbor is typically applied to all forward-looking statements pursuant to the Private Securities Litigation Reform Act (PSLRA), with the exception of forward-looking statements included in initial public offer-

80. *See id.* §229.1502(a).
81. *See id.* §229.1502(b).
82. *See id.* §229.1503.
83. *See id.* §229.1504.
84. *Id.*
85. *See id.* §229.1506.
86. TCFD Report, *supra* note 57, at 6.
87. *Id.* at 5-6.
88. *See id.* at 10-11; *see also* Climate Disclosure Rule, *supra* note 12, at 21347 (In accordance with the TCFD Framework, the Climate Disclosure Rule categorizes financial impacts as either those affecting a registrant's financial performance—income statement-focused—or those affecting a registrant's financial position—balance sheet-focused.).
89. TCFD Report, *supra* note 57, at 6-7.
90. *See id.* at 5; *see also* Climate Disclosure Rule, *supra* note 12, at 21351 (However, registrants are still encouraged to disclose climate-related opportunities to the extent possible.).
91. Climate Disclosure Rule, *supra* note 12, at 21351; *see infra* Section III.D.2.
92. Climate Disclosure Rule, *supra* note 12, at 21351.
93. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 238 (1988).
94. Climate Disclosure Rule, *supra* note 12, at 21351 n.211.
95. TCFD Report, *supra* note 57, at 25-28.
96. Climate Disclosure Rule, *supra* note 12, at 21357; *see infra* Section III.C.2.
97. *See* Climate Disclosure rule, *supra* note 12, at 21352, 21357.

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ings. The same protection against enforcement liability is afforded to registrants who make forward-looking statements about the impact of climate-related risks on their business strategy. The SEC claims to have customized the TCFD Framework in such a way as to dovetail the Climate Disclosure Rule with the realities of the existing disclosure obligations under the federal securities laws, tailoring the rule's scope and implementation with an eye toward mitigating compliance burdens.

By contrast, the *governance* and *risk management* portions of the Climate Disclosure Rule closely track the recommendations of the TCFD Framework without much customization. The *governance* portion requires a registrant to disclose the oversight and governance mechanisms by which members of both the registrant's board and management discuss climate-related risks as they pertain to the registrant's business.[98] This is akin to existing rules under Regulation S-K that require disclosures about various corporate governance issues.[99] The *risk management* portion requires a registrant to disclose the processes for identifying, assessing, and managing climate-related risks, and whether any such processes are integrated into the overall risk management system.[100]

The *metrics and target* portion presents an amalgam of issues discussed heretofore, as it entails a mix of GHG emissions data and forward-looking statements about a registrant's targets or goals. A registrant is required to disclose scopes 1 and 2 GHG emissions—both in gross terms[101] and in terms of GHG intensity[102]—and required to disclose scope 3 GHG emissions *only if* they pose a material impact on the registrant's business or if they are included in the registrant's reduction target or goal.[103]

The definitions of and ambit covered by the "scopes" are derived from the GHG Protocol Standard. Scope 1 covers a registrant's direct GHG emissions, which occur from sources that are owned or controlled by the registrant (e.g., emissions from combustion in owned or controlled boilers, furnaces, and vehicles).[104] Scope 2 covers a registrant's indirect GHG emissions from the generation of purchased electricity consumed by the registrant.[105] Scope 3 covers all other indirect GHG emissions of a registrant that are not caught in scope 2.[106] These are emissions that are a consequence of the activities of a registrant, but occur from sources not owned or controlled by the registrant in the upstream and downstream activities of the registrant's value chain.[107]

The SEC has found a compelling interest in mandating the scope framework because it provides quantifiable and comparable GHG emissions data across industries.[108] GHG emissions data presented in such a way are also useful in conducting a transition risk analysis for registrants.[109] More importantly, the SEC finds such information integral to investment and voting decisions because GHG emissions could impact a registrant's access to financing and ability to reduce its carbon footprint in the face of regulatory, policy, and market constraints.[110]

Notwithstanding the utility of disclosing all three "scopes" of GHG emissions data, the SEC has determined to only mandate scopes 1 and 2 emissions data, but to qualify the disclosure of scope 3 emissions data with materiality. There are concerns that disclosures of only scopes 1 and 2 emissions could paint an incomplete, and potentially misleading, picture of a registrant's business.[111] A registrant's longitudinal scope 3 emissions data have considerable informational value for investors in discerning how the registrant is managing its climate-related transition risks.[112]

Considering the administrative difficulty of calculating scope 3 emissions data at such an early stage, the SEC has extended various protections to mitigate compliance burdens.[113] First, the SEC advises that a registrant consider whether scope 3 emissions make up a relatively significant portion of its overall GHG emissions.[114] Second, safe harbor is extended to scope 3 emissions, protecting a registrant from certain forms of liability for making a reasonable statement, in good faith, about its scope 3 emissions data.[115] Third, smaller reporting companies (SRCs) are exempt from scope 3 emissions disclosure.[116] Lastly, the SEC will delay the compliance date of scope 3 emissions disclosure for an additional year.[117]

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98. *See* proposed 17 C.F.R. §229.1501(a).
99. *See* 17 C.F.R. §§229.401, 229.407.
100. *See* proposed 17 C.F.R. §229.1503; *see also* Climate Disclosure Rule, *supra* note 12, at 21361 (Examples of required disclosures include the relative significance of climate-related risks compared to other risks; regulatory requirements or policies; shifts in customer or counterparty preferences, technological changes, and market changes; whether to mitigate, accept, or adapt to a risk; prioritizing which climate risks to address; determining how to mitigate a high priority risk, etc.).
101. *See* proposed 17 C.F.R. §229.1500(a) (GHG emissions data in gross terms exclude any use of purchased or generated offsets. This is so investors can assess the full magnitude of the climate-related risks and a registrant's risk management plan.).
102. *See id*. §229.1500(i) (Derived from the definition of the term in the GHG Protocol Standard, GHG intensity is a ratio that expresses the impact of GHG emissions per unit of economic value or per unit of production. This will provide context to a registrant's emissions in relation to its business scale.).
103. *See id*. §229.1504.
104. *See* GHG Protocol, A Corporate Accounting and Reporting Standard 25 (2004), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf [hereinafter GHG Protocol Standard]; *see also* proposed 17 C.F.R. §229.1500(p).
105. *See* GHG Protocol Standard, *supra* note 104, at 25; *see also* proposed 17 C.F.R. §229.1500(q).
106. *See* GHG Protocol Standard, *supra* note 104, at 25; *see also* proposed 17 C.F.R. §229.1500(r).
107. *See* GHG Protocol Standard, *supra* note 104, at 25.
108. Climate Disclosure Rule, *supra* note 12, at 21373-74.
109. *Id*.
110. *Id*.
111. *See id*. at 21381; *see, e.g.*, TCFD, Guidance on Metrics, Targets, and Transition Plans app. 1 (2021).
112. Climate Disclosure Rule, *supra* note 12, at 21377 (Registrants may seek to reduce upstream emissions by choosing more GHG emission-efficient suppliers, and may seek to reduce downstream emissions by making products that are more energy efficient or involve less GHG emissions when used by consumers.).
113. *See infra* Section III.D.2.
114. Climate Disclosure Rule, *supra* note 12, at 21379 (The SEC is not implementing a quantitative threshold.).
115. *Id*. at 21391 (Issuers will "only be liable for [scope 3 emissions data] if it was made without a reasonable basis or was disclosed other than in good faith.").
116. *See* proposed 17 C.F.R. §229.1504(c)(3).
117. *See* Climate Disclosure Rule, *supra* note 12, §II.M.

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As part of the *metrics and target* portion, a registrant is also required to disclose information about any climate-related targets or goals only if it has elected to do so.[118] While information about a registrant's climate-related targets or goals may qualify as decision-useful information for investors when discerning the long-term viability and resilience of the registrant's business outlook against the effects of climate change, the SEC determined not to mandate such disclosures at this time.[119]

D. Article 14 of Regulation S-X: Financial Statement Disclosures

In alignment with the TCFD Framework, the disclosure topics required by Article 14 of Regulation S-X revolve around capturing cognizable financial impacts of climate change in a registrant's consolidated financial statements that are required as part of its regular filings with the SEC.[120]

The Climate Disclosure Rule requires the following disclosures in a registrant's consolidated financial statements:

> The impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant's consolidated financial statements and related expenditures, and disclosure of financial estimates and assumptions impacted by such climate-related events and transition activities.[121]

This requirement closely tracks the aforementioned *strategy* portion of Subpart 1500 of Regulation S-K.

Along with the narrative disclosures about climate-related risks that have a material impact on a registrant's business, which are required in the *strategy* portion, Article 14 of Regulation S-X requires the registrant to include a note in its consolidated financial statements consisting of disaggregated information about the impact of climate-related conditions and events, and transition activities, on the line items of its consolidated financial statements.[122] The registrant is further required to disclose certain climate-related financial statement metrics.[123] Article 14 of Regulation S-X specifies three categories of financial statement metrics: financial impact metrics related to a registrant's financial performance (income statement focused) and financial position (balance sheet-focused); expenditure metrics; and financial estimates and assumptions.[124] The financial statement disclosures must be audited by an independent registered public accounting firm, and the disclosures must come within the scope of the registrant's internal control over financial reporting.

There are several ways in which the Climate Disclosure Rule engages with the Generally Accepted Accounting Principles in the United States (U.S. GAAP). Overall, the rule requires a registrant to apply the same set of accounting principles that are required for the preparation of the rest of the consolidated financial statements for consistency.[125] The SEC has relied on its broad authority to set accounting standards and principles in the past.[126] Financial impact metrics related to climate-related events or transition activities may manifest on the line items of the consolidated income statement, balance sheet, or cash flow statement in the form of changes to revenue or costs from disruptions to business operations or new emissions pricing; impairment charges or changes to the carrying amount of assets due to the exposure of the assets to severe weather conditions; or changes to loss contingencies or reserves due to impact from severe weather events.[127]

Expenditure metrics entail disclosures of separate aggregate amounts of (1) expenditure expensed and (2) capitalized costs incurred during the fiscal years presented due to climate-related events, transition activities, and climate-related risks identified in the financial impact metrics.[128] If a registrant determines that there were indeed any climate-related events or transition activities that had a material impact on its consolidated financial statements, the registrant is further required to provide a qualitative description of how such events have impacted the development of its estimates and assumptions.[129] The SEC emphasizes that estimates and assumptions like the ones being requested in the rule are generally required for standard accounting and financial reporting purposes in other contexts.[130]

Notwithstanding the general rule of full disclosure of the climate-related financial impacts, Article 14 of Regulation S-X is qualified by a de minimis threshold exemption. The duty to disclose financial impact metrics and expenditure metrics is suspended if "the aggregated impact of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is *less than one percent* of the total line item for the relevant fiscal year."[131] That is to say, the actual impact of climate-related events

118. *See* proposed 17 C.F.R. §229.1506.
119. *See infra* Section III.D.3.
120. *See* TCFD Report, *supra* note 57, at 10-11 (The TCFD Framework emphasizes the importance of tethering each climate-related risk or opportunity to its corresponding financial impact on a line-item basis, whether it impacts a company's revenues, expenditures, assets and liabilities, or capital and financing.).
121. *See* proposed 17 C.F.R. §§210.14-01, 210.14-02.
122. *See id*. §210.14-02.
123. *See id*.
124. *See id*.
125. *See id*. §210.14-01(c)(2).
126. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (This Act, along with many other federal securities laws, exemplifies the authority of the SEC to set accounting standards for public companies and other entities that file financial statements with the SEC.).
127. *See* Climate Disclosure Rule, *supra* note 12, at 21367 (providing examples of how a registrant can record financial impact of climate-related risks in its consolidated financial statements).
128. *See* proposed 17 C.F.R. §210.14-02(e), (f), (i).
129. *See id*. §210.14-02(g), (h), (i).
130. Examples of such estimates and assumptions that the SEC provides are projected financial information used in impairment calculations, estimated loss contingencies, estimated credit risks, and commodity price assumptions.
131. Proposed 17 C.F.R. §210.14-02(b) (emphasis added).

