



TENNESSEE FARM BUREAU FEDERATION

June 17, 2022

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

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

Dear Ms. Countryman,

The Tennessee Farm Bureau Federation (TFBF) represents a diverse aggregate of commodity producers across the state and with over 680,000 members, is the largest general farm organization in Tennessee. On behalf of our member producers, we appreciate the opportunity to submit comments 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"). In addition to these comments, we encourage the Securities and Exchange Commission to consider comments submitted by the American Farm Bureau Federation.

According to the University of Tennessee, in 2020, farming operations occupied 10.8 million acres in Tennessee, around 40 percent of the state's nearly 27 million acres of land area. Just under 49 percent of the farmland in Tennessee is operated as cropland. Of Tennessee's 69,500 farming operations, average farm size in 2020 was around 155 acres. Tennessee ranks 9th in the U.S. in terms of the number of farming operations but 25th in terms of acres operated, reflecting farm sizes smaller than the U.S. average.

Farmers have a deep and long-standing interest in protection of the environment based upon philosophical beliefs and practical self-interest. The climate is important to all of agriculture and our families. Land is typically a farmer's largest asset and primary source of income. Farmers have every incentive to leave this natural resource in better shape for the next generation. Modern agriculture is environmentally sustainable, and farmers strive to constantly improve the environmental resources in their care while playing a significant role in climate solutions. Success in farming is dependent on the climate. Farmers continually strive to balance earning a living from the land while being stewards of the land, air, and water. Increasingly, farmers are asked to produce more using fewer resources all the while decreasing agricultural greenhouse gas (GHG) emissions. Therefore, we believe this illustrates voluntary, market-based incentives are helping farmers accomplish these milestones all while making real progress on climate-change.

Sustainability and efficiency on the farm positively correlate. Farmers today are doing more with less because of innovation and technology. In fact, U.S. agriculture would have needed nearly 100 million more acres 30 years ago to match today's production levels. Smarter farm equipment, precision agriculture tools, and biotechnology are helping farmers care for their crops, while using less water, fertilizer, and pesticides.

As farm efficiency improves, GHG emissions decrease in the livestock sector. Although livestock emissions attract attention in discussions around sustainability, they make up less than three percent of overall emissions in the U.S., and those numbers are declining because of improvements in feed and production. Farmers are improving efficiency and promoting healthy soil by planting cover crops and adopting practices which reduce and, in some cases, eliminate the need for tillage. Healthier soil means cleaner air and water, as farmers sequester carbon in the soil and reduce runoff with these practices.

Agriculture can play a role in offsetting emissions beyond the farm gate. From climate-smart farming practices to voluntary management of forests, grasslands, wetlands and croplands, farmers are not only reducing their footprint but also are actively absorbing carbon from the atmosphere. According to the Environmental Protection Agency (EPA), land management practices alone removed 764 million metric tons of carbon dioxide from the atmosphere in 2018. This is equal to taking 165 million vehicles off the road for a year.

Tennessee farmers have made great strides in conservation efforts in the recent decades by improving nutrient use efficiency and environmental outcomes. Many farmers have adopted all viable conservation practices for their operations and are concerned of the missed opportunity to be rewarded for their efforts. Of the row crops grown in Tennessee, over 80 percent is planted using no-till and conservation tillage methods according to the 2017 USDA Census of Agriculture. Additionally, many have already adopted the use of cover crops. Implementing these practices are not always the most financially feasible, yet farmers understand the investment for the next generation's food security.

We are proud of agriculture's role in climate discussions but we acknowledge the need for increased research and innovation. Land-grant universities are indispensable resources for farmers as they deliver climate smart practices. TFBF supports the University of Tennessee Institute of Agriculture (UTIA) and its efforts to provide research and innovation specific to Tennessee farmers.

TFBF is committed to transparency in climate-related matters to inform our stakeholders in a manner consistent with existing practices in the agriculture industry. However, without changes and clarifications, the Proposed Rules will be ominously burdensome and expensive if not altogether impossible for many small and mid-sized farmers to comply with, as they require reporting of climate data at the local level. When farmers cannot afford the overhead required to comply, they will have no choice but to consolidate. Such consolidation would have far-reaching socioeconomic consequences, including further eroding rural tax bases. Because of population decline in rural communities, farmers are

already bearing a greater share of the tax burden for rural communities.¹ If further consolidation were to occur, this could seriously impede the ability of local communities to fund education, social services and access to health care. It is important to also realize farming plays a vital role in the social fabric of rural communities which revolve around the agricultural industry, especially small and medium-sized farmers. We do not believe the SEC fully considered nor has sufficiently sought to mitigate the potential socioeconomic impact of the Proposed Rules on agricultural communities. We also believe the Proposed Rules will not only adversely impact farmers, but also harm consumers and erode the strength of America’s agricultural industry.] 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 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 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 confidential 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.

