June 17, 2022

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

Re: Comments by the Oregon Farm Bureau on SEC's Proposed Rules on the Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22)

Dear Ms. Countryman,

Thank you for the opportunity to provide comments in response to the request by the Securities and Exchange Commission (the "SEC" or the "Commission") for public input on the enhancement and standardization of climate-related disclosures for investors (File No. S7-10-22) (the "Proposed Rules").

The Oregon Farm Bureau Federation ("OFB") is Oregon's largest general agriculture association, representing nearly 7,000 families engaged in farming and ranching. Oregon is a specialty-crop state, growing over 240 different commodities that help supply Oregon and the world with food, fiber, and critical cover crops that aid in the health and vitality of our soils. Agriculture is also a key contributor to Oregon's economy, making up 13 percent of the state's gross domestic product.

In the State of Oregon, 97% of our farms and ranches are family owned and operated. Many family farms and ranches are already struggling to manage labor costs, record high inflation, fertilizer costs, and supply chain issues. For our members, the SEC's proposal requiring companies to report on greenhouse gas emissions, climate-related targets and goals, as well as how climate risks impact businesses is not about the environmental goals of the agency, but rather the additional regulatory overreach being placed on the backs of our farmers and ranchers.

Unlike large corporations that are currently regulated by the SEC, family farms and ranches do not have compliance offers to manage additional regulations. In Oregon, our farm and ranch families face some of the strictest regulatory burdens in the United States, but adding another layer of responsibility, potentially the requirement to track and disclose information on day-to-day activities, could be the final straw for many of

our members struggling to hold on. To avoid these consequences, in the final adopted rules (the "Final Rules"), we highly encourage the Commission to consider the following:

- remove the "value-chain" concept from the Proposed Rules;
- remove or substantially revise the Scope 3 emissions disclosure requirement to include a carveout for the agricultural industry;
- remove the requirement that registrants provide disclosures pertaining to their climate-related targets and goals;
- provide guidance with respect to the Consolidated Appropriations Act's (2022) (the "CAA") prohibition on mandatory GHG emissions reporting for manure management systems;
- revise the Proposed Rules so that disclosures of GHG emissions operate in unison with existing federal emissions reporting programs;
- ensure the Final Rules do not include location data disclosures for GHG emissions, which may inadvertently disclose the private information of our members; and
- disimply a private right of action for Scope 1, 2, and 3 disclosures.

1. The Proposed Rules' Focus on the "Value-Chain" Concept Will Place Harmful Burdens and Costs on Farmers and Ranchers.

The requirement in the Proposed Rules for registrants to gather information from their value chain as it relates to climate-related risks and impacts from those risks and Scope 3 emissions will be extremely detrimental to farmers and ranchers.

The proposal defines "value chain" vaguely, extending upstream to "supplier activities" without a clear limitation and extends to an ill-defined downstream scope. Nearly every farmer and rancher, irrespective of size, at some point finds themselves in the upstream or downstream activities of a registrant's value chain. The agriculture supply chain is also extremely diverse in terms of the products produced and the various roles in which the products play in the creation of a variety of other products as well (*e.g.*, corn for livestock consumption as feed versus ethanol production as fuel).[1] Forcing the

[1] As an example of the complexities in the system, ethanol is generally produced from corn. Its production into ethanol, which happens through fermentation, generates CO2. Much of that CO2 is captured and then transformed into dry ice which is often utilized at meat packing plants. As well, distiller grains, a byproduct of the ethanol industry, are routinely sold and consumed as feed for livestock.

agriculture industry to disclose the litany of different ways in which our products are used will disproportionately impact our members. Many registrants will receive products from farmers and ranchers at different steps throughout their value chain. Further, asking registrants to evaluate all the material risks arising from all of the small- and medium-sized farms in their respective value chain will lead to further consolidated supply lines, harming the nation's rural communities in the process.

Moreover, registrants will likely demand additional data and information from farmers and ranchers or default to engaging only with larger farmers and ranchers that have more sophisticated data gathering and reporting systems or to simply vertically integrate their supply chains, leading to further consolidation.

In fashioning any Final Rule, the SEC should remove the expansive "value chain" concept, which departs from historical SEC materiality standards, is overly vague, would impose considerable burdens onto registrants and harm farmers and ranchers.

2. Mandatory Scope 3 Emissions Disclosures Will Squeeze Out Small and Mid-Sized Farmers and Ranchers.

Under the Proposed Rules, a registrant would be required to disclose Scope 3 emissions if such emissions are material or included in a previously disclosed emissions reduction target or goal. The Proposed Rules define Scope 3 emissions as, "all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain." Our small- and medium-sized farm and ranch members are deeply concerned about the indirect economic effects of Scope 3 emissions disclosures and the impact on data privacy.