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and transition activities on a registrant's business in the aggregate must be sufficiently cognizable and significant to trigger a reporting obligation. The upshot is that the requirement for disclosing the narrative of climate-related risks that have a material impact on a registrant's consolidated financial statements and the disclosure of their actual financial impact on the line items of the registrant's consolidated financial statements are qualified by both materiality and the de minimis exemption.

II. Jurisprudence of Compelled Commercial Speech

Having discussed the relevant aspects of the Climate Disclosure Rule, we will examine here the relevant doctrines of First Amendment jurisprudence that may serve as a legal obstacle for the SEC when putting the rule into effect. More specifically, this Part will discuss the evolution of the compelled commercial speech doctrine that has generated considerable legal conundrums in the federal appellate courts.

A. Any Regulation of Commercial Speech Must Withstand Intermediate Scrutiny

This section will discuss the development of the commercial speech doctrine and the unique position that securities regulation occupies in the doctrinal landscape. It will then discuss the operative test that courts apply when reviewing any regulation of commercial speech: the intermediate scrutiny test introduced in *Central Hudson*. As will be discussed later, this test is not adequate for certain commercial disclosure requirements, such as the SEC's Climate Disclosure Rule. However, as a result of the ensuing confusion in this doctrinal landscape, courts may nevertheless resort to applying this test to the Climate Disclosure Rule if they deem it to exhibit specific characteristics that preclude it from meriting less protection under the First Amendment.

1. Commercial Speech and Securities Regulation

The First Amendment of the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[132] It is based on this text that federal courts provide constitutional protection for any laws and regulations that abridge one's free speech. However, commercial speech has historically been outside the ambit of First Amendment protection altogether.[133]

In 1975, the Supreme Court extended constitutional protection to commercial speech for the first time. In *Bigelow v. Virginia*, the Court concluded that commercial speech, such as a paid advertisement or a product label, "is not stripped of First Amendment protection merely because it appears in that form."[134] In the following year, the Court enshrined that constitutional protection when it held that truthful speech that proposed a lawful commercial transaction deserved constitutional protection.[135] The Court recognized that society has a strong interest in the "free flow of commercial information."[136] Additionally, it reasoned that commercial speech is not so far removed from any "exposition of ideas" and from "truth, science, morality, and arts in general" that it should lack all First Amendment protection.[137]

At its inception, "commercial speech" encompassed speech that does "no more than propose a commercial transaction."[138] The Court subsequently specified that a showing of all three of the following characteristics would raise a strong presumption that a speech is commercial: (1) it is in the form of advertising, (2) it refers to a specific product, and (3) its speaker has an economic motivation.[139] Despite the blanket protection under the First Amendment, commercial speech is typically afforded lesser protection compared to noncommercial speech.[140]

Some scholars have questioned the distinction between commercial and noncommercial speech. Alex Kozinski and Stuart Banner, for instance, have argued that affording less First Amendment protection to commercial speech may give the government a powerful weapon to suppress or control speech by merely classifying it as "commercial."[141] Jonathan Adler noted that it is often difficult to distinguish commercial speech from other forms of protected expression because the former is often "imbued with political or other normative content."[142] Indeed, even the Supreme Court was cautious to not define commercial speech too broadly "lest speech deserving of greater constitutional protection be inadvertently suppressed."[143]

Further contributing to the conundrum of discerning what exactly falls under the umbrella of "commercial speech," the domain of securities regulation has also undergone scrutiny in relation to First Amendment jurisprudence. Referencing dicta in *National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, the D.C. Circuit attempted to carve out an exception to the First Amendment with respect to securities regulation.[144] In

132. U.S. Const. amend. I.
133. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that the First Amendment did not impose "restraint on government as respects purely commercial advertising"); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (communications granted First Amendment protection were not "purely commercial").
134. 421 U.S. 809, 818 (1975).
135. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
136. *Id.* at 765.
137. *Id.* at 762.
138. *Id.*
139. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983).
140. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
141. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 653 (1990).
142. Jonathan Adler, *Compelled Commercial Speech and the Consumer "Right to Know*,*"* 58 Ariz. L. Rev. 421, 429-31 (2016).
143. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 579 (1980).
144. Securities & Exch. Comm'n v. Wall St. Publ'g, 851 F.2d 365, 372-73 (D.C. Cir. 1988); *see also* National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." In this case, the Court cited labor and antitrust cases as examples.).

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Securities & Exchange Commission v. Wall Street Publishing, the question presented to the court was whether feature articles included in *Stock Market Magazine*, a financial periodical with a modest circulation among small investors, constitute "commercial speech" for First Amendment purposes. The court answered in the negative and found that such articles do not meet the expanded three-part *Bolger* test.[145] It went even further to imply a securities regulation exception:

> We believe instead that the government may have the power to regulate Stock Market Magazine, not because the articles are "commercial speech," but rather because of the federal government's broad powers to regulate the securities industry. Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government . . . and regulation of such communications has been upheld.[146]

Since *Wall Street Publishing*, many scholars have debated the validity of the securities regulation exception. The proponents of the exception have argued that securities, as "credence goods," greatly depend on government-mandated disclosures.[147] As a result, the First Amendment should not apply to securities and capital markets because they are unique products and markets, respectively, that have different requirements for information.[148]

The opponents have argued that securities regulation is indistinguishable from fully protected, high-value political speech.[149] Further, in direct rebuttal of the "securities as credence goods" argument, one scholar contended that there is insufficient evidence to support that securities regulation warrants an exception from First Amendment jurisprudence merely because of the information-dependent nature of securities.[150] In fact, he went as far as to argue that the level of scrutiny that the SEC will have to overcome when justifying its regulations will likely lead to better and more effective securities regulation overall.[151]

Against this backdrop, there are scholars who have occupied a middle ground by stating that securities regulation should be reviewed under the First Amendment, albeit in a modified way, to account for their unique characteristics while still upholding the sanctity of the freedom of speech.[152] These middle-ground views generally align with the Supreme Court's treatment of commercial speech in the realm of First Amendment jurisprudence, namely in regards to its application of a more deferential standard of review for the regulation of such speech. Since the decision in *Central Hudson*, courts have applied the intermediate scrutiny standard to governmental regulations of commercial speech.

2. *Central Hudson:* Intermediate Scrutiny

Prior to *Central Hudson*, there was no specific test to determine whether a regulation of commercial speech was violative of First Amendment principles. In alignment with traditional First Amendment analysis, all content-based regulations of speech had to withstand strict scrutiny to remain constitutional, and only content-neutral regulations of speech warranted intermediate scrutiny.[153]

In 1980, the Supreme Court was finally given an opportunity to clarify the standard, when Central Hudson Gas & Electric Corp. challenged on First Amendment grounds a regulation ordered by the Public Service Commission of the state of New York to cease all advertising that "promote[s] the use of electricity" in an effort to tackle a recent fuel shortage.[154] In assessing the First Amendment implications of such comprehensive ban on advertisement, the Court in *Central Hudson* recognized that the commercial speech at risk of abridgement merited weaker constitutional protection.[155] That is, the abridgement must pass constitutional muster under intermediate scrutiny regardless of whether the regulation is content-based or content-neutral.[156] Further, in this inquiry, the burden is on the government to justify that its regulation is consistent with the First Amendment.[157]

The test, as formulated in *Central Hudson*, is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask

145. *Wall St. Publ'g*, 851 F.2d at 372.
146. *Id.* (citations omitted).
147. Arthur Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 Brook. L. Rev. 77, 85 (1989).
148. *Id.* at 102-03.
149. *See* Nicholas Wolfson, *Corporate First Amendment Rights and the SEC*, 20 Conn. L. Rev. 265 (1988).
150. Anthony Page, *Taking Stock of the First Amendment's Application to Securities Regulation,* 58 S.C. L. Rev. 789, 818 (2007).
151. *Id.* at 829-30.
152. *See* Lloyd L. Drury III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. Rev. 757 (2007) (SEC disclosures must be characterized as commercial speech because such disclosures propose a transaction and investors need less government protection than other listeners due to the constant pricing adjustments made by efficient capital markets.); *see also* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 Brook. L. Rev. 5 (1989) (Securities regulation should be evaluated under the First Amendment based on a listener-centered approach similar to that used to justify First Amendment scrutiny of commercial speech regulations, rather than to protect the corporate speaker's interests. Under this approach, regulations mandating disclosure are generally acceptable, as long "as the forced disclosure is limited to information that is genuinely necessary to permit hearers to make informed and autonomous choices."); Aleta Estreicher, *Securities Regulation and the First Amendment*, 24 Ga. L. Rev. 223 (1990) (Some speech affected by securities regulation was distinguishable from high-value speech based not on the speaker's motive, but on the message's content. If "the message communicates a point of view or espouses something other than a commercial transaction," then it may be regulated "under principles that would be applicable to any other expressive communication, whether it be political, religious, artistic or economic in content.").
153. *See* Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015).
154. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 558-60 (1980).
155. *Id.* at 562-63.
156. *Id.*
157. Sorrell v. IMS Health Inc., 564 U.S. 552, 571-72 (2011) (citing Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002)).

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whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[158]

The *Central Hudson* test, as it has come to be known, is a four-part analysis in which the first two prongs are threshold questions, which must be satisfied before a court can move on to the more exacting third and fourth inquiries.

