June 16, 2022

****Via electronic submission: https://www.sec.gov/cgi-bin/ruling-comments****

Ms. Vanessa Countryman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Proposed Rule Regarding "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (File Number S7-10-22)

Dear Ms. Countryman:

The National Restaurant Association and the Restaurant Law Center welcome the opportunity to submit these comments addressing the SEC's Proposed Rule on The Enhancement and Standardization of Climate Related Disclosures for Investors ("Proposed Rule").

The National Restaurant Association was founded in 1919 and is the nation's largest trade association representing and supporting the restaurant and foodservice industry. Its mission is to represent and advocate for industry interests, primarily with national policymakers. Nationally, the foodservice industry consists of more than one million restaurant and foodservice outlets employing about sixteen million people—about ten percent of the American workforce. The foodservice industry is the nation's second-largest private-sector employer.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts and before regulatory agencies. Through regular engagement on behalf of the industry, the Restaurant Law Center provides regulatory agencies and courts with the industry's perspective on important issues, like the Proposed Rule, that may significantly impact the restaurant and foodservice industry.

The restaurant and foodservice industry is the lifeblood of the American economy. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits to small family-run neighborhood restaurants, and everything in between. The industry employs over 14 million people, the nation's second-largest private-sector employer. The industry also contributes directly and indirectly to the livelihood of others, including suppliers, purveyors, farmers and ranchers, distributors, myriad professional service providers, as well as governments who benefit from added tax revenue. Restaurants are cultural centers and community anchors, too. They drive commercial revitalization, provide opportunities for upward mobility and ownership (particularly for minorities, immigrants, women, and historically disadvantaged communities), and foster neighborhood identities.

As responsible stewards of the environment, the restaurant industry has long supported efforts to assess, improve, and report on environmental impacts. Specifically, the industry has worked to collaborate with governments, businesses, partners, customers, and other stakeholders to promote and adopt measures designed to address climate change. Restaurants have also enhanced efforts to reduce their environmental footprint in many ways—including by creating science-based targets in line with the Science Based Targets initiative on greenhouse gas emissions; establishing best practices in setting net-zero targets and achieving emission reductions; committing to increased transparency; pursuing renewable energy solutions and improving energy efficiency; identifying and implementing new solutions on sustainable packaging and recycling; and reducing food waste.

Nevertheless, the National Restaurant Association and the Restaurant Law Center cannot support the Proposed Rule in its current form. While the industry recognizes the need for predictable and workable compliance regimes and for clear guidelines for communicating with stakeholders about climate issues, the Proposed Rule provides neither. Instead, the Proposed Rule would impose unrealistic, unwarranted and costly obligations on the industry by requiring development and disclosure of a wide array of climate-related metrics and issues that are not material to restaurant businesses and not material to investors. In other words, the Proposed Rule may not actually drive meaningful disclosures for investors or foster environmental improvements.

Yet the Proposed Rule threatens to impose these obligations at a time when the restaurant industry is already reeling—after bearing the brunt of the COVID-19 pandemic, facing major challenges resulting from inflation and supply chain issues, and experiencing steep increases in labor, energy, and ingredient costs, among others. Moreover, the Proposed Rule's heavy financial and legal burdens would be felt not only by restaurants themselves, but also by suppliers and partners facing unfunded and unfeasible compliance mandates, customers facing higher prices, and investors facing lower returns. With little if any added benefit to investors from requiring additional unnecessary disclosures, the high burdens imposed by the Proposed Rule are unfounded.

The National Restaurant Association and the Restaurant Law Center therefore urge the SEC to significantly alter the Proposed Rule to substantially narrow it, as described below, if the SEC does not withdraw the Proposed Rule entirely in light of the multiple legal defects that call into question the SEC's authority to issue the Proposed Rule in the first place.[1]

The Proposed Rule Imposes Significant Burdens and Costs on Public Companies Without Creating A Meaningful Improvement in Disclosure of Material Information.

The Proposed Rule is a substantial change with wide-ranging implications that would impose significant, unnecessary, and undue burdens and costs on the restaurant industry. For example, among other things, the Proposed Rule requires companies to do all of the following, each of which would impose overly onerous consequences:

- Disclose certain climate-related information ranging from governance, business strategy impact and risk management of climate-related risks, to GHG emissions and climate-related goals and targets in the domestic company's registration statements and annual report on Form 10-K;
- Disclose certain GHG emissions, regardless of their materiality to the company, and include the disclosure period, the GHG categories, Scope 1 and 2 emissions, Scope 3 emissions in some instances, and GHG intensity, and include an attestation report;
- Disclose certain climate-related financial metrics in their consolidated financial statements beyond a 1% threshold in annual reports and registration statements; and
- Phase-in the Proposed Rules by certain compliance dates depending on the company's filing status.

