

SEC's Climate Rule Is Compatible With The 1st Amendment

By **Rebecca Tushnet, Ellen Goodman and Samara Spence** (July 28, 2022)

The public comment period recently closed on the U.S. Securities and Exchange Commission's proposed rule that would require public companies to disclose, in their registration statements and annual reports, certain climate-related risks — including how they are accounting for, and preparing for, those risks, what they are doing to meet any publicly proclaimed climate goals, and what their greenhouse gas emissions are.[1]



Rebecca Tushnet

We, along with other scholars, submitted a comment to the SEC in support of the proposed rule.[2] The rule is good for the functioning of financial markets. As climate change progresses, companies face unique and systemic risks from catastrophic weather events, supply chain disruptions, demand changes, and regulatory and energy transition costs.



Ellen Goodman

Recent studies show that the world's biggest companies have nearly \$1 trillion at risk from climate impacts likely to hit within the next five years.[3] The U.S. suffered \$1 billion in economic damage from weather events in the last two years alone.[4]

How companies expect climate costs to change their businesses — and what they plan to do about it — is of central concern to shareholders, as attested to by the groups that pushed for SEC disclosure.[5]



Samara Spence

Notwithstanding the SEC's mandate to ensure investors have risk information, some have argued that the proposed disclosure requirements would violate public companies' First Amendment rights.[6] That position is legally incorrect and misguided.

In fact, the proposed rule is consistent with settled First Amendment principles, which value the public's right to know important, relevant information. Rules of the kind proposed — securities disclosure requirements deemed "necessary or appropriate in the public interest or for the protection of investors"[7] — do not normally trigger First Amendment review.

In fact, many activities that might be considered speech are not protected by the First Amendment at all, particularly where an economic or other relationship of trust exists between the speaker and listener.[8] For example, contracting parties generally cannot lie — that's fraud.[9] A doctor generally cannot mislead a patient — that's malpractice.[10]

Likewise, required securities-related disclosure requirements have traditionally been treated as outside First Amendment review.[11] The U.S. Supreme Court will consider categories of speech exempt where there is what it referred to as a "long-settled tradition of subjecting [the] speech to regulation" in its 2010 decision in *U.S. v. Stevens* — a description that certainly applies to securities-related compelled disclosures.[12]

American securities disclosure mandates go back at least to the 1800s.[13] Even if the proposed disclosure requirements constituted protected First Amendment speech, they would only warrant treatment as commercial communications, to which the "Constitution ...

accords a lesser protection" than other forms of expression, as the high court said in its 1980 decision in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.^[14] This is all the more true when the rule requires additional speech, instead of suppressing speech.

The Supreme Court's 1985 opinion in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio held that the government may compel a commercial disclosure that is "factual and uncontroversial ... as long as disclosure requirements are reasonably related to the [government] interest" at issue, and are not unduly burdensome on further speech.^[15]

Under Zauderer, a commercial speaker's constitutional interest in nondisclosure is minimal. The proposed SEC disclosure requirements would easily survive Zauderer review.

First, the proposed rule would mandate disclosure of purely factual information about business operations, such as an issuer's own estimates of its climate-related risks. And because the mandated statements would be purely factual, they are considered uncontroversial for Zauderer purposes.^[16]

The disclosures here would not force companies to take a position on the regulation of greenhouse gas emissions, endorse any ideological position on climate change or make any moral statements. The issue of climate change may provoke disagreement, but climate disclosures reflect objective realities affecting businesses.

Controversiality under Zauderer is not established because people dispute the value of the information or because it can be tied in some way to a controversial issue.^[17] Such a rule would render every disclosure mandate infirm as soon as someone challenged it.

Second, the proposed disclosure requirements would protect investors — a purpose squarely within the SEC's mandate. Thousands of investors managing hundreds of trillions of dollars have called for more and better disclosure of climate-related information.^[18] This is not merely to support so-called ethical investing. Climate-related risks pose risks to investments, period.

Some companies already disclose climate-related information under existing materiality requirements,^[19] but companies do not currently provide consistent, comparable information that is decision-useful to investors.^[20] Indeed, growing evidence suggests the lack of sufficient information has prevented climate risks from being accurately incorporated into asset prices.^[21]

Finally, the proposed disclosure requirements are not unduly burdensome within the meaning of Zauderer, which requires a burden on speech.^[22] Companies would be free to supplement their statements, claim that they do not face climate-related risks, or even identify climate-related opportunities.

The difficulty or cost of gathering information is not a constitutionally salient burden under Zauderer, so long as the disclosure of the information, once gathered, does not burden further speech.