The Supreme Court has since elaborated the standards for the prongs. First, the government has the burden to prove that the commercial speech in question either is inaccurate or relates to unlawful activity.[159] A mere allegation that a speech conveys "little useful information" is not sufficient to remove the speech from the safeguard of the First Amendment.[160] Second, determining whether a governmental interest is substantial is a fact-specific inquiry that hinges on whether the interest proffered is compatible with First Amendment principles.[161] As an example, the Court has accepted that an interest in "ensuring the accuracy of commercial information in the marketplace" is a cognizable and substantial state interest.[162]

With respect to the third prong, the Court has further explained that the government "must demonstrate that the harms [it] recites are real and that [the commercial speech] restriction will in fact alleviate them *to a material degree*."[163] Lastly, with respect to the fourth prong, the "least restrictive means" is not the standard for intermediate scrutiny, while it is for strict scrutiny analysis. Instead, the Court requires "a *reasonable fit* between the [government's] ends and the means chosen to accomplish those ends, a means *narrowly tailored* to achieve the desired objective."[164] Additionally, when challenged regulations have "numerous and obvious less burdensome alternatives to the restriction on commercial speech," these alternatives will be a "relevant consideration in determining whether the 'fit' between ends and means is reasonable."[165]

Decades have passed since *Central Hudson*, but the intermediate scrutiny test propounded therein remains the default standard of review for any regulation of commercial speech, which is effectively the most stringent scrutiny in the context of commercial speech.[166]

B. Under Certain Circumstances, Compulsion of Commercial Speech Must Withstand Rational Basis Review

In addition to the first important doctrinal theme that seeks to distinguish between commercial and noncommercial speech, this section will discuss the second important theme: the distinction between compulsion of commercial speech and restriction of commercial speech. It will then discuss the more permissive *Zauderer* test, which is applied to instances of compelled commercial speech—usually in the form of commercial disclosure requirements—as long as certain conditions regarding the compelled speech are met.

One of those conditions, which requires that the compelled commercial speech be "purely factual and uncontroversial," has generated a veritable conundrum in the federal appellate courts. The vagueness of the language and the Supreme Court's incomplete analysis thereof have left the lower courts to ponder the minutiae of the word choices and to surmise the Supreme Court's intended objective for such requirement in the first place.[167] As will be discussed later, this condition poses a significant obstacle to predicting how courts will rule on impending First Amendment challenges to SEC-mandated disclosures pertaining to ESG matters.

1. *Zauderer:* Rational Basis

In the context of First Amendment jurisprudence, courts have acknowledged that the freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."[168] That is, individuals cannot be forced to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable."[169] In order to protect speakers from such undue coercion, courts have applied "exacting scrutiny" to compelled subsidization of private speech, which is more permissive than strict scrutiny, but not as permissive as rational basis review.[170]

However, the compulsion of commercial speech presents a different issue. Given that commercial speech occupies a lower position than other forms of speech on the First Amendment totem pole, it follows that the compulsion of commercial speech must also be reviewed with less scru-

158. *Central Hudson*, 447 U.S. at 566.
159. *Id.*
160. *Id.* at 567.
161. *Sorrell*, 564 U.S. at 577 (noting that the state cannot proffer an interest that attempts to "reverse a disfavored trend in public opinion" because that is incompatible with First Amendment principles).
162. Edenfield v. Fane, 507 U.S. 761, 769 (1993).
163. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (emphasis added).
164. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (emphasis added).
165. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993).
166. *See Sorrell*, 564 U.S. at 571-72 (In *Sorrell*, the Supreme Court attempted to formulate a new test called "heightened judicial scrutiny" for all content- or speaker-based restrictions on non-misleading commercial speech regarding lawful goods or services. However, the Court did not provide a concrete framework for this new level of scrutiny and proceeded to apply intermediate scrutiny à la *Central Hudson* in the very case that it announced the new test. As a result, most circuits have continued to use some form of the *Central Hudson* test as the operative standard of review for content-based and/or speaker-based regulations on commercial speech.); *see, e.g.*, Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638, 648-49 (9th Cir. 2016); *see, e.g.*, 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1054 (8th Cir. 2014); *see, e.g.*, United States v. Caronia, 703 F.3d 149, 164 (2d Cir. 2012); *see, e.g.*, American C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 604 (7th Cir. 2012); *see, e.g.*, King v. Governor of the State of N.J., 767 F.3d 216, 236 (3d Cir. 2014).
167. *See, e.g.*, Kimberly-Clark Corp. v. District of Columbia, 286 F. Supp. 3d 128 (D.D.C. 2017).
168. Wooley v. Maynard, 430 U.S. 705, 714 (1977).
169. *Id.* at 715.
170. Janus v. American Fed'n of State, Cnty. & Mun. Empls., Council 31, 138 S. Ct. 2448, 2464-65 (2018).

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tiny. This was the issue of first impression for the Supreme Court in the case of *Zauderer*.

In *Zauderer*, an attorney practicing in Columbus, Ohio, challenged on First Amendment grounds the decisions of the Office of Disciplinary Counsel of the Supreme Court of Ohio, finding that the attorney's advertisement failed to comply with a professional requirement to disclose certain information regarding contingent-fee services, among other infractions.[171] The Office of Disciplinary Counsel found that the attorney did not disclose "whether percentages [of contingent-fee rates] are computed before or after deduction of court costs and expenses," and failed to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful.[172] This was the first case that pertained to the compulsion of commercial speech since commercial speech had been included in the pantheon of protected speech.

In recognition of the informational value that commercial speech has for listeners, the Court held that speakers deserve less First Amendment protection when they seek to withhold information that otherwise may be valuable to consumers: "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[173] The Court's rationale above has been met with much resistance, namely whether the "consumer's right to know" is indeed "a sufficiently substantial interest to justify compelling speech by others."[174]

The *Zauderer* test is akin to rational basis review, which is a more permissive standard than intermediate scrutiny. The chilling effect that disclosure requirements have on commercial speech is cured "as long as [the] disclosure requirements are *reasonably related* to the State's interest in preventing deception of consumers."[175] Notwithstanding the deferential nature of the test, it is not without constitutional safeguards, notably in the form of an additional condition that the disclosure requirements not be "unjustified or unduly burdensome."[176] In response to criticisms surrounding the perceived permissiveness of the *Zauderer* test, one scholar has highlighted the utility of this additional condition, arguing that courts can use it effectively to prevent excessive governmental intrusion on free speech, especially in the context of sustainability disclosure requirements.[177]

The Court further stipulated two threshold conditions that would prompt the application of the *Zauderer* test to commercial disclosures. First, the purpose of the required disclosure must relate to resolving "consumer confusion or deception."[178] Second, the required disclosure must be of "purely factual and uncontroversial information."[179]

With respect to the first condition, there is a circuit split on whether *Zauderer* only applies to disclosure requirements that cure misleading speech or consumer deception. The circuits that have followed a strict interpretation of the original condition include the U.S. Courts of Appeals for the First, Sixth, and Eighth Circuits.[180] On the other hand, other circuits, such as the U.S. Court of Appeals for the Ninth and D.C. Circuits, have broadened the scope of the original condition to include regulations that reach beyond issues of misleading speech or consumer deception.[181]

The second condition, on the other hand, has stirred more controversy in the federal courts of appeals. The Sixth Circuit interpreted "controversial" to mean anything that is in dispute within the scientific or medical community.[182] Essentially, the court has doubled down on the "factual" aspect of the disclosure. The Ninth Circuit has similarly viewed the condition to only require information that is "purely factual," pointing to the fact that the Court in *Zauderer* did not get into a discussion about the controversial nature of the topic in question.[183]

The D.C. Circuit, on the other hand, has interpreted the language of the condition to be equivalent to "factual and non-ideological."[184] The argument is that "controversy" should mean something other than "factual" based on the rule against surplusage.[185] In other words, the required message must be controversial "for some reason other than dispute about simple factual accuracy."[186]

The U.S. Court of Appeals for the Second Circuit has taken a unique approach, whereby it considers the context of the speech to determine what regulation of commercial speech constitutes "controversial."[187] That is, the court considers whether there is a public debate on the matter and whether it entails "controversial political topics."[188] The Second Circuit's approach appears to be the most analogous to the Supreme Court's view, which was revealed most recently in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*).

171. Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 633-34 (1985).
172. *Id.*
173. *Id.* at 651 (emphasis added) (citation omitted).
174. Adler, *supra* note 142, at 425-26 (arguing that the consumer's right to know is not a substantial interest that would satisfy the second prong in the *Central Hudson* test because such interest lacks limits, lacks neutrality, poses a threat of stigma, and poses a threat to political discourse).
175. *Zauderer*, 471 U.S. at 651 (emphasis added).
176. *Id.*
177. Olivier Jamin, *Empowering Consumers and Investors to Choose a Sustainable Future*, 8 Seattle J. Env't L. 64, 92-93 (2018).
178. *Zauderer*, 471 U.S. at 651.
179. *Id.*
180. *See, e.g.*, Pharmaceutical Care Mgmt. Ass'n v. Rowe, 429 F.3d 294 (1st Cir. 2005); *see, e.g.*, Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); *see, e.g.*, 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014).
181. *See, e.g.*, CTIA-The Wireless Ass'n v. City of Berkeley, Cal., 854 F.3d 1105 (9th Cir. 2017); *see*, *e.g.*, American Meat Inst. v. U.S. Dep't of Agric. (*AMI*), 760 F.3d 18 (D.C. Cir. 2014).
182. *Discount Tobacco City*, 674 F.3d at 526.
183. *CTIA-The Wireless Ass'n*, 854 F.3d at 1117 ("'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience").
184. *NAM*, 800 F.3d 518, 530 (D.C. Cir. 2015).
185. *Id.* at 528.
186. *AMI*, 760 F.3d at 27.
187. *See* Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2d Cir. 2014).
188. *Id.* at 249-50.

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2. *NIFLA*

In 2018, the Supreme Court ruled on a commercial disclosure case that generated even more confusion as to how courts should apply the *Zauderer* test. More specifically, Justice Clarence Thomas' explanation of "purely factual and uncontroversial" appears to interpret the original language used in *Zauderer* in such a way as to significantly narrow the scope of the test. Time and time again, scholars have spoken about the risk of abuse to which such language may expose the compelled commercial speech doctrine even before *NIFLA*.[189] The *NIFLA* opinion will likely obfuscate the task for the lower courts even more, since they are the ones tasked with navigating the ever-narrowing scope of the *Zauderer* test.

In *NIFLA*, the Supreme Court examined a First Amendment challenge to a California statute seeking to require certain crisis pregnancy centers (pro-life centers) in the state to provide certain notices.[190] The two notice requirements are as follows. First, licensed clinics must notify female patients that the state provides free or low-cost services, including abortions, and give them a number to call. Second, unlicensed clinics must notify women that the state has not licensed the clinics to provide medical services. The Court struck down both notice requirements as violations of the First Amendment for different reasons.[191] The significance of the holding, however, lies in the line of reasoning that Justice Thomas applied to reach the conclusion that the licensed notice did not qualify for the deferential *Zauderer* test.