[1] For purposes of brevity and to avoid unnecessary overlap, RLC expressly incorporates by reference the comments and arguments made by others in this proceeding and preserves all rights to assert at the proper time any additional arguments raised in those submissions.

In contrast to the SEC's expressed desire to move toward reducing and simplifying disclosure burdens on public companies,[2] these new obligations actually increase and complicate disclosure burdens. In substance, cost, and potential liability, the Proposed Rule's mandates represent the most sweeping disclosure requirements since Dodd-Frank.

The full magnitude of the cost and complication of compliance is not yet clear. Even the Commission itself has been unable to provide meaningful guidance about the likely expected costs to comply with the Proposed Rule's many disclosure requirements.[3] But what is clear is that the high costs are further exacerbated by the Proposed Rule's lack of specific, workable guidance for companies if they are forced to undertake significant new efforts to identify, track, report, and attest under the auspices of the Proposed Rule.

Against these major costs and burdens, the Proposed Rule may not actually drive meaningful disclosures for investors or foster environmental improvements. Under the securities laws, companies are already obligated to disclose all information that is "material" to an investor, meaning that the information may be significant to a shareholder making an investment or voting decision.[4] As such, as the SEC itself has recognized, the existing framework drives disclosure of environmental, social,

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[2] SEC, *FAST Act Modernization and Simplification of Regulation S-K* (March 20, 2019) available at https://www.sec.gov/rules/final/2019/33-10618.pdf.

[3] Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission – At Least Not Yet*, U.S. SEC (March 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321; *see also* Proposed Rule, p. 86 (recognizing that complying with certain aspects of the Proposed Rule may be costly and difficult).

[4] *See* 15 U.S.C. § 78j(b); 15 U.S.C. § 78n; 17 C.F.R. § 240.10b-5; *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (describing as material information that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

and corporate governance (ESG) issues, including those related to climate change, when that information is material to investors in light of the specific circumstances.[5]

In other words, to the extent that disclosures about GHG and related issues are material for restaurant companies today, those companies are already required under existing law to provide all such disclosures. And to the extent such disclosures are *not* material to a restaurant company's investors, then under current law those companies are not required to disclose such information. Yet under the Proposed Rule, Item 1504 of Regulation S-K would require all registrants to disclose information about their GHG emissions, regardless of whether they are in fact material to the company or its shareholders. Importantly, requiring disclosure of information that is not necessarily material may not only be contrary to the law, but also may have far-reaching unintended negative ramifications. For example, given limited amounts of investor attention, requiring restaurant enterprises to disclose immaterial information may have the perverse effect of actually reducing the amount of information that an investor notices and absorbs.[6]

Specific Elements Of The Proposed Rule Are Especially Problematic For The Restaurant Industry.

In light of the questionable legal foundation for the Proposed Rule, *see infra*, it should not proceed at all. However, assuming that the Commission will nevertheless pursue the Proposed Rule in some fashion, the four specific elements of the Proposed

[5] Henry Engler, *"Double materiality": New legal concept likely to play in debate over SEC's climate plan*, Thomson Reuters (April 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate/; Alexander J. May, Charles D. Riely, and Gabrielle Sigel, *SEC Enforcement Division's ESG Task Force "Lifts the Vale" on its Scrutiny of ESG Disclosures*, Jenner & Block (May 11, 2022), https://jenner.com/library/posts/21805.

[6] *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (noting that an unnecessarily loose materiality standard "might bring an overabundance of information within its reach, and lead management 'simply to bury the shareholders in an avalanche of trivial information - a result that is hardly conducive to informed decisionmaking.'").

Rule discussed below are acutely problematic for the restaurant industry and should be corrected. At a minimum, then, if the Commission moves forward with this Proposed Rule, it should take these concerns into account by providing clear guidance that can be applied easily and consistently by the broad and diverse array of companies across the economy, including those in the restaurant industry.