The Proposed Rules will inevitably require registrants to pass the costs and burdens of reporting Scope 3 emissions onto farmers and ranchers. This is particularly problematic for our small- to medium-sized family owned farms and ranches, which are already dealing with increased production costs due to inflationary pressure and global supply chain disruptions. The burden of providing such disclosures and the estimation process would be hard for farmers and ranchers to overcome. The average family farm already must take significant time away from the actual business of farming to demonstrate compliance with a tangled web of federal, state, and local regulation. A farm is not a power plant where a known quantity of fuel produces a known quantity of energy. On any given day, a farm may require more or less water, more or less fertilizer or crop protection products. Tracking such fluctuations in the context of GHG emissions would be daunting. Additionally, the likelihood that estimation methodologies will change over time risks causing confusion.

Further, and as the USDA acknowledges, data shows that the profitability of farmers and ranchers increases with scale.[2] Meaning, inevitably, a significant cost of the proposed Scope 3 disclosure would be borne by the least able to afford it—small- and medium-sized farms and ranches. Because our small- and medium-sized members often deal with thinner profit margins compared to their large peers,[3] the Proposed Rules could lead to a market shift whereby registrants prefer to use only those farms that can afford to invest in the controls and processes necessary to track emissions down to the product level.[4]

We believe that such a consequence would be disastrous for our small- and medium-sized farms, lead to further monopolization and vertical consolidation within the agriculture sector (harming farmers, ranchers and consumers) and severally erode the gains made by farmers and ranchers from historically underrepresented backgrounds.

As well, for those farmers and ranchers that can afford to invest in such technology and controls, they will be less able to invest in renewable or sustainable technology that could actually reduce the environmental footprint of the farm or ranch. For example, modernized irrigation systems that would reduce a farm's water consumption, or reduced nitrogen fertilizer applications that would improve farming (land) regeneration, will be put aside in favor of emissions reporting and tracking software so that these farms and ranches do not risk losing business with their registrant partners.

Therefore, we believe that the Commission must remove the Scope 3 emissions disclosure in its entirety, or, alternatively, the Commission should provide a specific carveout for the agricultural industry. Such a carveout should explicitly make clear that registrants do not need to include Scope 3 emissions from the agricultural industry in their respective disclosures. This type of carve out is not unprecedent, and Congress has previously provided similar exemptions for the agricultural industry, such as Section 437 of CAA (discussed in Section 4).[5] By including such a carveout for the agricultural industry, the Commission would avoid the externalities associated with such a complex and difficult reporting regime, while also preserving the competitiveness of the agricultural industry.

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[2] *See* Robert A. Hoppe, Profit Margin Increases With Farm Size, U.S. Department of Agriculture (Feb. 2, 2015), available at https://www.ers.usda.gov/amber-waves/2015/januaryfebruary/profit-margin-increases-with-farm-size/.

[3] *See id.*

[4] It is important to realize that not everything produced for sale on a farm or ranch emits the same amount of GHG emissions and farms and ranches sell multiple products all of which emit varying levels of GHG emissions. Thus, our members will need to individualize their GHG emissions calculations down to the product level, which will cost even more resources than a system that purely tracks all gross emissions for a single product output.

[5] *See* Consolidated Appropriations Act, 2022, H. R. 2471—372, 117th Cong. §437 (2022).

3. Mandatory Disclosures on Climate-related Targets and Goals Will Disincentivize Registrants From Using Sustainable Agricultural Products.

Our members are concerned that the Commission's Proposed Rule on climate-related targets and goals could disincentivize companies from setting targets in the first place, diminishing the ability of farmers and ranchers to economically capitalize on climate-smart agriculture opportunities. Given the level of granularity and detail the Proposed Rule requires for companies that make such targets and goals, it seems reasonable that this will cause some registrants to not set them in the first place or cause other registrants to retract previously set targets or goals.

4. The SEC Should Provide Guidance to Registrants on How They Should Exclude GHG Emissions From Manure Management Systems in Their GHG Emissions Disclosures.

The SEC should provide guidance on how registrants should report GHG emissions in light of the prohibition on GHG reporting set forth in Section 437 of CAA.[6] Section 437 of the CAA states that "[n]not withstanding any other provision of law, none of the funds made available in this or any other Act may be used to implement any provision in rule, if that provision requires mandatory reporting of greenhouse gas emissions from manure management systems."[7] Section 437 prohibits all agencies government-wide—including the SEC—from using funds to require mandatory reporting of GHG emissions from manure management systems.[8] This prohibition extends to the use of non-appropriations funds *(e.g.*, Section 31 fees) as money received by the government would be deposited in the Treasury per the Miscellaneous Receipts Act, and use of such funds would still be considered a federal appropriation.[9] Under the Proposed Rules, presumably, registrants would be required to disclose GHG emissions from manure management systems as the Proposed Rules provide no guidance with respect to how a registrant should exclude such emissions from its GHG emissions disclosure and manure management is a significant part of dairy, meat, poultry and protein production.