Justice Thomas claimed that the "purely factual and uncontroversial" prong existed to grant a lower level of scrutiny only to disclosures regarding an "uncontroversial topic."[192] He went on to conclude that "abortion" is "anything but an 'uncontroversial' topic," and thus *Zauderer* did not apply to a notice requirement that compelled clinics to provide information about abortion services.[193] This new approach then appears to hinge on whether the subject matter underlying a disclosure requirement is controversial, and not necessarily on the factual accuracy of the disclosure requirement.[194]

Such act of arbitrarily cabining the scope of the *Zauderer* test is in contravention of the Court's reasoning in *Zauderer* that the consumer's interest in obtaining more commercial information overrides the speaker's interest in withholding otherwise useful commercial information.[195] The test is arbitrary, insofar as it is difficult to assess ex ante whether a group of nine individuals with varying levels of tolerance for controversy will consider a given topic controversial. It also has a sweeping effect of prohibiting many standard regulations of otherwise factually accurate commercial disclosures, merely because the topic underlying a given disclosure may be characterized by some as controversial. Indeed, as controversial as the topic of abortion may be, the requirement for clinics to let patients know that abortion services exist in and of itself is hardly controversial. This is precisely what Justice Stephen Breyer pointed out in his dissent in *NIFLA*.[196]

The dissents in *Sorrell v. IMS Health Inc.* and *NIFLA*, both spearheaded by Justice Breyer, warned of the overreaching use of the First Amendment to invalidate "ordinary economic and social regulations."[197] Courts may be tempted to abuse the First Amendment to encroach upon the traditional province of the legislative bodies and administrative agencies.[198] This argument is redolent of the arguments put forth in the past calling for a securities regulation exception to the First Amendment.[199] Disclosure rules pertaining to areas that are traditionally regulated by the federal government, such as the securities market, merit a different conduit for review, one that is not disproportionately reliant on the judicial authorities. The idea is not to defang courts from adjudicating on compelled commercial speech cases altogether, but rather to encourage courts to consider other valid recourses before resorting to the First Amendment.[200]

C. *Compelled Commercial Speech in the D.C. Circuit*

The D.C. Circuit will likely be the next battleground for any impending First Amendment challenges to SEC-man-

189. *See Repackaging* Zauderer, 130 Harv. L. Rev. 972 (2017) (noting that there have been many attempts in recent years by commercial speaker-centric courts to shield commercial actors from certain disclosure regulations through the abuse of the "purely factual and uncontroversial" prong of the *Zauderer* test).
190. *See NIFLA*, 138 S. Ct. 2361 (2018).
191. *Id*. at 2370 (The Court did not find the licensed requirement to qualify for *Zauderer* and applied *Central Hudson* instead. The requirement could not withstand intermediate scrutiny because it was not narrowly tailored. The Court punted on whether the unlicensed requirement qualified for *Zauderer*. However, it ruled that, even assuming, arguendo, that *Zauderer* did apply, the notice requirement was "unjustified or unduly burdensome.").
192. *Id*. at 2372.
193. *Id*.
194. The majority did not assess whether the notice requirement itself was "purely factual," but instead placed a great amount of weight on the perceived controversy of the underlying topic of abortion.
195. *See supra* note 173 and accompanying text.
196. *NIFLA*, 138 S. Ct. at 2388 (Breyer, J., dissenting) ("Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth.").
197. Sorrell v. IMS Health Inc., 564 U.S. 552, 584-85 (2011) (Breyer, J., dissenting) (Arguing that it is not necessary to apply the exacting First Amendment standards to "ordinary economic regulatory programs" (even if "that program has a modest impact upon a firm's ability to shape a commercial message"), because doing so would be to replace the legislature with judges. The legislature and administrative agencies should spearhead regulations.); *NIFLA*, 138 S. Ct. at 2383 (Breyer, J., dissenting) ("Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.").
198. *See supra* note 197.
199. *See supra* notes 147-48 and accompanying text.
200. *See* Andra Lim, *Limiting* NIFLA, 72 Stan. L. Rev. 127 (2020) (arguing that *Zauderer* should apply generally to commercial warnings and disclosures, but in the event that an agency oversteps its bounds with respect to a regulation, plaintiffs have access to other valid recourses such as the "arbitrary and capricious" challenge pursuant to the Administrative Procedure Act, political processes, etc.); *see also Sorrell*, 564 U.S. at 587 (Breyer, J., dissenting) (stating that for checks and balances on regulations, courts can instead rely on the Administrative Procedure Act and assess whether the agency's enforcement of a regulation is "arbitrary and capricious").

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dated disclosures, such as the Climate Disclosure Rule. The D.C. Circuit has witnessed many First Amendment challenges to commercial disclosures, including SEC-mandated disclosures,[201] and the court has interpreted the compelled commercial speech doctrine in a way that has further contributed to the confusion and doctrinal divergence in the federal appellate courts.

The D.C. Circuit had initially taken the position of narrowly defining the scope of the *Zauderer* test. In *R.J. Reynolds Co. v. Food & Drug Administration*, the D.C. Circuit refused to apply the *Zauderer* test to the Food and Drug Administration's (FDA's) requirement for tobacco companies to display new textual warnings and graphic images on cigarette packaging.[202] Pointing to precedents, the court deemed that *Zauderer* applies only to disclosure requirements where "the government shows that, absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will *mislead consumers*."[203]

Accordingly, the court attempted to cabin the scope of *Zauderer* to only curing speech that misleads or has the potential to mislead consumers. Further, the court found that a disclosure requirement is not "purely factual and uncontroversial" if the disclosure "requires significant extrapolation on the part of the consumers," or if it is "intended to evoke an emotional response."[204] As a prelude to the cases to come, the court interpreted the language to exclude any disclosures for which there is a dispute about something more than merely the factual accuracy of the conveyed message.

In *American Meat Institute v. U.S. Department of Agriculture* (*AMI*), the D.C. Circuit took a different position and expanded the scope of the *Zauderer* test. Looking at the language in *Zauderer*, the court recognized that the test applies to more than misleading advertisements and issues of consumer deception.[205] Additionally, the court determined that a U.S. Department of Agriculture requirement that actors in the meat industry label the "country-of-origin" of their meat products was "purely factual and uncontroversial" to warrant the deferential *Zauderer* test.[206] The court reasoned that a given disclosure would not qualify as "purely factual and uncontroversial" only if it "communicates a message that is controversial for some reason other than dispute about simple factual accuracy" or if it is "so one-sided or incomplete."[207] In sum, the *Zauderer* test applies to a broader variety of governmental interests in addition to remedying consumer deception, and it is foreclosed to disclosures the controversy of which extends beyond mere dispute about their factual accuracy.

The most recent iteration of the D.C. Circuit's review of commercial disclosures took place in the 2015 case *National Ass'n of Manufacturers v. Securities & Exchange Commission* (*NAM*). The challenged SEC disclosure rule required applicable issuers to "publicly state on their own websites, as well as in SEC filings, that certain of their products are 'not DRC [Democratic Republic of the Congo] conflict free.'"[208] In recognition of the intervening decision in *AMI*, the court applied the expanded scope of the *Zauderer* test to include issues beyond consumer deception.[209] However, the court once again narrowed the scope of the test by ruling that it only applies to "advertising or product labeling at the point of sale."[210] Further, regarding the "purely factual and uncontroversial" language, the court reaffirmed its reasoning in the 2014 ruling of the same case, stating that the requirement for issuers to publish on their websites whether any of their products are "conflict free" or "not conflict free" is not "factual and non-ideological."[211]

The D.C. Circuit's reading of the language is then consistent with its previous interpretation that required that there be a dispute regarding something in addition to the factual accuracy of the disclosure. Additionally, the court's emphasis on issues of "ideology" is reminiscent of the Supreme Court's rationale for the dangers of compelling speech in general. That is, the Court warned of the danger of forcing individuals to adhere to an "ideological point of view" that they do not find acceptable.[212] In addition to the issues of ideology, the D.C. Circuit noted the dangers of stigma associated with the government compelling corporate speakers to make disclosures that unduly expose them to "moral responsibility" in the controversy underlying the disclosure.[213]

The D.C. Circuit's reconfiguration of the scope of *Zauderer* warrants caution. The *NAM* court's assertion that the *Zauderer* test was designed to apply only to "advertising or product labeling at the point of sale" evinces the court's disregard for the rationale of the Court in *Zauderer* in upholding the listener's right to obtain useful

201. *See, e.g.*, Natural Res. Def. Council v. Securities & Exch. Comm'n, 606 F.2d 1031, 9 ELR 20367 (D.C. Cir. 1979); *NAM*, 800 F.3d 518 (D.C. Cir. 2015).
202. *See* 696 F.3d 1205 (D.C. Cir. 2012).
203. *Id*. at 1214 (emphasis added).
204. *Id*. at 1216 (noting that the graphic warnings are susceptible to misinterpretation by consumers and tend to shock the viewers into retaining the information in the textual warning).
205. *AMI*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) ("The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception.").
206. *Id*. at 27.
207. *Id*.
208. National Ass'n of Mfrs. v. Securities & Exch. Comm'n, 956 F. Supp. 2d 43, 73 (D.D.C. 2013).
209. *NAM*, 800 F.3d 518, 520 (D.C. Cir. 2015) (The *AMI* decision was published after the previous ruling of *NAM* in 2014, in which the D.C. Circuit had declined to apply *Zauderer* to the "conflict minerals" disclosure rule because the test only applied to issues of consumer deception.).
210. *Id*. at 522-24 (The majority bases its argument that *Zauderer* only applies to commercial or voluntary advertising to Supreme Court precedents on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).).
211. *Id*. at 530.
212. *See supra* note 169 and accompanying text.
213. *NAM*, 800 F.3d at 530:

> The label "[not] conflict free" is a metaphor that conveys moral responsibility for the Congo war. . . . An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence." . . . By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.