1. *Scope 3 disclosure requirements, as proposed, would be nearly impossible to accurately implement in the restaurant industry. The SEC therefore should remove the Scope 3 reporting requirements from the final rule. If Scope 3 is not severed from the final rule, reporting should be furnished to the SEC rather than publicly filed.*

Scope 3 reporting would require restaurant companies to disclose a wide array of information about activities of individuals and entities in the company's value chain, both upstream (e.g., farms, manufacturers, distributors) and downstream (e.g., delivery services, consumers). This would include emissions of all other businesses that are not directly owned, controlled or impacted by the company. The tremendous reach of Scope 3 reporting leaves restaurants with the major challenge of accurately reporting on the metrics of their extensive value chains. And that challenge is made all the more difficult given the structure of the restaurant industry and its reliance on other companies (including many small businesses) that are not well-equipped to gather or provide such information. The value supply chain for restaurants is different than any other industry, and Scope 3 requires estimation and third-party information which cannot be a part of a 10-K filing or other public filing. If the SEC advances Scope 3 emissions within the final rule, these reports should be considered and treated as furnished rather than filed.

Notably, the Proposed Rules regarding Scope 3 reporting do not include a quantitative definition of materiality. The SEC made one reference indicating that it considered including a quantitative materiality standard with respect to Scope 3 emissions, but decided against a bright-line rule, reasoning: "because whether Scope

3 emissions are material would depend on the particular facts and circumstances, making it difficult to establish a 'one size fits all' standard."[7] The absence of clear guidance about materiality and reporting requirements, however, creates a challenge for many companies and may affect the SEC's goals of comparability and consistency in climate-related disclosures because it will spur companies to submit a wide array of disparate information.

Moreover, Scope 3 emissions calculation methods are highly unreliable. Current methods can lead to duplicate emissions reporting, generating unreliable and confusing data for the public – the precise opposite outcome the SEC contends the Proposed Rule is intended and designed to achieve. To ensure filers and investors have meaningful information, the SEC should not make Scope 3 emissions reporting an annual burden. The immense time and cost investment does not yield material information on a year-to-year basis, and the SEC should consider a Scope 3 reporting schedule commiserate with the exhaustive process it requires.

The SEC proposal also creates a perverse incentive for companies to centralize all supply chain products in the attempt to accurately track data, at a time when less-centralized and more locally driven food is considered to be a way to combat climate change. Restaurants are fundamentally local operations, and using regional products makes both financial sense and reduces their environmental footprint. However, in light of the burdensome nature of the Proposed Rule and risk of data duplication, it will be easier and cheaper for restaurants to transact with larger, more centralized suppliers who can more easily provide emissions data than it will be to transact with local suppliers and farmers who do not have such data readily available and which data will be more difficult for restaurant owners to process.

[7] Proposed Rule, p. 174.

2. *The 1% threshold for greenhouse gas reporting requirements is unduly burdensome. It should be raised to 10% and greenhouse gas emissions should be reported on a CO2 equivalent basis.*

In today's economy, many restaurant companies may not be able to include metrics for each line-item activity at that threshold, or to collect the necessary data to make such disclosures. Therefore, with the goal of reducing excessive and harmful activities, the Commission should set a 10% financial statement line-item threshold for disclosure. This would better serve investors and the public—as well as the restaurant industry and the Commission itself—by focusing reports on the disclosure of significant, material emissions. It would also serve smaller entities by reducing costs while still making progress towards the Proposed Rule's underlying goals.

Under the Proposed Rule, a restaurant's financial statements would need to detail any climate-related event or transition activity that affects 1% or more of the financial statement line item. This arbitrarily low threshold would mandate that restaurant companies and other financial statement filers would track virtually all types of climate-related events or transition activities which adds to the burdensome nature of the Proposed Rule. Instead, and in order for regulated entities to properly implement this proposal, the SEC should provide detailed examples of all potential "climate-related events" as well as guidance related to how to accurately assess financial impacts.

The SEC rule requires filers to "disaggregate" their emissions reporting, adding another costly burden for restaurants. Restaurants uniquely utilize many distinct types of energy, resulting in different reporting mandates on methane (animal-based), nitrous oxide (agriculture and soil treatment for farming), fluorinated gas (refrigeration), and normal carbon dioxide emissions. Reporting on multiple types of gases with multiple types of reporting streams, mostly collected from third-party vendors, creates an undue burden on restaurants. This type of data should be compared via aggregated reporting in furnished, not filed, documentation.

3. *Extension of Phase-Ins: The phase-in of attestation standards should be extended. The phase-in of limited assurance should be extended by three years, and the transition to reasonable assurance should be extended by six years.*

The attestation requirement for Scope 1 and 2 emissions progresses to limited assurance by 2025 and reasonable assurance by 2027. If a company is currently voluntarily attesting to its emissions disclosures, the common standard is limited assurance. Establishing processes and controls takes time and resources that the industry cannot currently afford to dedicate to the task.

