



Submitted Online via CFTC Comment Portal

October 7, 2022

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34,856 (June 8, 2022)

Dear Mr. Kirkpatrick,

Democracy Forward¹ appreciates the opportunity to respond to the Commodity Futures Trading Commission's Request for Information on Climate-Related Financial Risk. Democracy Forward is a non-profit public interest legal organization that, among other things, works to ensure that federal agencies have access to accurate information and legal support for rulemaking efforts that improve the lives of Americans.

We commend the Commission for its efforts to better understand how climate-related risks affect commodities and to consider its role in protecting the commodities markets from climate-related financial risks. This comment responds to Topics 13 through 17 regarding potential disclosure requirements. Given the risks that climate change poses for the economy in general and the commodities and futures markets specifically, climate-related risk disclosure requirements would be a reasonable tool to help protect the market from volatility. Contrary to recent claims,² disclosure requirements focused on the financial risks that climate change poses would be consistent with First Amendment principles.

I. Climate-Related Risk Disclosure Requirements Could Help Maintain Stability in Commodities and Futures Markets.

As the Commission notes, climate change threatens to substantially undermine the stability and health of the U.S. financial system, including the commodities market. Increasingly severe weather disasters, rising sea levels, and frequent droughts and wildfires all affect market stability by imposing substantial costs on the economy, interrupting economic productivity, and heavily

¹ Democracy Forward thanks legal fellow Courtney Dougherty for her assistance in preparing this comment.

² *E.g.*, David R. Burton & The Heritage Foundation, Comment Letter on Commodity Futures Trading Commission's Request for Information on Climate-Related Financial Risk (Aug. 9, 2022), <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69530&SearchText=>.

damaging resources and property.³ Climate change specifically impacts Commission-registered market participants through both physical and transitional risks by escalating market volatility, destroying assets, and frustrating current risk management frameworks.⁴

The dangerous effects of climate change are particularly evident in the agricultural commodity markets. Higher temperatures, deteriorating soil conditions, and a growing lack of water have crippled crop yields in the past and will continue to do so as climate effects worsen. A recent NASA study found, for example, that the production of maize will decrease by nearly 24% by 2030.⁵ Crops such as wheat, sugarcane, and cotton also face expected decreases in production due to water availability and the rise of crop diseases and pest populations as a result of climate change.⁶ Additionally, the storage and transportation of agricultural commodities (and the commodities market more generally) will also bear the burden of climate change. With temperatures changing the length and intensity of growing seasons, the costs needed to properly store agriculture will rise.⁷ Severe weather events, which are occurring at a greater frequency, can destroy transit infrastructure and result in delays in commodity supply chains and goods transportation.⁸

The Commission currently uses risk disclosure requirements to protect the commodities market from other dangers, such as fraud and the risks of relying on clearing organizations.⁹ Climate-related risk disclosure requirements could similarly benefit market participants by allowing consumers to make better-informed decisions and enabling market participants to prepare for potential financial upset due to climate disasters.¹⁰

³ Financial Stability Oversight Council, Report on Climate-Related Financial Risk 11 (2021); Climate-Related Market Risk Subcommittee, Managing Climate Risk in the U.S. Financial System i-ii (Leonardo Martinez-Diaz & Jesse M. Keenan, 2020).

⁴ Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34,856, 34,857 (June 8, 2022).

⁵ Ellen Gray, *Global Climate Change Impact on Crops Expected Within 10 Years, NASA Study Finds*, NASA Global Climate Change (Nov. 2, 2021), <https://climate.nasa.gov/news/3124/global-climate-change-impact-on-crops-expected-within-10-years-nasa-study-finds/>.