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commercial information.[214] As Judge Srikanth Srinivasan noted in his dissent in *NAM*, the Court in *Zauderer* granted a deferential review specifically to advertising not in recognition of its unique characteristics as a medium that deserves a customized First Amendment review as such, but only because "that was the particular factual context in which the case arose."[215] Indeed, it would make little sense for courts to treat advertisements any differently from public filings with the SEC, for example, when the crux of minimal First Amendment protection for commercial speech lies in society's interest in the "free flow of commercial information."[216]

Moreover, the D.C. Circuit's broad interpretation of the "purely factual and uncontroversial" language, to preclude speech that is "controversial for some reason other than dispute about simple factual accuracy," gives the commercial speakers leeway to demand heightened scrutiny under the guise of controversiality. Judge Srinivasan offered a counterpoint in his dissent in *NAM*. He advised the majority to adopt a reading of the precondition that "refrains from giving 'uncontroversial' a meaning wholly untethered to the core question of whether the disclosure is 'factual.'"[217] That is, he espoused a reading of the precondition that hinges on the "factual accuracy" of the compelled commercial disclosure to remain faithful to the intent of the *Zauderer* Court. Against this backdrop, Justice Thomas' newly minted "controversial topic" test in *NIFLA* will likely further obfuscate the scope of the *Zauderer* test in the D.C. Circuit.[218]

In addition to its reconfiguration of the scope of the *Zauderer* test, the D.C. Circuit made changes to the *Central Hudson* test as well. More specifically, the *NAM* court strengthened the second and third prongs of the test. First, it is now necessary to "identify and 'assess the adequacy of the [governmental] interest motivating'" the challenged disclosure requirement.[219] Second, the evidentiary burden for the government is heightened, as it now has "the burden of demonstrating that the measure it adopted would 'in fact alleviate' the harms it recited 'to a material degree.'"[220] The series of changes in *NAM* effectively make it more difficult for the government to promulgate disclosure rules that qualify for the deferential *Zauderer* test and overcome the heightened burden to pass muster under the more stringent *Central Hudson* test.[221]

III. Discussion and Analysis

This part will discuss the Climate Disclosure Rule in the context of the compelled commercial speech doctrine. In so doing, it will analyze the Climate Disclosure Rule through the doctrinal framework and predict the outcome of the anticipatory First Amendment challenge to the rule in the D.C. Circuit.

A. *The Climate Disclosure Rule Is a Regulation of Commercial Speech*

There remains some uncertainty as to whether the D.C. Circuit will find that the Climate Disclosure Rule is a regulation of commercial speech. The *NAM* court punted on the issue of whether the SEC's conflict minerals disclosure rule involved commercial speech.[222] However, the court proceeded to apply the compelled commercial speech doctrine for the sake of argument, so it is likely that the D.C. Circuit will treat the Climate Disclosure Rule in the same manner even if it were to harbor some misgivings about the commercial nature of SEC-mandated disclosures.[223]

As discussed in Part I, the Climate Disclosure Rule is a series of amendments to existing SEC rules, namely to Regulations S-K and S-X. The disclosure requirements would apply broadly to issuers who have reporting obligations with the SEC pursuant to the Securities Act of 1933[224] and the Securities Exchange Act of 1934[225] (the Exchange Act). Therefore, the affected parties include not only issuers subjected to the disclosure requirements by these forms, but also investors and other market participants that consume the information included in these regulatory filings, such as financial analysts, investment advisors, and asset managers.[226]

As discussed in Part II, the primary test for determining whether a particular speech constitutes "commercial speech" hinges on whether the speech in question does "no more than propose a commercial transaction."[227] When making regulatory filings with the SEC pursuant to the Securities Act, issuers prepare the disclosures with an eye toward making a commercial transaction: a public offer-

214. *See supra* note 173 and accompanying text.
215. *NAM*, 800 F.3d at 536 (Srinivasan, J., dissenting) ("What matters is that the Court's driving rationale, as the Court itself said, applies to 'commercial speech' writ large, not just (and not any more so) to advertising alone.").
216. *See supra* note 136 and accompanying text.
217. *NAM*, 800 F.3d at 538 (Srinivasan, J., dissenting) (Judge Srinivasan proposes the following test that places a greater emphasis on the "factual accuracy" of the disclosure requirement: "If a disclosure is factual, and if the truth of the disclosed factual information is incontestable (*i.e.*, if the facts are indisputably accurate), the interest in arming consumers with truthful, factual information about products calls for relaxed review under *Zauderer*.").
218. *See supra* note 192 and accompanying text.
219. *NAM*, 800 F.3d at 524.
220. *Id.* at 527.
221. *See* Celia R. Taylor, *The Unsettled State of Compelled Corporate Disclosure Regulation After the Conflict Mineral Rule Cases*, 21 Lewis & Clark L. Rev. 427 (2017) (As a result of *NAM*, ESG disclosures will encounter First Amendment challenges, notably on the "purely factual and uncontroversial" prong to qualify for the *Zauderer* test and the "to a material degree" prong to pass muster under the *Central Hudson* test.); *see also* Rebecca Susko, *The First Amendment Implications of a Mandatory Environmental, Social, and Governance Disclosure Regime*, 48 ELR 10989 (Nov. 2018) (arguing that there is a need for courts to revisit the heightened evidentiary standard for the government and the overbroad scope of "controversial" since *NAM*); *see also* Emma Land, *Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of* National Association of Manufacturers v. SEC, 69 Okla. L. Rev. 519 (2017) (arguing that the D.C. Circuit was erroneous in its holding in *NAM* and that Judge Srinivasan's dissent revealed many deficiencies in the majority's analysis).
222. *NAM*, 800 F.3d at 522.
223. *Id.* at 521-22.
224. The disclosure requirements apply to Forms S-1, F-1, S-3, F-3, S-4, F-4, and S-11.
225. The disclosure requirements also apply to Forms 6-K, 10, 10-Q, 10-K, and 20-F.
226. *See* Climate Disclosure Rule, *supra* note 12, at 21413.
227. *See supra* note 138 and accompanying text.

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ing of securities. Whether an issuer intends to conduct its first public offering of securities, continue issuing securities through shelf registration, or issue additional shares in conjunction with a business combination, the SEC disclosure requirements are intended solely to compel the issuer to proffer accurate information about its business to investors in tandem with its securities offering.

This is also the case with respect to the disclosure requirements for secondary market offerings pursuant to the Exchange Act. As a statute that regulates securities transactions in the secondary market, the Exchange Act governs transactions between parties that do not include the original issuer. This may take the form of individual trades by retail investors on national exchanges or block trades placed by institutional investors. Be that as it may, the U.S. Congress nonetheless gave the SEC the authority to compel issuers to disclose information about their business that may be decision-useful for their investors engaged in both primary market *and* secondary market offerings.

The issuers that fall within the purview of the Exchange Act are deemed "reporting companies" that must make periodic disclosures with the SEC, including annual and quarterly reports.[228] While these periodic disclosures are not tethered to a particular issuance of securities from an issuer, they are nonetheless crucial information for investors in making their investment decisions by keeping them apprised of all the up-to-date and material information about the issuer's business. Therefore, the Exchange Act reporting obligations also pertain to nothing more than a commercial transaction. It is further worth noting that all of the affected parties other than an issuer, such as financial analysts, investment advisors, and asset managers, have commercial interests in the issuer's disclosures filed with the SEC.

Even if a court were to expand the test to the three-part *Bolger* test, it should reach the same conclusion. Per the *Bolger* test, speech is commercial if it is in the form of advertising, it refers to a specific product, and the speaker has an economic motivation.[229] First, the core mandate of the SEC allows the Commission to protect investors by providing them enough information before making investment decisions.[230] This is de facto advertising in the sense that issuers are compelled to provide accurate information about the product (securities) that investors are shopping for, whether the product comes directly from the original issuer or indirectly through secondary transactions. The compelled disclosures also refer to a specific product: the offered securities.

Further, as speakers, issuers are solely driven by economic motivations, nothing more, nothing less. It is in the best interest of issuers to provide the most comprehensive and accurate information about their business—with the exception of immaterial information or information that may have an undue anticompetitive impact on their business—so as to prevent the market from mispricing their assets, which may adversely impact their share price.[231] In compelling fulsome disclosures, the SEC in turn has an economic motivation of facilitating capital market transactions and efficiently allocating capital among market participants. The SEC does not proffer any other noneconomic motivation for the promulgation of the Climate Disclosure Rule.

In fact, this is a key distinction between the Climate Disclosure Rule and the conflict minerals rule, which was the underlying controversy in *NAM*. In *NAM*, the SEC promulgated the conflict minerals rule as a result of Congress' response to the Congo war.[232] Far from a purely financial disclosure, the conflict minerals rule required issuers using "conflict minerals" to investigate and disclose the origin of those minerals.[233] On its face, the rule appeared to be driven by economic motivations as well as political and humanitarian motivations, which made it understandably difficult for the D.C. Circuit to determine whether the rule pertained to purely commercial speech. The Climate Disclosure Rule, on the other hand, presents a clearer case because it is based solely on economic motivations. As such, the Climate Disclosure Rule is a clear regulation of commercial speech.

B. *The Climate Disclosure Rule Should Be Reviewed Under the Zauderer Test*

Another point of contention is whether the D.C. Circuit would review the Climate Disclosure Rule under the deferential *Zauderer* test or the stringent *Central Hudson* test. As discussed in Part II, the two greatest hurdles for the Climate Disclosure Rule will be whether a court would find that the rule involves purely factual and uncontroversial disclosure requirements and whether it pertains to advertising or product labeling at the point of sale.[234]

In a post-*NIFLA* world, the D.C. Circuit will need to determine whether the subject matter underlying a disclosure rule is a controversial topic.[235] Many interested parties who filed their comments with the SEC in response to the Commission's request for public input would argue that the subject matter of climate change is indeed controversial. They contend that the impact of climate change on the operations and financial conditions of issuers is too uncertain or remote for the issuers to report in a digestible format for investors.[236] However, leaning on Justice Breyer's

228. Such as Forms 10-K, 20-F, and 10-Q.
229. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983).
230. *See supra* note 45 and accompanying text.
231. *See supra* note 49 and accompanying text.
232. National Ass'n of Mfrs. v. Securities & Exchange Comm'n, 748 F.3d 359, 363 (D.C. Cir. 2014).
233. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1502, 124 Stat. 1376; *see also* 15 U.S.C. §78m(p)(1)(A).
234. *See supra* Section II.C.
235. *See supra* Section II.B.2.
236. *See, e.g.*, American Enterprise Institute, Public Comment on Proposed Climate Disclosure Rule (June 10, 2021); CO_2 Coalition, Public Comment on Proposed Climate Disclosure Rule (June 1, 2021); Heritage Foundation, Public Comment on Proposed Climate Disclosure Rule (June 13, 2021); Steve Milloy, Public Comment on Proposed Climate Disclosure Rule (June 1, 2021); Berkeley T. Rulon-Miller, Public Comment on Proposed Climate

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argument in his dissent in *NIFLA*, the normative debate about climate change and the current state of sustainability reporting are two discrete subject matters.[237]

Even if the opponents argue that the subject matter of climate change is controversial in the sense that there remain public debates about the topic, the subject matter of sustainability reporting is far from being controversial: it does not compel corporate issuers to make "a normative statement" or utter "a fact of debatable truth."[238] That is, an issuer is able to comply with the reporting requirements irrespective of its beliefs in climate change. Whether the issuer believes in climate change or not, it will nevertheless conduct business in a global economy that is increasingly placing greater weight on operations that are resilient to climate change, and there are and will be numerous climate-related regulatory hurdles it must overcome. Such aspects will be covered in the issuer's disclosures of strategy, governance, and risk management with respect to imminent transition risks, for example. Additionally, regardless of whether an issuer is a climate denier, it can still gauge how much of its direct and indirect operations are emitting noxious gases into the environment. The GHG Protocol has issued clear guidance on how to draw the operational boundaries and collect data on the seven GHGs.[239]

Further, sustainability reporting frameworks have been implemented in various other jurisdictions, and there is a trend of consolidating the frameworks to enhance the comparability and consistency across jurisdictions.[240] For instance, many large jurisdictions have adopted formal TCFD-aligned disclosure requirements or guidance for their "domestic issuers": Australia, Brazil, Canada, the European Union, New Zealand, Singapore, Switzerland, and the United Kingdom.[241] Despite the current lack of a standardized mandatory sustainability reporting regime in the United States, there still exists a great deal of interest among companies to publish some form of a sustainability report.