The assurance that companies must acquire under the Proposed Rule will be very expensive. These added expenses may be particularly difficult for members of the restaurant industry to absorb—in the aftermath of the pandemic and facing broad economic headwinds that are not expected to abate any time soon.[8] Therefore, and as a result, the phase-in of limited assurance should be extended by three years, and the transition to reasonable assurance should be extended by six years. This additional time would provide the restaurant industry with critical flexibility and time to stabilize operations before dedicating substantial resources on efforts (including retention of third-party consultants) to compile such disclosures.

[8] National Restaurant Association, *2022 State of the Restaurant Industry* (January 31, 2022), https://restaurant.org/research-and-media/research/research-reports/state-of-the-industry/ (noting labor costs will continue to remain elevated and impact restaurant profit margins throughout 2022); Alicia Kelso, *How Inflation and Labor Shortages are Changing Menus*, Forbes (May 25, 2022), https://www.forbes.com/sites/aliciakelso/2022/05/25/how-inflation-and-labor-shortages-are-changing-restaurant-menus/?sh=5fab5a46be30 (noting that supply shortages, rising inflation, and higher food costs predicted to be the norm for some time).

4. *The Commission should allow GHG disclosures to be furnished, including on company websites, rather than filed with the SEC.*

The SEC's stated goal in its Proposed Rule is to provide investors with "consistent, comparable, and reliable" information on a company's environmental impact. But under the current proposal, companies lack a uniform and reliable method for reporting information, and thus may be subject to significant potential liability based on the statements made in reports filed with the SEC. The requirement to "file" GHG-related disclosures should therefore be removed. Alternatively, if not removed, the Commission at the very least should create a safe harbor for registrants by allowing them to disclose GHG emissions information publicly to investors by having it readily available on company websites and furnished but not filed with the SEC. This alternative, which the SEC has permitted in other contexts,[9] achieves the goal of getting information to investors while removing some of the compliance burdens and potential legal risks that the Proposed Rule will place on companies, including members of the restaurant industry.

The Proposed Rule Suffers from Multiple Legal Defects

Although implementing the suggested changes discussed above would reduce the Proposed Rule's negative impact on the restaurant industry, even those changes

[9] *See, e.g.*, SEC, General Instruction B.2 of Form 8-K ("The information in a report furnished pursuant to Item 2.02 (Results of Operations and Financial Condition) or Item 7.01 (Regulation FD Disclosure) shall not be deemed to be 'filed' for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section unless the registrant specifically states that the information is to be considered 'filed' under the Exchange Act or incorporates it by reference into a filing under the Securities Act or Exchange Act."); SEC, *XBRL Voluntary Financial Reporting Program on the EDGAR System*, 70 Fed. Reg. 6556, 6562 (Feb. 8, 2005) (providing that XBRL-Related Documents "are not deemed filed for purposes of Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act or otherwise subject to the liability of these sections"); 17 C.F.R. § 229.201 (Instructions to Item 201(e) providing that required information "need not be provided" in certain required SEC filings and "will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.").

cannot cure the fundamental legal defects that render the Proposed Rule invalid. Four such defects are highlighted below. First, the regulation of GHG emissions is outside the SEC's jurisdiction and expertise. Second, the Proposed Rule violates the major questions doctrine. Third, the Proposed Rule does not satisfy the requirements of the Administrative Procedure Act. Finally, the Proposed Rule violates the First Amendment's prohibition on compelled speech.

Regulating Greenhouse Gas Emissions is Outside the SEC's Jurisdiction and Expertise.

The Proposed Rule is beyond the SEC's statutory authority, outside the SEC's area of expertise and will require some registrants to report non-material information regarding climate change risks and greenhouse gas emissions.

A federal agency may only regulate matters within the bounds of its statutory authority.[10] The SEC's core mission—and statutory mandate—is to protect investors, facilitate capital formation, and promote fair, orderly, and efficient markets. The Securities Act and Securities Exchange Act grant the SEC rulemaking authority to require public disclosure of information it determines is "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security" of an issuer,[11] or "necessary or appropriate in the public interest or for the protection of investors."[12] When determining what disclosures to require, the SEC is statutorily

[10] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014) (stating that to avoid "a severe blow to the Constitution's separation of powers," an agency must act within the bounds established by Congress and may not rewrite statutory terms to suit its own sense of how a statute should operate); *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.")*.

[11] 15 U.S.C. § 78m(a).