Manure management systems are ubiquitous features of farms and ranches, and our members are concerned with the lack of guidance with respect to the CAA prohibition and the SEC's Proposed Rules. Therefore, our organizations and members recommend that the SEC should clearly indicate that registrants that operate manure management systems are not required to disclose such GHG emissions and provide guidance to

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[6] Consolidated Appropriations Act, 2022, H. R. 2471—372, 117th Cong. §437 (2022).

[7] *Id.*

[8] *See id.*

[9] Congressional Research Service, Congress's Power Over Appropriations: A Primer, (Jun. 16, 2022), available at https://crsreports.congress.gov/product/pdf/IF/IF11577.

registrants and auditors on how they should exclude such emissions from their respective mandatory GHG disclosures.

5. Location Data About the Source of Emissions May Create Privacy Concerns for Farmers.

Question 108 of the proposing release requests if the SEC should require registrants to provide location data for its GHG emissions in the Final Rules.[10] We urge the SEC not to adopt such a requirement in Final Rules as this may result in serious privacy concerns for farmers. If registrants are required to disclose the location of sources of GHG emissions in their value chain, this may inadvertently reveal to the public data about a farmer at a particular location. Greater access to farmer data creates serious privacy concerns. Courts have protected farmers from disclosure of personal information and have recognized that farmers are uniquely situated in that they generally live on their farm, meaning that business information is also personal information.[11]

6. The Final Rules Should Provide A More Robust Safe Harbor That Precludes All Implied Private Rights of Action for Alleging Defects in Quantitative Scopes 1, 2, or 3 disclosures.

In the Final Rules, the Commission should provide a stronger safe harbor for the disclosures of Scopes 1, 2 and 3 emissions. Under the Proposed Rules, Scope 3 disclosures are deemed not fraudulent unless made or reaffirmed "without a reasonable basis" or disclosed "other than in good faith." However, we don't believe this would serve as a meaningful roadblock to litigation for a plaintiffs' class action counsel, who routinely plead around this requirement.

To remedy these concerns, we believe that the Commission can and should provide a more robust safe harbor that precludes all implied private rights of action alleging defects in quantitative Scopes 1, 2 or 3 disclosures. The Commission's authority to disapply the Rule 10b-5 private right of action for Scopes 1, 2 or 3 disclosures is supported both by prominent legal scholars and the Supreme Court.[12] A robust safe harbor of this nature would provide the appropriate level of liability protection for Scopes

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[10] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21382 (Apr. 11, 2022).

[11] *See American Farm Bureau Federation v. EPA*, 836 F.3d 963 (8th Cir. 2016) (public disclosure of farmers' personal information would constitute a "substantial" and "clearly unwarranted invasion of privacy" and is therefore exempt from disclosure under the Freedom of Information Act). *See also Campaign for Family Farms v Glickman,* 200 F. 3d 1180 (8th Cir. 2000) (whether acting in a personal capacity or as a shareholder in a corporation, disclosure of financial records of individually owned businesses invokes need of personal privacy exemption, citing *National Parks & Conservation Ass'n v Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)).

[12] *See* Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harvard Law Review 961-1024 (1994); *see also*, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., et al.*, 552 U.S. 148 (2008).

1, 2 or 3 disclosures and incentivize registrants to provide voluntary disclosures. As well, the SEC and the Department of Justice would retain the authority to institute proceedings alleging defects in Scopes 1, 2, or 3 disclosures—providing the intended deterrent effect and ability to police against fraud—while minimizing the externalities, both in terms of increased insurance premiums and legal fees associated with such a novel and expansive disclosure regime as the Proposed Rules.

7. Potential Legal Challenges to the Proposed Rules.

In addition to the concerns with the specifics of the proposal, we urge the Commission to consider whether it has the legal authority to implement the Proposed Rules. For one, requiring this type of expansive disclosure raises questions under the compelled-speech doctrine. Many registrants publish sustainability reports and are voluntarily trying to meet investor demand for climate-related disclosures. However, the Proposed Rules could be viewed as the Commission seeking to compel such speech in the form of SEC disclosures. Because of the magnitude of the SEC's proposal that cuts across every aspect of the U.S. economy–and beyond–the Commission should consider whether this is a matter for the Congress to act or direct, before embarking on this rulemaking. Further and along the same lines, the SEC should revisit whether the Commission's existing statutory authority granted to it by Congress is sufficient to require the detailed disclosure of climate-related metrics, and in particularly, whether the Proposed Rules satisfy the requirements set forth in Section 13(a) of the Exchange Act.[13] The SEC should strongly consider these and other legal principles before finalizing a climate-related disclosure rule.

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We appreciate the opportunity to provide comments on the Proposed Rules and would be happy to discuss these comments and our members concerns or provide you with further information to the extent you would find it useful.

Respectfully submitted,

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Oregon Farm Bureau

[13] *See generally* 15 U.S. Code § 78m(a).