A recent survey of 436 companies across 17 industries showed that more than half of the companies surveyed are currently publishing a corporate social responsibility (CSR), sustainability, ESG, or similar report whose content commonly includes information regarding climate-related risks.[242] Similarly, GHG emissions reporting has also become standardized. The GHG Protocol aligned the seven GHGs commonly referenced by international, scientific, and regulatory authorities as having significant climate impacts with those identified by the Kyoto Protocol, the United Nations Framework Convention on Climate Change, the U.S. Energy Information Administration, and the U.S. Environmental Protection Agency.[243]

Despite the growing consensus on the reliability of the TCFD Framework and GHG Protocol Standard, the SEC should still be prepared to defend the Climate Disclosure Rule against opponents who argue that the frameworks do not have sufficient credibility and ubiquity. As discussed, the rationale for a lesser First Amendment protection for compelled commercial speech lies in the informational value that commercial speech has for listeners.[244] However, the deferential review only applies to factually accurate and uncontroversial commercial speech—that is, speech that carries informational value for listeners.[245] Otherwise, the government may have a blank check to force a speaker to produce speech that not only contradicts his or her own values, but also confounds the listeners who require the most accurate information to conduct proper commercial transactions.

On the other hand, the government (and those who benefit from its regulations) has an interest in putting forth "ordinary economic and social regulations" without the undue delay and resistance stemming from First Amendment challenges.[246] In this context, the SEC will need to carefully balance the countervailing interests and be prepared to argue that the Climate Disclosure Rule is based on credible, reliable, and universal frameworks such that the informational interest of listeners outweighs the weaker First Amendment protection granted to dissenting issuers.

In addition, the D.C. Circuit has revived the stringent requirement that the compelled commercial speech in question be in the form of advertising or product labeling at the point of sale.[247] The Climate Disclosure Rule compels issuers to include climate-related disclosures in their filings with the SEC pursuant to the Securities Act and Exchange Act. As discussed previously, this is de facto advertising because the information provided is tethered to the procurement of a single product: the securities of an issuer. Whether a consumer is a market participant in a primary or secondary market offering, the SEC's intent behind the Climate Disclosure Rule is to regulate the sale of securities and provide investors with accurate information of the securities. Similar to how the Federal Trade Commission oversees the advertising industry to protect consumers, the SEC also engages in rulemakings intended to protect unsophisticated investors from false or misleading disclosures.

Disclosure Rule (Apr. 9, 2021); Texas Public Policy Foundation, Public Comment on Proposed Climate Disclosure Rule (June 11, 2021) (on file with the SEC).

237. *See supra* note 196 and accompanying text.

238. *See supra* note 196 and accompanying text.

239. *See* GHG Protocol Standard, *supra* note 104, at 24-33.

240. *See supra* Section I.B; *see also* Foerster et al., *supra* note 53, at 181-83 (Australia is one such jurisdiction that has sought to improve climate risk disclosure available to investors by encouraging companies to comply with global sustainability reporting frameworks such as the TCFD Framework.).

241. TCFD 2022 Status Report, *supra* note 36, at 99-100.

242. *See* Center for Capital Markets Competitiveness, Climate Change & ESG Reporting From the Public Company Perspective (2021) (The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness, in collaboration with several other organizations, conducted a survey on a sample of U.S. public companies—436 companies across 17 industries that range from small to large in terms of market capitalization. According to the survey, more than half of the companies (52%) are currently publishing a CSR, sustainability, ESG, or similar report whose content commonly includes information regarding climate-related risks.).

243. Climate Disclosure Rule, *supra* note 12, at 21374.

244. *See supra* note 173 and accompanying text.

245. *See supra* note 173 and accompanying text.

246. *See supra* note 197 and accompanying text.

247. *See supra* note 210 and accompanying text.

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C. The Climate Disclosure Rule Should Pass Muster Under *Zauderer*

Once the Climate Disclosure Rule is found to have satisfied the preconditions, it will be subjected to a rational basis review per *Zauderer*. The rule will then likely be found to be constitutional because it is reasonably related to the SEC's asserted interests and is neither unjustified nor unduly burdensome.

1. The Rule Is Reasonably Related to the SEC's Asserted Interests

The interest that the SEC has asserted is to foster a sustainability reporting environment in the U.S. capital markets where issuers are able to generate climate-related disclosures that are "consistent," "comparable," "reliable," and "decision-useful" for investors.[248] In addition to protecting investors with accurate information in the securities market, the SEC's interest extends further to promoting "efficiency, competition, and capital formation" in accordance with its core mandate.[249]

Designed to further the asserted interests, the Climate Disclosure Rule—the proposed regulation—takes the form of several amendments to the SEC's existing disclosure regime, namely Regulations S-K and S-X. The amendments govern both qualitative and quantitative aspects of new climate-related disclosures that registrants will need to publish, which include information about climate-related risks, GHG emissions metrics (including scope 3 emissions data), and climate-related financial statement metrics.[250]

The required disclosures governed by the new amendments are reasonably related to the SEC's interest in providing consistent, comparable, reliable, and decision-useful information to investors and promoting efficiency, competition, and capital formation.

First, climate-related disclosures are fundamental to investors' understanding of an issuer's business, its operating prospects, and its financial performance, especially in relation to other issuers. Such disclosures help investors paint a more fulsome picture of an issuer's business, especially with respect to its long-term resilience against the impact of climate change. As such, it makes sense to present the new climate-related information along with the other customary disclosures about the issuer's business and financial condition (e.g., management discussion and analysis (MD&A) and audited financial statements). The SEC argues that the *strategy* portion of the disclosures helps

> improve investors' understanding of what the registrant considers to be the relevant short-, medium-, and long-term climate-related risks that are reasonably likely to have a material impact on its business, taking into consideration the useful life of the organization's assets or infrastructure and the fact that climate-related risks may manifest themselves over the medium and longer terms.[251]

With respect to the *governance* portion, the SEC contends the disclosures will "enable investors to better understand how the firm is informed about climate-related factors and how frequently the firm considers such factors as part of its business strategy, risk management, and financial oversight."[252] With respect to the *risk management* portion, the SEC argues the disclosures will "inform investors regarding how proactive and diligent registrants may be with respect to climate-related risks," and that they "can use [the] information to acquire a more detailed understanding of how resilient registrants' risk management systems may be towards climate-related risks, which could contribute to better informed investment or voting decisions."[253] With respect to the *metrics* portion, the SEC believes that disclosures about an issuer's financial statement metrics will "provide additional transparency into the nature of a registrant's business and the significance of many of the climate-related risks and impacts on its overall financial condition."[254]

Second, scope 3 emissions reporting is a new requirement introduced in the Climate Disclosure Rule. Representing all other *material* indirect GHG emissions of an issuer not caught in scope 2 emissions, scope 3 emissions provide a fuller picture of an issuer's business and its future trajectory when read alongside its other disclosures and its financial statements. Scope 3 emissions allow investors to better assess comparable data published by issuers across multiple industries. This is particularly decision-useful for investors when calibrating the overall risk exposure of their investment portfolios.[255] Scope 3 emissions data are also useful when assessing an issuer's potential exposure to transition risks.[256] For example, issuers with significant scope 3 emissions may be more likely to face disruptions in their cash flows because they may be at a greater risk of needing to adjust their products, suppliers, or distributors.[257]

In addition to the utility to investors, the Climate Disclosure Rule appears to also have anticipated effects on efficiency, competition, and capital formation—another interest the SEC asserts. In terms of efficiency, the SEC predicts the rule "to improve market efficiency and price discovery by enabling climate-related information to be more fully incorporated into asset prices."[258] In terms of competition, the SEC forecasts that a more standardized climate reporting regime could both reduce costs to issuers for producing such information and reduce costs to investors for acquiring and processing the information.[259] The SEC also states the pro-competitive effects of "peer bench-

248. *See supra* note 44 and accompanying text.
249. *See supra* note 46 and accompanying text.
250. *See supra* Section I.B.

251. Climate Disclosure Rule, *supra* note 12, at 21431.
252. *Id.* at 21432.
253. *Id.* at 21432.
254. *Id.* at 21432-33.
255. *Id.* at 21435.
256. *Id.*
257. *Id.*
258. *Id.* at 21445.
259. *Id.* at 21446.

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marking" for issuers both across and within industries, and of reducing the "informational gap" between U.S. issuers and companies operating in foreign jurisdictions that already require climate-related disclosures.[260] In terms of capital formation, the SEC forecasts the benefits of the rule "in the form of improved liquidity, lower costs of capital, and higher asset prices (or firm valuations)."[261]

Given the above justifications of the expected benefits and anticipated effects of the Climate Disclosure Rule, the SEC's interests in providing consistent, comparable, reliable, and decision-useful information to investors and promoting efficiency, competition, and capital formation will likely be found to be reasonably related to the rule.

2. The Rule Is Not Unjustified or Unduly Burdensome

Even if a court finds that there is a reasonable relation between the Climate Disclosure Rule and the SEC's asserted interests, the court may nonetheless invalidate the rule if it finds that the rule is unjustified or unduly burdensome. As discussed before, this is a useful safeguard to prevent the government from liberally compelling commercial speech without repercussion.[262] Disclosures are required to remedy a harm that is "potentially real and not purely hypothetical."[263] They should extend "no broader than reasonably necessary."[264]

As discussed in the "reasonable relation" analysis, the SEC proffers several justifications for the promulgation of the Climate Disclosure Rule. The rationale for and the anticipated effects of the rule substantiate the fact that the harm the Commission is trying to remedy—the fragmented state of sustainability reporting in the U.S. capital markets—is indeed real and not "purely hypothetical."[265] Further, the Climate Disclosure Rule *as is* constitutes the product of the SEC's efforts to revamp and enhance the 2010 Climate Change Guidance, which proved to be unsuccessful in eliciting consistent, comparable, reliable, and decision-useful climate-related information for investors.[266] This serves as additional justification for the SEC to tackle the harm once again, taking a different approach in hopes of finally standardizing the assessment of issuers' climate-related risks for investors.