⁶ One 2021 study out of the journal of Environmental Science and Pollution Research found that climate change will have substantial negative effects on agriculture. As a result of rising temperatures, sugarcane production will decrease due to the proliferation of major crop diseases. Although rising levels of carbon dioxide might initially increase wheat yield, wheat production will likely decrease overall as a result of rising heat which will cause wheat plants to produce less useable grain. Finally, the study predicts that cotton, one of the most important crops internationally, will experience yield reductions due to increased temperatures and rising carbon dioxide levels. See Aqeel Shahzad et al., *Nexus on climate change: agriculture and possible solution to cope future climate change stresses*, 28 Environmental Science and Pollution Research 14,211, 14,218-20 (Jan. 29, 2021).

⁷ Kyle Lesinger et al., *Impact of climate change on storage conditions for major agricultural commodities across the contiguous United States*, 162 Climatic Change 1287, 1302 (Sept. 19, 2020).

⁸ Samuel A. Markolf et al., *Transportation resilience to climate change and extreme weather events – Beyond risk and robustness*, 74 Transport Policy 174, 175 (Feb. 2019).

⁹ Report on Climate-Related Financial Risk, *supra* note 3, at 73.

¹⁰ Managing Climate Risk in the U.S. Financial System, *supra* note 3, at 87.

II. *Climate-Related Risk Disclosure Requirements Would Likely Comply with the First Amendment.*

Despite the claims of some commenters, if the Commission decides to proceed by requiring appropriate climate-related risk disclosures, such requirements will satisfy First Amendment requirements.

a. Disclosure requirements would be treated as unprotected by the First Amendment or as compelled commercial speech subject to Zauderer review.

It is probable that the First Amendment would not cover climate-related risk disclosures at all. That is, certain types of speech, such as perjury, contracts, and malpractice do not receive First Amendment protection and, as such, can be regulated without higher levels of scrutiny.¹¹ The Supreme Court has suggested through dicta that other financial regulations, such as securities disclosures, are not protected speech.¹²

Additionally, the Supreme Court has indicated that other unidentified categories of speech may fall outside of the First Amendment's protection if there is a "long-settled tradition of subjecting that speech to regulation."¹³ Climate-related risk disclosures that focus on combatting market disruptions would be consistent with the Commission's long-settled regulatory traditions. The Commission has required risk disclosures in various forms throughout its history,¹⁴ and several disclosure frameworks currently remain in place. Most notably, the Commission requires futures commission merchants and brokers to provide a specific written disclosure statement to customers

¹¹ Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318 (2018); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1767 (2004); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1271 (1995).

¹² The Supreme Court has suggested that disclosure requirements from the SEC do not fall under First Amendment protections. *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 64 (1973); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985). This has been further upheld by lower courts. See *Bulldog Invs. Gen. P'ship v. Galvin*, No. 07-1261-BLS2, 2007 WL 4647112, at *5 (Mass. Super. Dec. 26, 2007); *S.E.C. v. Agora, Inc.*, No. 1:03-cv-01042-MJG, 2007 WL 9725170, at *13 (D. Md. Aug. 3, 2007). It is likely that a similar exemption extends to CFTC regulations given the similarity in financial disclosure schemes. Both SEC disclosure requirements and CFTC disclosure requirements are intended to ensure that investors and consumers are well informed of potential risks when making financial decisions. As such, an exemption of securities disclosures from First Amendment protection would likely also extend to CFTC risk disclosures.

¹³ *United States v. Stevens*, 559 U.S. 460, 471 (2010); see also, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011).

¹⁴ The CFTC has implemented and promulgated rules regarding risk disclosures frequently throughout its history. These rules include approving exemptions for certain commodity pool trade advisors from specific disclosures and record keeping; allowing registrants to give "generic" risk disclosures to satisfy requirements for commodity futures transactions; revising rules on risk disclosures to further explain the requirements; and eliminating risk disclosure rules for certain parties while increasing them for other market participants. *History of the CFTC*, Commodity Futures Trading Comm'n, https://www.cftc.gov/About/HistoryoftheCFTC/history_2020s.html (last visited Oct. 5, 2022).

to inform them of the potential risks associated with futures trading.¹⁵ Additionally, swap dealers and participants must disclose to their counterparty information on material risks of the swap, including liquidity, market, legal, credit, operational, and “any other applicable risks.”¹⁶ Climate-related risk disclosures could easily fit within these frameworks. Just as the extensive prior disclosure requirements have been accepted without raising First Amendment concerns, any new disclosure requirements for climate-related risks may be exempt from First Amendment review.

