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June 1, 2022

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100 F Street, NE
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File No. S7-10-22; Proposal on Climate-Related Disclosures for Investors

Before taking office, each SEC Commissioner swears an oath to support and defend the Constitution.[1] The oath is a reminder that actions taken by government officials have the power to undermine our basic liberties. In swearing to support and defend the Constitution, incoming Commissioners promise that they will at least try not to do so.

The oath is especially important for Commissioners of the SEC because their agency is, fundamentally, a regulator of speech. Essentially all of securities regulation either restrains speech, as in the case of the "gun-jumping" rules, or compels it, as in the case of the myriad disclosure mandates catalogued in Regulation S-K. As a result, the actions of the SEC are in constant tension with the First Amendment's prohibition against "abridging the freedom of speech." SEC Commissioners therefore must take special care to conform their rulemaking to First Amendment limits.

Nevertheless, three SEC Commissioners have forced through the Proposed Climate-Related Disclosure rules without making any effort to defend the constitutionality of their actions.[2] The Proposed Rule Release mentions the prospect of a

[1] 5 U.S.C. § 3331 (2015) (" "I, [ ], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.").

[2] The proposed rule was supported by Chair Gensler and Commissioners Crenshaw and Lee. It was opposed by Commissioner Peirce, who noted the First Amendment problem in her dissenting statement. See Hester M. Peirce, We are Not the Securities and Environment Commission – At Least Not Yet, available at https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (noting that "This proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech.").

First Amendment problem only once, in reference to an objection raised in comment letters.[3] The Proposed Rule Release makes no effort to answer the objection or to address the constitutional problem at all. Instead, it ignores it.

This is contrary to the Commissioners' oath to support and defend the constitution. The Proposed Climate-Related Disclosures are, in fact, an unconstitutional abridgment of the freedom of speech, as I explain in my draft law review article, ***What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment***, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4118755 and attached to this letter. In the Article, I show that although the vast majority of mandatory disclosure regulations are consistent with First Amendment doctrine, the Proposed Climate-Related Disclosures are not. The paragraphs that follow summarize my analysis.

Securities regulation involves commercial speech—that is, speech involved in the buying and selling of some good or product—in this case investment products. According to Supreme Court precedent, commercial speech receives *limited* constitutional protection.[4] Commercial speech is protected because consumers in a market economy require the free flow of information about products, but its protection is limited because the consumer protection rationale leaves room for regulations aimed at protecting consumers.[5] As the doctrine has developed, a form of intermediate scrutiny has been applied to rules *restraining* commercial speech,[6] but a substantially lesser standard often applies to rules *compelling* commercial speech, provided that the required disclosures are "purely factual and uncontroversial."[7]

The hinge on which the First Amendment analysis turns is the concept of controversy. What makes a disclosure "purely factual and uncontroversial?" I argue that this requirement operates as a pretext check to ensure that the regulator has not exceeded the plausible bounds of the commercial speech doctrine. In this way, the analysis of controversy does not look to any outside constituency but rather to the plausibility of the consumer protection rationale. A regulation that is plainly focused on consumer

[3] Proposed Rule Release, 21 ("Some commenters also argued that mandated climate disclosure rules could violate First Amendment rights.") (citing letters received from letters from the Institute for Free Speech, the West Virginia Attorney General, and the Texas Public Policy Foundation).

[4] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976).

[5] Id., at 771-72 ("[T]he stream of commercial information [must] flow cleanly as well as freely.").

[6] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY, 447 U.S. 557 (1980).

[7] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652-53 (1985); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

protection is uncontroversial and therefore entitled to deference, but a regulation that can plausibly be attributed to some other motive is controversial.

Applied to securities regulation, the compelled commercial speech paradigm requires the SEC to justify disclosure mandates as a form of investor protection. I argue that investor protection must be conceived on a class basis—the interests of *investors qua investors* rather than focusing on the idiosyncratic preferences of individuals or groups of investors. Focusing on investors *as such* reveals a common core—specifically, concern for the financial return of an investment. Understanding financial return as the core interest common to all investors clarifies the limits of the SEC's authority to protect investors. Disclosure mandates that are uncontroversially motivated to protect investors are eligible for deferential judicial review. Disclosure mandates failing this test must survive a form of heightened scrutiny.

The Proposed Climate-Related Disclosures fail to satisfy these requirements. Instead, the proposed climate rules create controversy by imposing a political viewpoint, by advancing an interest group agenda at the expense of investors generally, and by redefining concepts at the core of securities regulation. Having created controversy, the proposed rules are ineligible for deferential judicial review. Instead, a form of heightened scrutiny applies, under which they will likely be invalidated. Much of the ESG agenda would suffer the same fate, as would a small number of existing regulations, such as shareholder proposals under Rule 14a-8. However, the vast majority of the SEC's disclosure mandates, which aim at eliciting only financially relevant information, would survive.

Lengthy support for these arguments can be found in the attached Article. It is my hope that the Commissioners will consider these arguments and, consistent with the oath they took upon assuming office, withdraw the unconstitutional rule proposal.

Sincerely,

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