The Climate Disclosure Rule also does not extend more broadly than reasonably necessary to achieve the SEC's asserted interests. This is evident in the various limitations that the Commission has built into the rule.

First, the Climate Disclosure Rule provides issuers with flexibility in determining the amount, scope, and granularity of many climate-related disclosures. For instance, while the SEC recognizes the utility of scenario analyses, especially when assessing an issuer's resilience against the foreseeable and plausible impacts of climate change, it has only recommended such analyses without mandating them.[267] This is also the case with the disclosure of other items such as a maintained internal carbon price and climate-related opportunities. While climate-related opportunities are a recommended disclosure item in the TCFD Framework, the SEC is currently recommending but not mandating such disclosure because the Commission is cognizant of the potential anticompetitive effects of compelling an issuer to over-disclose proprietary aspects of its business.[268] An issuer also has flexibility in defining what time frames constitute short-, medium-, and long-term horizons for the purpose of assessing material impacts of climate change on its business operations.[269]

Second, the customary safeguards and carveouts that limit enforcement liability against an issuer are also present in the Climate Disclosure Rule. Pursuant to the PSLRA, safe harbor provides relief for issuers when making forward-looking statements. Safe harbor applies to all forward-looking statements related to the compelled climate-related disclosures, such as scenario analysis, discussion of climate-related targets or goals, and scope 3 emissions data.[270] There is also a de minimis threshold exemption for the financial statement disclosures required by Article 14 of Regulation S-X.[271] Undergirding the determination of the cognizable financial impacts of climate change and scope 3 emissions data is the materiality qualifier, a creature of the federal securities law that all issuers are familiar with.[272]

Third, in recognition of the novel issues presented by mandating scope 3 emissions data, the SEC added cushions for the requirement to mitigate compliance burdens. In addition to safe harbor and the materiality qualifier, the SEC allows for delayed compliance for all scope 3 emissions disclosures. All issuers will have an additional year to comply initially with the scope 3 emissions disclosure requirement beyond the compliance date set for the other proposed rules.[273]

Fourth, there is a possibility that some issuers may find the requirement to provide the derivation of financial statement metrics pursuant to Article 14 of Regulation S-X burdensome. This may be the case because the issuers who have not already reflected on the financial impact of the physical and transition risks of climate change and the resulting impact on their financial statements will likely need to work closely with accountants to come up with estimates

260. *Id*. at 21446-47.
261. *Id*. at 21447.
262. *See supra* note 177 and accompanying text.
263. Ibanez v. Florida Dep't of Bus. & Pro. Regul., Bd. of Acct., 512 U.S. 136, 146 (1994).
264. In re R.M.J., 455 U.S. 191, 203 (1982).
265. *See supra* Section III.C.1.
266. Climate Disclosure Rule, *supra* note 12, at 21413 ("While these provisions may elicit some useful climate-related disclosure, these provisions have not resulted in the consistent and comparable information about climate-related risks that many investors have stated that they need in order to make informed investment or voting decisions.").
267. *See supra* Section I.C.
268. *See supra* note 90 and accompanying text.
269. *See supra* note 92 and accompanying text.
270. Climate Disclosure Rule, *supra* note 12, at 21391 (Issuers will "only be liable for [scope 3 emissions reporting] if it was made without a reasonable basis or was disclosed other than in good faith.").
271. *See supra* Section I.D.
272. *See supra* Section I.B.
273. Climate Disclosure Rule, *supra* note 12, at 21391.

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and assumptions to fully comply with the requirement. However, the SEC reasons that this is a standard accounting practice in accordance with U.S. GAAP,[274] and that it has a broad statutory authority to set such accounting standards and principles.[275] Despite the initial hurdle of devising a viable accounting system that accounts for climate risks, an issuer may ultimately benefit from having such a system in place so that it may better forecast future impacts of climate change and reflect on the resilience of its business operations in the long run.

Fifth, the enforcement of the Climate Disclosure Rule takes into account the respective size and compliance capacity of the affected parties. For instance, SRCs and emerging growth companies are subjected to fewer and diluted disclosure obligations compared to large filers. To compel a speaker to speak even if the burden on the speaker outweighs the informational value of the listeners would violate fundamental First Amendment principles.

Considering the above limiting principles of the Climate Disclosure Rule, the rule shows many dissimilarities compared to the "unlicensed notice" that was in dispute in *NIFLA*. The majority in *NIFLA* found such notice, which compelled unlicensed pregnancy crisis centers in California to provide a government-drafted notice stating that they have not been licensed by the state of California, among other things, to be based on a "purely hypothetical" justification.[276] Further, the majority found that the requirement unduly burdens speech because it "imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's information interest."[277]

Unlike the state of California, the SEC has provided concrete justifications to corroborate the enforcement of the Climate Disclosure Rule and, more importantly, the Commission has neither "scripted" specific language for an issuer to speak nor is the rule intended to discriminate against specific types of issuers. The Climate Disclosure Rule applies broadly to all issuers who have reporting obligations with the SEC, and it only provides broad guidelines in accordance with authoritative frameworks whereby issuers can exercise discretion in crafting the required disclosures. More importantly, the informational interest of investors for the disclosures is paramount as climate change has a significant and concrete financial impact on issuers, which in turn increases the necessity of investors to be cognizant of their overall risk exposure borne of their investment in their portfolio companies.

As a result, the Climate Disclosure Rule will likely withstand the rational basis review per *Zauderer* because neither is its implementation unjustified nor is its enforcement unduly burdensome for the affected parties.

D. *The Rule Should Pass Muster Under* Central Hudson, *With a Caveat*

While the character and scope of the Climate Disclosure Rule should entitle the rule to go through the rational basis review per *Zauderer*, there is still a possibility that the D.C. Circuit may not agree that the rule fits the limited profile of the compelled commercial speech reserved for a more deferential review. Even if that were the case, the Climate Disclosure Rule should pass muster under the more stringent *Central Hudson* test. However, this will not be without difficulty for the SEC. As discussed earlier, the *NAM* court has heightened the burden on the government for the *Central Hudson* test, especially for the second[278] and third prongs[279] of the test.

As a threshold matter, a commercial speech must concern lawful activity and not be misleading to be protected by the First Amendment.[280] The required disclosure necessarily concerns lawful activity because it is mandated by the SEC, an administrative agency whose rulemaking authority comes from Congress. Additionally, there is no reason for issuers to stigmatize themselves by disclosing information about unlawful activity, as it would not only expose them to liability, but also adversely impact their standing in the capital markets. The disclosures also may not be misleading because such disclosures may trigger Rule 10b-5 liability, which can expose issuers to civil and/or criminal liability.[281]

1. The SEC's Asserted Interest Is Substantial

In contrast to the *Zauderer* test, the *Central Hudson* test further requires that the government's interest be substantial. The *NAM* court has provided additional guidance on the prong: courts are to identify and assess the adequacy of the government's interest.[282] As such, the SEC must go beyond merely stating its interest in promulgating the Climate Disclosure Rule and be prepared to defend the adequacy of its asserted interest to avoid constitutional invalidation of the rule.

The Supreme Court has acknowledged that an interest in "ensuring the accuracy of commercial information in the marketplace" is a substantial state interest.[283] The two interests discussed for the *Zauderer* test apply here: an interest in providing consistent, comparable, reliable, and decision-useful information to investors and an interest in promoting efficiency, competition, and capital formation. The need to ensure a constant stream of accurate commercial disclosures in the U.S. capital markets undergirds both interests of the SEC.

First, there is a growing demand among investors for accurate commercial disclosures on how climate-related

274. *See supra* Section I.D.
275. *See supra* note 126 and accompanying text.
276. *NIFLA*, 138 S. Ct. 2361, 2377 (2018).
277. *Id.*

278. *See supra* note 219 and accompanying text.
279. *See supra* note 220 and accompanying text.
280. *See supra* note 158 and accompanying text.
281. *See* 17 C.F.R. §240.10b-5.
282. *See supra* note 219 and accompanying text.
283. *See supra* note 162 and accompanying text.

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risks have impacted issuers' business operations and the issuers' responses to them, if any.[284] The shareholders of many public companies have also been making more proposals related to climate risks in recent years.[285]

Second, the under-disclosure of reliable climate-related data poses a risk to both investors *and* the U.S. capital markets. If issuers fail to provide reliable climate-related data notwithstanding the ever-increasing financial impact borne of climate change, investors and other market participants may end up making uninformed business decisions by failing to properly assess risks to firms, margins, cash flows, and valuations.[286] Additionally, such failure may lead the U.S. capital markets to misprice risks and misallocate capital, thereby making it more difficult for the SEC to fulfill its core mandate to protect investors; maintain fair, orderly, and efficient markets; and promote capital formation.[287]

The SEC's two asserted interests are then not only aligned with an interest that the Supreme Court has historically recognized as being substantial, but they also comport with the Commission's core mandate.

2. The Rule Directly Advances the SEC's Interest, but the SEC May Need Additional Justification

Since *NAM*, the D.C. Circuit has imposed a heightened evidentiary burden on the government when issuing regulation that triggers the *Central Hudson* test. That is, the government has the burden to demonstrate that the regulation would "in fact alleviate" the alleged harms "to a material degree."[288] Several scholars have pointed out that such heightened burden would pose a great hurdle for the government to pass regulations related to ESG disclosures.[289] The Supreme Court provided additional guidance, namely that the government may not provide "mere speculation or conjecture" to satisfy this prong.[290]

Even before *NAM*, the third prong posed issues for the government in the past when attempting to pass regulations that regulate commercial speech. In *R.J. Reynolds Co. v. Food & Drug Administration*, the D.C. Circuit struck down FDA's disclosure requirement on cigarette packages because of deficiencies in the third prong in particular.[291] The court found that the government had not proffered evidence to show that graphic warnings would directly reduce the rate of smoking as the government had asserted.[292]

In another instance, the Supreme Court invalidated a prohibition of beer labels displaying alcohol content in an attempt to suppress the threat of "strength wars" among brewers, who would seek to compete in the marketplace solely based on the potency of their beer in the absence of regulation.[293] The Court reasoned that the government's deficiency stems from "the overall *irrationality* of the [government's] regulatory scheme," pointing to the fact that if the government's interest was indeed to suppress competition based on the potency of the alcohol content, then it should have applied a similar regulation to wines and spirits, which have stronger alcohol content than beers.[294] The regulation appears to be underinclusive to directly and materially advance the government's purported interest. From these precedents, we can glean that courts generally look to the government's proffered evidence and the rationality of the overall regulatory scheme.

