MOUNTAIN STATES LEGAL FOUNDATION
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Comment: The Enhancement and Standardization of Climate-Related Disclosures for Investors

RIN: 3235-AM87
File Number: S7-10-22

Mountain States Legal Foundation ("Mountain States" or "MSLF), is a non-profit, public interest law firm located in Lakewood, Colorado. One of Mountain States' focuses is defending property rights, particularly on behalf of farmers and ranchers. The SEC's Proposed Rule—specifically the required reporting[1] of Scope 3 emissions[2]—directly affects MSLF's farming and ranching clients. This requirement would require farmers and ranchers to essentially assemble a compliance team and become experts on greenhouse gas emissions or run afoul of the SEC's overreaching regulation.[3] The proposed rule would go beyond the SEC's statutorily authorized scope, and thus, the SEC could not lawfully force inherently speculative greenhouse gas reporting requirements on the agriculture industry.

Another central focus of Mountain States' is defense of the First Amendment right to freedom of speech. On this front, too, the proposed rule is unlawful. Mountain States recommends that the agency abandon this unlawful proposal, which has no hope of surviving judicial review, in its entirety.

Statutory Authority

Under the Proposed Rule, SEC "[r]egistrants would specifically be required to disclose impacts on, or any resulting significant changes made to, their . . . supply chain or value chain[.]"[4] Farmers and ranchers *are* that supply chain, seeing as "[t]he agriculture sector provides nearly every raw product that goes into the supply chain, with a valued contribution of over $1 trillion to

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[1] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,431 (April 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, 249), https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors.

[2] *Id.* at 21,344 ("Scope 3 emissions are all other indirect emissions not accounted for in Scope 2 emissions. These emissions are a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company."); *id.* at 21,374 ("Scope 3 emissions . . . occur in the upstream and downstream activities of a registrant's value chain.").

[3] "For farmers to stay compliant with the companies that purchase their products downstream, this could mean producers will need to track and disclose on-farm data regarding individual operations and day-to-day activities. Unlike large corporations currently regulated by the SEC, farmers do not have teams of compliance officers or attorneys dedicated to handling SEC compliance issues." AMERICAN FARM BUREAU FEDERATION, https://www.fb.org/market-intel/overreach-of-sec-proposed-climate-rule-could-hurt-agriculture (last visited June 8, 2022).

[4] Fed. Reg. at 21,431.

the U.S. gross domestic product in 2020 and employing over 21 million people."[5] The American Farm Bureau Federation has aptly noted that "[w]hile farmers and ranchers are not public companies and therefore are not 'registrants' that are required to report directly to the SEC, their obligations through their regulated customers could be enormous."[6]

Not only does the SEC lack the authority to regulate the agriculture industry in this capacity, but doing so would place a burden on farmers and ranchers that may drive them out of business. The American Farm Bureau notes that "economists anticipate reporting requirement for farms 'could create several substantial costs and liabilities, such as reporting obligations, technical challenges, significant financial and operational disruption and the risk of financially crippling legal liabilities.'"[7] This regulation would indirectly make America dependent on other countries for food should our Nation's agriculture industry crumble under these crushing, extensive reporting requirements.

Of course, the SEC claims it "has broad authority to promulgate disclosure requirements that are 'necessary or appropriate in the public interest or for the protection of investors[]' . . . and determined that disclosure of information about climate-related risks and metrics would be in the public interest and would protect investors."[8]

However broad the authority, the agency has not been given congressional authority to regulate the agriculture industry. Should a court decide if this regulation is within the SEC's authority, it would most likely utilize *Chevron*'s two-pronged analysis.[9] First, a court will ask "whether Congress has directly spoken to the precise question at issue."[10] If Congress has, the court "must give effect to the unambiguously expressed intent of Congress."[11] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute."[12]

The current proposed regulation fails the first prong of the *Chevron* analysis. The SEC is purporting to use an ambiguous statute to defend its right indirectly to regulate the agriculture industry, *but Congress has spoken* on the issue of greenhouse gas reporting requirements for the agriculture industry.[13]

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5 AMERICAN FARM BUREAU FEDERATION, https://www.fb.org/market-intel/overreach-of-sec-proposed-climate-rule-could-hurt-agriculture (last visited June 9, 2022).

6 *Id.*

7 AMERICAN FARM BUREAU FEDERATION, https://www.fb.org/newsroom/sec-proposed-climate-rule-could-intensify-farm-and-ranch-consolidation (last visited June 9, 2022).

8 87 Fed. Reg. at 21,335 (quoting 15 U.S.C. § 77g(a)(1); 15 U.S.C. §§ 78l, 78m, 78o)).

9 "Because this case involves an administrative agency's construction of a statute that it administers, [a court's] analysis is governed by *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

10 *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

11 *Id.* at 843.

12 *Id.*

13 "Congress has been very clear that agencies may not require mandatory reporting of greenhouse gas emissions from livestock." AMERICAN FARM BUREAU FEDERATION, https://www.fb.org/market-intel/overreach-of-sec-proposed-climate-rule-could-hurt-agriculture (last visited June 9, 2022).