For example, in American Meat Institute v. U.S. Department of Agriculture, the U.S. Court of Appeals for the D.C. Circuit held in 2014 that meat country-of-origin labeling requirements were permissible, despite the substantial investment that would be required to create new supply chain records — including documenting where the animal was born,

raised and slaughtered.[23]

Likewise, in *New York State Restaurant Association v. New York City Board of Health*, the U.S. Court of Appeals for the Second Circuit concluded in 2009 that a requirement that restaurants disclose calorie content on menus passed constitutional muster, even though that might require them to measure and calculate the figures.[24]

In any case, the burden on companies would be reasonable under the circumstances. Most of the proposed requirements would mandate disclosure of information that the company already has — risks it has identified, and progress on actions it has promised. The information on emissions might have to be newly generated, but is based on a preexisting accounting system already used under the Greenhouse Gas Protocol.[25]

Reasonable people can debate whether the proposed rule should be modified for other reasons. But the First Amendment provides no basis for modification or rejection.

Rebecca Tushnet is a professor at Harvard Law School.

Ellen Goodman is a professor at Rutgers Law School.

Samara Spence is senior counsel at Democracy Forward.

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

[2] Rebecca Tushnet, et al., Comment Letter on Proposed Rule (July 17, 2022), <http://democracyforward.org/wp-content/uploads/2022/06/Comment-SEC-Disclosure-Rule-6.17.22.pdf>.

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

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

[5] Investors managing hundreds of trillions of dollars have urged disclosure of climate-related information by signing such initiatives as the Global Investor Statement to Governments on Climate Change, the U.N. Principles for Responsible Investment, the Net Zero Asset Managers Initiative, and the Climate Action 100+. Proposed Rule, 87 Fed. Reg. at 21,340-41.

[6] The theory first appeared in a statement by dissenting SEC Commissioner Hester Peirce,

and has been repeated even in this publication. See Commissioner Hester M. Peirce, Statement: We Are Not the Securities and Environment Commission – At Least Not Yet, SEC (March 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321#_ftnref48; Thomas Berry & Jennifer Schulp, SEC Should Reject Climate Rules Over First Amendment Issue, Law360 (July 1, 2022), <https://www.law360.com/environmental/articles/1504875/sec-should-reject-climate-rules-over-first-amendment-issue>.

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

[8] Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. Rev. 318, 344 (2018); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1767 (2004); see also Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1271 (1995).

[9] Shanor, *supra* note 7, at 349.

[10] *Id.* at 350.

[11] E.g., [Paris Adult Theatre I v. Slayton](#), 413 U.S. 49, 64 (1973) ("Neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition") (citation omitted); [Ohralik v. Ohio State Bar Ass'n](#), 436 U.S. 447, 456 (1978) ("[C]ommunications that are regulated without offending the First Amendment" include "the exchange of information about securities [and] corporate proxy statements"); see also Sarah C. Haan, The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule, 2 (June 16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138712 ("Introducing First Amendment scrutiny to securities disclosure would be a radical departure from existing law, and an unprecedented step by the judiciary to interfere with markets and to distort market outcomes").

[12] [U.S. v. Stevens](#), 559 U.S. 460, 469 (2010).

[13] Haan, *supra* note 10, at 3-4.

[14] [Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.](#), 447 U.S. 557, 562-63 (1980).

[15] [Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio](#), 471 U.S. 626, 651 (1985).

[16] [Am. Meat Inst. v. U.S. Dep't of Agric.](#) ("AMI"), 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (upholding requirement for country-of-origin labeling on meat).

[17] [CTIA — The Wireless Ass'n v. Berkeley](#), 928 F.3d 832, 845 (9th Cir. 2019).

[18] Proposed Rule, 87 Fed. Reg. at 21,340-41.

[19] See, e.g., Form 10-K, [Adobe Inc.](#), 27-28, 34 (2022), available at <https://www.adobe.com/pdf-page.html?pdfTarget=aHR0cHM6Ly93d3cuYWRvYmUuY29tL2NvbnRlbnQvZGFtL2NjL2VuL2lu>

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[20] Proposed Rule, 87 Fed. Reg. at 21,335.

[21] See generally, Madison Condon, *Market Myopia's Climate Bubble*, 1 *Utah L. Rev.* 63 (2022).

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

[23] *AMI*, 760 F.3d at 21, 27.

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

[25] Proposed Rule, 87 Fed. Reg. at 21,344 (relying on Greenhouse Gas Protocol framework).