¹ Maureen Manier, *Study: Rural-urban divide grows in response to decades of state overhauls*, Purdue University (Jul. 15, 2020), available at <https://www.purdue.edu/newsroom/releases/2020/Q3/study-rural-urban-fiscal-divide-grows-in-response-to-decades-of-state-tax-overhauls.html> (Stating that “[r]ising farmland values improve a rural county’s ability to fund its basic services, but they also mean that more tax burden is placed on the shoulders of farmers as their county population declines.”)

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.

The proposal defines “value chain” vaguely, extending upstream to “supplier activities” without a clear limitation and extends to an ill-defined downstream scope. Most farmers, irrespective of size, at some point find 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).² Forcing the 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 at different steps throughout their value chain. Further, asking registrants to evaluate all the material risks arising from 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 demand additional data and information from farmers or default to engaging only with larger farmers who have more sophisticated data gathering and reporting systems or to 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.

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

Under the Proposed Rules, a registrant must 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 members are deeply concerned about the indirect economic effects of Scope 3 emissions disclosures and the impact on data privacy.

² 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.

The Proposed Rules will inevitably require registrants to pass the costs and burdens of reporting Scope 3 emissions onto farmers. This is particularly problematic for our small- to medium-sized family-owned farms, 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 to overcome. The average family farm already must take considerable time away from the 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 estimation methodologies will change over time risks causing confusion.

Further, and as the USDA acknowledges, data shows the profitability of farmers increases with scale.³ 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. Because our small- and medium-sized members often deal with thinner profit margins compared to their large peers,⁴ 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.⁵

We believe 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 and consumers) and severely erode the gains made by farmers from historically underrepresented backgrounds.

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

³ 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/>.

⁴ See *id.*

⁵ It is important to realize that not everything produced for sale on a farm emits the same amount of GHG emissions and farms 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.

Therefore, we believe 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 unprecedented, and Congress has previously provided similar exemptions for the agricultural industry, such as Section 437 of CAA (discussed in Section 4).⁶ 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.

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

Our members are concerned 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 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 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.⁷ Section 437 of the CAA states “[n]otwithstanding 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.”⁸ Section 437 prohibits all agencies government-wide—including the SEC—from using funds to require mandatory reporting of GHG emissions from manure management systems.⁹ 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

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

⁷ Consolidated Appropriations Act, 2022, H. R. 2471—372, 117th Cong. §437 (2022).

⁸ *Id.*

⁹ *See id.*

considered a federal appropriation.¹⁰ 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 our members are concerned with the lack of guidance with respect to the CAA prohibition and the SEC's Proposed Rules. Therefore, we recommend the SEC should clearly indicate that registrants operating manure management systems are not required to disclose such GHG emissions and provide guidance to 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.¹¹ 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 farmers are unique because they generally live on their farm, meaning their business information is also personal information.¹²

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 do not believe this would serve

¹⁰ Congressional Research Service, Congress's Power Over Appropriations: A Primer, (Jun. 16, 2022), available at <https://crsreports.congress.gov/product/pdf/IF/IF11577>.

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

¹² 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)).

as a meaningful roadblock to litigation for a plaintiffs' class action counsel, who routinely plead around this requirement.

To remedy these concerns, we believe the Commission can and should provide a more robust safe harbor precluding all implied private rights of action alleging defects in quantitative Scopes 1, 2 or 3 disclosures. The Commission's authority to disimply 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.¹³ A robust safe harbor of this nature would provide the appropriate level of liability protection for Scopes 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 cutting 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 by Congress is sufficient to require the detailed disclosure of climate-related metrics, and in particular, whether the Proposed Rules satisfy the requirements set forth in Section 13(a) of the Exchange Act.¹⁴ The SEC should strongly consider these and other legal principles before finalizing a climate-related disclosure rule.

¹³ 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).

¹⁴ See generally 15 U.S. Code § 78m(a).

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.

Sincerely,

A handwritten signature in cursive script that reads "Eric Mayberry".

Eric Mayberry
President
Tennessee Farm Bureau