However, even if climate-related risk disclosure requirements are not treated as outside the First Amendment, they would still comply with the First Amendment under its compelled commercial speech framework. Content-based speech regulations typically receive strict scrutiny review under the First Amendment,¹⁷ but various forms of speech receive a lesser degree of scrutiny, including commercial speech.¹⁸ Commercial speech typically means “speech that . . . propose[s] a commercial transaction,”¹⁹ but courts have called for a “common-sense distinction”²⁰ between commercial and non-commercial speech and have employed a fact-based analysis to determine whether speech fits into this category.²¹ As such, courts have understood disclosure regulations to fall under the commercial speech umbrella.²²

The test for when the government may compel commercial speech (such as mandating a disclosure) falls under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.²³

¹⁵ *Futures Commission Merchants (FCMs) Disclosure*, Commodity Futures Trading Comm’n, <https://www.cftc.gov/IndustryOversight/Intermediaries/FCMs/fcmibdisclosures.html#:~:text=The%20state%20informs%20the%20customer,opening%20a%20commodity%20options%20account> (last visited Oct. 5, 2022).

¹⁶ 17 CFR § 23.431 (2012).

¹⁷ *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [hereinafter *NIFLA*].

¹⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

¹⁹ *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); see also *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

²⁰ *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (quoting *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014); *Ohralik*, 436 U.S. at 455–56).

²¹ *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017).

²² See *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (per curiam) (citing *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 796 (1988)) (“Defendants’ first argument, that the stand-alone corrective statements do not fall within the commercial speech doctrine because they are not attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden.”); see also Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 *Ariz. L. Rev.* 421, 427 (2016).

²³ 471 U.S. 626, 651 (1985). The Supreme Court established a four-part test to determine the lawfulness of a commercial speech regulation in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*. 447 U.S. at 566. Under *Central Hudson*, in order for a regulation to be constitutional, the test requires that it must: first, “concern lawful activity”; second, be speech the government has a substantial interest in; third, “directly advance” that government interest; and fourth, “be no more extensive than is necessary” to advance that interest. *Id.* at 563-66. *Zauderer* applied a lower standard when the speech in question is compelled speech to prevent “deception of consumers.” 471 U.S.

There, in examining disclosure requirements for a legal services advertisement, the Supreme Court explained that the commercial interest implicated in disclosure requirements was that of an individual to *not* provide specific factual information. The Court held that the government may compel a disclosure that is “factual and uncontroversial” so “as long as disclosure requirements are reasonably related to the [government’s] interest.”²⁴ Notably, as lower courts have explained, a statement of fact does not become controversial simply because it “can be tied in some way to a controversial issue”²⁵ or because a *listener* may use the fact to inform an opinion. Disclosures will generally be treated as uncontroversial when the information itself is factual, i.e., objectively true, and not a statement of opinion or policy.

A quick survey of cases illustrates how this standard applies. In *AMI*, the D.C. Circuit upheld a regulation requiring the disclosure of meat products’ country of origin (despite the burden in collecting it) because the information itself was purely factual (and therefore uncontroversial for *Zauderer* purposes). Disclosure itself was a straightforward matter, and the long history of concern about country of origin revealed the government’s interest in mandating disclosure.²⁶ The Second Circuit similarly upheld a requirement that restaurants disclose the calorie content of menu items under a similar analysis.²⁷ And the D.C. Circuit upheld a tobacco disclosure mandate that was confined to “purely factual and uncontroversial information” intended to prevent tobacco companies from capitalizing on “consumers’ existing misperceptions” and was therefore “reasonably related to the [government’s] interest in preventing deception of consumers.”²⁸