[12] 15 U.S.C. §§ 77a, et seq.; 15 U.S.C. §§ 78a, et seq.; *see also* 15 U.S.C. §§ 77g(a)(1), 78l(b)(1).

required to consider investor protection and whether the disclosure will "promote efficiency, competition and capital formation."[13]

The Proposed Rules are outside the SEC's scope of authority. While the SEC must consider the public interest when carrying out its statuary mandate, the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. "Rather, the words take meaning from the purposes of the relevant regulatory legislation."[14] Here, the purpose of that regulatory legislation is to protect investors by requiring the disclosure of material information regarding the business, financial performance, securities and management of publicly traded companies.[15] The SEC itself has acknowledged that it is generally not authorized to mandate disclosures regarding environmental, sustainability or other broad societal goals absent "a specific congressional mandate."[16] But the SEC has no such mandate to require disclosures regarding climate change and GHG emissions: the Proposed Rule is primarily for the purpose of environmental protection, not investor protection, capital formation, or market efficiency. It therefore exceeds the SEC's statutory authority.

Moreover, the Proposed Rule goes beyond the SEC's authority by seeking to influence the registrant into altering operations to curtail GHG emissions. In other words, the Proposed Rule's disclosures are not designed to serve as a source of *information* to protect investors or promote an efficient marketplace, but rather to press public companies to change their businesses. The Proposed Rule even cites evidence "that mandatory reporting of GHG emissions results in reduced aggregate

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13 *Id.* §§ 77b(b), 78c(f); *see also id.* § 78w(a)(2).

14 *NAACP v. FPC*, 425 U.S. 662, 670 n.4 (1976).

15 *See* 15 U.S.C. § 77g(a)(1) and Schedule A (listing the required disclosures for registration statements for public offers); *id.* § 78l(b)(1).

16 SEC, Concept Release, *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23916, 23918–19, 23,922 (Apr. 22, 2016).

reported emissions" for companies required to make such reports.[17] This policy goal, however one views it, is beyond the SEC's authority.

That the Proposed Rule concerns complex issues of environmental policy further reinforces that the SEC is acting outside its ken. The Supreme Court has acknowledged that an agency's attempt to regulate issues beyond its area of expertise is an indication that the agency action is inconsistent with its underlying statutory purpose.[18] As Commissioner Peirce noted in her dissent, the SEC is not the agency charged by Congress with regulating the environment. In fact, the Environmental Protection Agency (EPA) already has regulations in force requiring mandatory GHG reporting for owners and operators of certain facilities that emit GHGs.[19] As the agency not charged with such policy questions, the SEC lacks the technical expertise to assess climate models and underlying assumptions used in companies' metrics and disclosures. Without such technical expertise, the SEC will likely review submissions arbitrarily, leading to uneven or unfair application.

The Proposed Rule Runs Afoul of the Major Questions Doctrine.

The SEC's efforts to use the Proposed Rule to enact environmental policy also raises an issue under the Major Questions Doctrine. Under the major questions doctrine, an administrative agency only has the authority to decide a major policy question if Congress clearly and unambiguously authorizes the agency to do so.[20] This

[17] Proposed Rule, p. 401.

[18] *See King v. Burwell*, 576 U.S. 473, 486 (2015); *see also Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006).

[19] *See* 40 C.F.R. §§ 98.1, et seq.

[20] *See, e.g., MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000); *Gonzales,* 546 U.S. at 243; *Ala. Ass'n. of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468–69 (2001); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.,* 448 U.S. 607, 645–46 (1980) (Stevens, J., controlling opinion).

doctrine protects the separation of powers by presuming that Congress would generally not want agencies to resolve national policy issues instead of the legislature.[21]

As applied here, absent specific authorization from Congress, the SEC cannot dramatically expand the scope of its authority by issuing regulations with such vast significance. When an agency purports to discover new authority to regulate a large portion of the economy in a long-standing statute, the courts typically treat such discoveries with a measure of skepticism.[22] For example, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Supreme Court recently found that OSHA's emergency temporary standard (ETS) mandating that large employers implement COVID-19 vaccination or testing requirements was too much of an encroachment into the lives – and health – of a large portion of the workforce to be implemented without express Congressional approval.[23] Given the Court's finding that the ETS had such vast impact, the Court applied the rule that: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[24] The Court granted a stay of the ETS because OSHA was unlikely to show that Congress had clearly authorized the agency to issue the ETS as written.