The SEC has proffered numerous pieces of evidence of benefits that various market participants may expect from the Climate Disclosure Rule. First, investors would have access to more comparable, consistent, and reliable disclosures with respect to issuers' climate-related risks.[295] Second, requiring such disclosures to be included in a common location in regulatory filings may reduce investors' search costs, improve their information-processing efficiency, and engender other positive information externalities.[296] Third, requiring information to be *filed* with the SEC as opposed to posted on company websites or *furnished* as exhibits to regulatory filings may improve the reliability of information provided to investors, thereby minimizing their reliance on nonstandardized and noncertified ESG ratings, which may be misleading for unsophisticated investors.[297]

Fourth, improving and standardizing climate-related disclosures may mitigate adverse selection problems that may occur due to information asymmetry.[298] Fifth, the mandatory standardized climate-related disclosures may allow a firm's shareholders to better monitor management's decisions and mitigate agency problems by strengthening scrutiny of the management's operational decisions with respect to climate risk management.[299] Lastly, more consistent, comparable, and reliable disclosures may lead to broader benefits in the capital markets in the form of improved liquidity, lower costs of capital, and higher asset prices (or firm valuations).[300] All of these purported benefits are in addition to the purported benefits of the four individual disclosure items discussed in the *Zauderer* analysis.[301]

However, it may be difficult for the SEC to avoid scrutiny for this prong altogether, particularly with respect to certain disclosure items such as the scope 3 emissions reporting requirement and scenario analysis recommendation. In the current voluntary reporting regime, the SEC notes that the overall GHG emissions information dis-

284. Climate Disclosure Rule, *supra* note 12, at 21424.
285. *See supra* note 5 and accompanying text.
286. *See supra* notes 38-40 and accompanying text.
287. *See supra* notes 38-40 and accompanying text.
288. *See supra* note 220 and accompanying text.
289. *See supra* note 221 and accompanying text.
290. Edenfield v. Fane, 507 U.S. 671, 770 (1993).
291. *See* 696 F.3d 1205 (D.C. Cir. 2012).
292. *Id*. at 1219-20.
293. *See* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
294. *Id*. at 488-89 (emphasis added).
295. Climate Disclosure Rule, *supra* note 12, at 21429.
296. *Id*. (Note that issuers are required to place all relevant climate-related disclosures in Securities Act or Exchange Act registration statements and Exchange Act periodic reports in a separately captioned "Climate-Related Disclosure" section or, alternatively, to incorporate by reference from another section, such as Risk Factors, Description of Business, or MD&A.).
297. *Id*.
298. *Id*. at 21430.
299. *Id*.
300. *Id*. at 21430-31.
301. *See supra* Section III.C.1.

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closed to the market may be biased because companies that have more favorable data (i.e., lower GHG emissions) may be more likely to make the voluntary disclosures.[302] Reducing such bias is one of the reasons why the Commission is seeking to require all issuers to provide consistent GHG emissions data, including their scope 3 emissions data.[303] Notwithstanding this rationale, the SEC is mandating issuers to disclose separately their total scope 3 emissions for the fiscal year if the emissions are *material* or if the issuers' GHG emissions reduction target includes scope 3 emissions data.[304]

The potential issue with ascribing a materiality qualifier to an issuer's scope 3 emissions is that such a maneuver may render the requirement "underinclusive," similar to the selective prohibition of beer labels from displaying alcohol content. Courts have often found such "underinclusiveness" of a regulation to be suspect on First Amendment grounds.[305] Given the SEC's substantial interest in providing consistent and comparable disclosures for investors, the Commission's decision to qualify the ostensibly decision-useful scope 3 emissions data with materiality (which is not the case for scopes 1 and 2 emissions data) may appear to be underinclusive, and thus irrational, as a regulatory scheme. The fact that a major impetus for the compulsory sustainability reporting framework lies in the SEC's acknowledgement of the limitation of materiality alone,[306] and that the issuers have relative flexibility in determining what is material in relation to their financial realities,[307] may render the rationality of the scope 3 emissions requirement questionable without further justification from the Commission.

In addition, the SEC's conscious decision to *not* mandate scenario analysis may also be subjected to a similar scrutiny. As discussed previously, the Commission is in agreement with the TCFD that scenario analysis is highly decision-useful data for investors because it provides additional information on how resilient an issuer's strategies are to a range of plausible climate-related scenarios.[308] However, the SEC refrained from mandating this disclosure item because it concluded that the compliance burden on issuers outweighed the utility of such disclosure for investors.[309] While it is reasonable for the SEC to be keen on mitigating compliance burden for registrants, its strategic decision of not mandating another source of potentially decision-useful information may expose the Commission to claims of underinclusiveness.

Courts will likely find that the Climate Disclosure Rule directly advances the SEC's asserted interest because of the copious amounts of evidence of the rule's anticipated benefits. However, the Commission may need to provide additional justification for certain disclosure items, such as the scope 3 emissions reporting requirement and scenario analysis recommendation, to successfully weather the third prong of the *Central Hudson* test.

3. The Rule Is Not More Extensive Than Necessary to Serve the SEC's Interest

The fourth prong of the *Central Hudson* test requires there to be a "reasonable fit" between the government's "narrowly tailored" regulation and its asserted substantial interest.[310] The standard is not as strict as that of a strict scrutiny analysis, which requires that the government's regulation be tailored as the "least restrictive means." Further, the presence of "numerous and obvious less burdensome alternatives" to the regulation is a relevant consideration in this analysis.[311]

The most obvious less-burdensome alternative to the Climate Disclosure Rule is the 2010 Climate Change Guidance, which governs the status quo voluntary sustainability reporting regime.[312] The question remains as to why the SEC does not continue trusting issuers to provide consistent, comparable, reliable, and decision-useful information on their own. After all, the impact of climate-related risks and GHG emissions can be material to an issuer's business operations and financial conditions even without the SEC's intervention.

The problem is that even after more than 10 years since the publication of the 2010 Climate Change Guidance, U.S. market participants are still faced with the same issue of fragmented sustainability reporting and underreporting.[313] While viable in theory, the voluntary disclosure regime has often led to "inconsistent and incomplete disclosures due to the considerable variation in the coverage, specificity, location, and reliability of information related to climate risk."[314] The SEC points to the following "key market failures": costly disclosures, agency problems, inaccurate presentation of information by managers, and unpredictable and nonuniform investor responses.[315] As such, the voluntary sustainability reporting regime pursuant to the 2010 Climate Change Guidance is simply not a viable "alternative" to the Climate Disclosure Rule when it comes to achieving the SEC's substantial interests.

The SEC proffered numerous "alternatives" to the rule that it consciously avoided adopting to not only mitigate compliance burden for issuers, but also to narrowly tailor the rule to achieve only the Commission's asserted

302. Climate Disclosure Rule, *supra* note 12, at 21434.
303. *Id.*
304. *See* proposed 17 C.F.R. §229.1504(c)(1).
305. *See, e.g.*, Brown v. Entertainment Merchs. Ass'n, 564 U.S. 786, 802 (2011):

> The consequence is that [the government's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

306. *See supra* note 17.
307. *See supra* note 94 and accompanying text.
308. *See supra* Section I.C.
309. *Id.*
310. *See supra* note 164 and accompanying text.
311. *See supra* note 165 and accompanying text.
312. *See supra* Section I.A.
313. *See supra* note 49.
314. Climate Disclosure Rule, *supra* note 12, at 21425.
315. *Id.* at 21426-27.

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interests. In a separate section titled "Reasonable Alternatives," the SEC enumerated a myriad of alternatives that the Commission forwent lest the scope of the Climate Disclosure Rule become overbroad, unwieldy, or simply nebulous.[316] The alternatives include limiting the requirement to only certain classes of filers, requiring scenario analyses, removing safe harbor for scope 3 emissions disclosures, requiring reasonable assurance for scopes 1 and 2 emissions disclosures from all issuers, and permitting GHG emissions disclosures to be furnished instead of filed, among many others.[317] Viewed alongside the previously discussed limitations that the SEC has built into the Climate Disclosure Rule,[318] the "Reasonable Alternatives" section further demonstrates the Commission's intention of narrowly tailoring the rule to achieve only its asserted interests and not extending it broader than reasonably necessary.

IV. Conclusion

The issue of climate change, among other ESG matters, has become a political hot topic in the United States, especially in recent years. Many Republican states have put anti-ESG bills into motion, and President Biden issued his first veto on such a bill that sought to ban retirement funds from considering ESG matters, such as material climate risks, in their investment decisions. This new wave of "climate denialism" paints a picture that is in stark contrast to the widespread understanding in the global financial industry that climate risk is indeed investment risk.

In this sociopolitical climate, the SEC's newly minted Climate Disclosure Rule will likely encounter First Amendment challenges in the D.C. Circuit, in a similar fashion as the challenge to the Commission's conflict mineral disclosure rule just a few years prior. The Commission will face many obstacles in the process, chief among them the hurdle of the "controversial" subject matter test that Justice Thomas formulated in *NIFLA*. Empowered by the anti-ESG rhetoric, the opponents of the Climate Disclosure Rule will argue that the issue of climate change is a controversial topic, which precludes the rule from being reviewed under the deferential *Zauderer* test.

However, courts should rather view the rule in a lens crafted by Justice Breyer in his dissent in *NIFLA*—that is, taking the position that the normative debate about climate change and the subject matter of sustainability reporting are two discrete topics. Complying with sustainability reporting frameworks does not compel corporate issuers to make a normative statement or utter a fact of debatable truth in contravention of their views on climate change. It is also worth noting that the SEC, as a federal administrative agency, has a prerogative pursuant to a statutory mandate to issue ordinary social and economic regulations without the undue delays imposed by the First Amendment. Notwithstanding, the First Amendment should still bestow constitutional protection on speakers who are compelled to render commercial speech in a way that the prejudicial harm on the speakers outweighs the informational benefit to the listeners.

Once the Climate Disclosure Rule overcomes this hurdle, it will likely withstand the rational basis scrutiny of the *Zauderer* test. However, if courts find that the rule is not part of the universe of commercial speech regulations that merit the rational basis review, the Commission will face a greater difficulty of convincing the courts that the rule nevertheless should pass muster under the intermediate scrutiny test of *Central Hudson*. While the Climate Disclosure Rule should still withstand the heightened scrutiny, the Commission should be prepared to bolster its justifications for certain disclosure items, such as the scope 3 emissions reporting requirement and scenario analysis recommendation, with an eye toward keeping the overall regulatory scheme consistent and rational.

316. *See id.* §IV.F, at 21448-52.
317. *Id.*
318. *See supra* Section III.C.2.