In contrast, where courts found that compelled speech did not survive *Zauderer* review or applied a higher standard of review, the rule in question did not compel commercial, factual speech about a product or service provided by the speaker. In *NIFLA v. Becerra*, the Supreme Court struck down mandatory notices at crisis pregnancy centers.²⁹ These clinics were not selling their services at all, so the speech at issue was not commercial under the *Zauderer* line of cases.³⁰ Additionally, one of the types of compelled speech at issue (a required notice about state-sponsored services, including abortions, provided by others) “in no way relate[d] to the services” that the crisis pregnancy centers provided but to services provided by others.³¹ The Court went on to note that the notice was about “abortion, anything but an ‘uncontroversial’ topic,” but this language appears to be dicta because the Court had already determined that *Zauderer* did not apply.³² The

at 651. Lower courts have clarified that *Zauderer* applies generally to compelled disclosures intended to improve the information environment for consumers. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) [hereinafter *AMI*].

²⁴ *Zauderer*, 471 U.S. at 651.

²⁵ *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019).

²⁶ *Id.* at 27.

²⁷ *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134, 136-37 (2d Cir. 2009).

²⁸ *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 327-28 (D.C. Cir. 2017).

²⁹ *NIFLA*, 138 S. Ct. at 2371.

³⁰ *Id.*

³¹ *Id.* at 2372.

³² *Id.*

other type of compelled speech at issue (a notice that the facility was unlicensed) failed because the government had provided no non-hypothetical justification for it and it targeted a small subset of speakers with no apparent basis.³³ In another example, in *National Association of Manufacturers v. SEC*, the D.C. Circuit struck down a requirement that companies disclose on their websites whether they could confirm that their minerals were “DRC [Democratic Republic of the Congo] conflict free.”³⁴ The court declined to apply *Zauderer* and instead applied a higher standard of review because the speech the rule compelled was a statement of value or opinion;³⁵ in other words, it did not require a statement of fact but an expression of moral culpability.³⁶ The court went on to find that the government interest—ameliorating the humanitarian crisis in the DRC—was sufficient under the higher standard but that any link between the interest and the rule was purely speculative.³⁷

Consequently, any appropriate climate-related risk disclosure requirement would fall well within the realm of *Zauderer* review so long as the rule compels only factual and uncontroversial information.

b. Disclosure requirements could be drafted in a manner that would withstand Zauderer review.

Climate-related risk disclosure requirements, properly crafted, would comply with the First Amendment under the *Zauderer* framework. Such disclosures should require only that registrants provide factual information, such as about weather-related hazards or other ways in which climate change creates potential financial risks for the commodity in question. Although some may debate *other* issues such as the cause or extent of climate change or whether to regulate climate-causing emissions, disclosures of factual information affecting the *financial* risk of commodities and futures would not be controversial for *Zauderer* purposes.

Any such disclosures should relate to the Commission’s interest in advancing greater transparency of potential financial risks. Disclosures would ensure that market participants have the necessary information to make informed financial decisions in light of the volatility and uncertainty climate change causes in the market. And they could be designed to present a burden comparable to the Commission’s existing disclosure frameworks. Requirements of this sort would be reasonably related to the Commission’s interests under *Zauderer*.

* * *

Given the substantial threat climate change poses to the commodity and futures trading markets as well as the U.S. financial system more broadly, climate-related risk disclosure requirements would be a reasonable tool for improving market stability. To the extent the Commission is

³³ *Id.* at 2377-78.

³⁴ *See* 800 F.3d 518 (D.C. Cir. 2015).

³⁵ *Id.* at 163-64.

³⁶ *Id.* at 167.

³⁷ *Id.* at 166-67.

considering disclosure requirements, the First Amendment should not pose a substantial barrier.

If you have any questions or would like to discuss the information in this comment, please contact Samara Spence at 202-701-1785 or sspence@democracyforward.org.

Respectfully submitted,

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