The fact pattern here is similar. Congress has not clearly authorized the SEC to require disclosure of climate risks and GHG emissions. The SEC's Proposed Rule requiring public companies to report climate change information and GHG emissions, whether or not such emissions are material to the company and its shareholders, has vast economic and political significance, as evidenced, in part, by the volume of

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21 *Indus. Union Dep't,* 448 U.S. at 645–46 (Stevens, J., controlling op.); *accord id.* at 685 (Rehnquist, J., concurring in the judgment).

22 *See Util. Air Regul. Grp.*, 573 U.S. at 302.

23 142 S. Ct. 661, 664-66 (2022) (per curiam).

24 *Id.* at 665 (quoting *Ala. Assn. of Realtors*, 141 S. Ct. at 2489).

comments the SEC has received regarding the Proposed Rule. Climate change policy is a task for Congress, not the SEC, and the SEC may not expand its authority without specific authorization from Congress.

The Proposed Rule Does Not Satisfy The Administrative Procedure Act.

The Administrative Procedure Act (APA) requires that agency action must be set aside when it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[25] In particular, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'"[26] "The Commission also has a 'statutory obligation to determine as best it can the economic implications of the rule.'"[27] "Indeed, the Commission has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation,' and its failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law."[28]

Here, the Commission's underlying rationale and factual assertions detailed in the Proposed Rule are unsupported, unreasonable, and fail to offer sufficient justification for choosing this proposal over alternative measures. The Commission unreasonably concludes that the Proposed Rule will generate "consistent, comparable, and reliable" disclosures even though the Commission has not provided

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[25] 5 U.S.C. § 706(2)(A), (C), (D).

[26] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.5 (1983) (citations omitted).

[27] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 n.2 (D.C. Cir. 2011) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

[28] *Id.* (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c) and citing *Chamber of Commerce*, 412 F.3d at 144).

sufficient quantitative or qualitative guidance about how the materiality threshold applies, or made any exceptions for companies (like many restaurants) with immaterial GHG emissions. Nor has the Commission provided clear, uniform guidelines on how information should be obtained or reported. Companies are thus tasked with collecting and reporting a wide range of environmental data which may or may not be what the Commission is actually seeking to require.

In sum, the Proposed Rule imposes substantial burdens without sufficient rationale or corresponding benefit. The Proposed Rule thus cannot withstand scrutiny under the APA.

The Proposed Rule Violates the First Amendment's Prohibition on Compelled Speech.

The Proposed Rule's mandated environmental impact disclosure is unconstitutional compelled speech. Generally, corporations are afforded First Amendment rights to tailor their speech—including expressions of value, opinions, and endorsements, as well as non-factual or controversial statements that the speaker would rather not make.[29] Accordingly, the First Amendment protects companies against being forced to speak unless the government demonstrates a substantial governmental interest that is directly and materially advanced by the rules, and that the rules are narrowly tailored.[30] And under the *Zauderer* test, to pass constitutional muster compelled speech must be purely factual, noncontroversial, and not unjustified or unduly burdensome.[31]

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[29] *National Ass'n of Mfrs. v. SEC.*, 800 F.3d 518, 523 (2015).

[30] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564-66 (1980); *see also Nat'l Ass'n of Mfrs.*, 800 F.3d at 521 (applying *Central Hudson*'s intermediate scrutiny to speech compelled by the SEC's prior conflict mineral disclosure rule).

[31] *CTIA – The Wireless Ass'n v. City of Berkeley*, 487 F.Supp.3d 821, 824 (2020); *Am. Bev. Ass'n v. City and Cty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019); *Nat'l Ass'n of Mfrs.*, 800 F.3d at 521.

SEC efforts to compel disclosure to achieve overall social benefits rather than direct economic benefits to investors—even when the benefit may relate to an important humanitarian issue—violate the First Amendment.[32] In other words, the Commission's interest in a public policy topic is not a sufficient basis to compel disclosure. Yet some may see that as the driving force behind the Proposed Rule. Moreover, the compelled speech at issue here may not satisfy the "uncontroversial" element of the *Zauderer* test given considerable public disagreement about measures relating to climate change. And the ambiguous and amorphous reporting requirements, combined with the lack of guidance about materiality, make it difficult to see the Proposed Rule as requiring disclosure of purely factual information that investors need to make informed decisions.

Conclusion

On behalf of the National Restaurant Association and the Restaurant Law Center, we thank you for this opportunity to submit comments and encourage you to contact either of us with any further questions or concerns.

Sincerely,

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[32] *National Ass'n of Mfrs.*, 800 F.3d at 526-27.