In fact, Congress explicitly stated in this year's 2022 Consolidated Appropriations Act, under the section dealing with the Department of the Interior, the Environmental Protection Agency ("EPA"), and related agencies that "none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under title V of the Clean Air Act . . . for carbon dioxide, nitrous oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production."[14] Also, "none of the funds . . . may be used to implement any provision in a rule, if that provision requires mandatory reporting of greenhouse gas emissions from manure management systems."[15]

If Congress prevented the Department of the Interior, the *Environmental Protection Agency*, and related agencies from promulgating regulations that regulate greenhouse gas emissions for the agriculture industry, how could the SEC have that authority? The SEC is merely tasked with protecting "investors; maintain[ing] fair, orderly, and efficient markets; and facilitat[ing] capital formation."[16] No matter how hard the SEC may squint at its ambiguous authorizing statute, it has not been given the authority by Congress to regulate a new industry. The proposed rule thus steps outside of permissible bounds.

Should this Proposed Rule remain unchanged and be promulgated as a Final Rule, a court analyzing the regulation would simply march through the two-step *Chevron* process mentioned above and find in favor of the agriculture industry. But that will require a significant amount of agency waste, a lawsuit, and potentially the award of attorney fees against the U.S. government. It would save agency, judicial, and taxpayer resources to simply abandon this unlawful proposal now; in other words, the SEC should concede now that it must rescind its Scope 3 emissions reporting requirement when it promulgates its Final Rule.

Freedom of Speech

Not only does the proposed rule exceed the Agency's statutory authority; the proposal is independently unlawful as an unconstitutional infringement on the First Amendment right to freedom of speech. At its essence, the proposed rule would be a content-based speech regulation of core political speech that both impermissibly compels speech, and impermissibly discriminates on the basis of viewpoint.[17] In our view, the proposed rule would clearly be subject to strict scrutiny in federal courts. But the proposed rule is such an egregious constitutional violation that it would be unconstitutional under *any* test that could apply to *any* protected speech.

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[14] Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, § 436 (2022).

[15] *Id.* at § 437.

[16] SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/about.shtml (last visited June 9, 2022).

[17] For a full analysis of the Supreme Court caselaw establishing the categorical impermissibility of viewpoint-discriminatory compulsion of private speech such as the SEC proposes here, the agency must review MSLF's recent amicus brief filed with the Supreme Court in *303 Creative v. Elenis*, No. 21-476, available at https://www.supremecourt.gov/DocketPDF/21/21-476/227016/20220602170227758_2022.06.02%20303%20Creative%20Amici%20Curiae.pdf. The Agency must also note that the outcome of. this currently-pending case has the potential to directly impact the legality of this proposed rule.

Content-based speech regulations, like the one proposed here, "target speech based on its communicative content."[18] By default, content-based regulation of speech is subject to strict scrutiny.[19] "Strict scrutiny" means the regulation is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."[20] For purposes of the First Amendment, compulsion of speech is at least as abhorrent to the First Amendment as restriction of it.[21] In fact, the Supreme Court has noted that "[w]hen speech is compelled . . . additional damage is done," and that therefore a law compelling speech "would require even more immediate and urgent grounds than a law demanding silence."[22]

The most odious form of speech restriction is that which is viewpoint-discriminatory.[23] And even purely factual disclosure requirements can be viewpoint-discriminatory where, as here, they operate in practice to advance a point of view (such as the view that climate risks are necessarily material in a way that other political or natural risks are not).[24] The proposed rule imposes on all registrants a requirement that they promote the SEC's view that purported climate risks are inherently material.

The Supreme Court has afforded less protection for certain commercial speech, where laws require professionals to disclose factual, noncontroversial information in their commercial speech.[25] The proposed rule may intuitively strike a layperson as a regulation of "commercial speech," but it is emphatically *not* a regulation of less-protected "commercial speech" under Supreme Court precedent. That lesser degree of protection applies only to *factual, noncontroversial* information.[26] Here, the rule proposal mandates disclosures regarding a hotly contested political topic, and calls for speculative predictions of the purported risks of potential future political outcomes. "The *Zauderer* standard does not apply" to disclosure requirements regarding controversial topics related to pushing ideological interests.[27]

The U.S. Court of Appeals for the District of Columbia Circuit considered a similar SEC effort to compel politically charged disclosures in *Nat'l Ass'n of Mfrs. v. SEC*.[28] In that case, the court considered a requirement that companies' filings disclose whether their products were "DRC

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[18] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

[19] *Id.*

[20] *Id.*

[21] *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind[.]" (cleaned up)).

[22] *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (cleaned up).

[23] *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory.").

[24] *See id.* at 564–65.

[25] *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

[26] *NIFLA*, 138 S. Ct. 2361 at 2372.

[27] *NIFLA*, 138 S. Ct. at 2372 (holding "*Zauderer* has no application" to abortion-related disclosures, because abortion is "anything but an 'uncontroversial' topic").

[28] *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

conflict-free" (that is, not involving minerals sourced to conflict areas in the Congo region). The court struck down the requirement, noting that *Zauderer* does not apply to such disclosures even if "factual," unless those disclosures are reasonably related to the government's interest in preventing deception of consumers.[29]

Here, the government has no conceivable such interest. The proposal does not even pretend to be intended to prevent deception (the word "deceptive," the only variant of "deception" to appear in the proposal, appears twice, both times in reference to the proposed safe harbor provision that excludes fraudulent statements from protection). Fraud is already unlawful. "Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made."[30]

If the Agency imposes its proposed dramatic curtailment of constitutional rights, MSLF anticipates joining the vast number of organizations that will consider challenging it in federal court. We also anticipate that those challenges will prevail.

Conclusion

For the reasons outlined above, Mountain States Legal Foundation strongly believes the proposed rule to be unlawful, both because it exceeds the Agency's statutory authority and because it violates the First Amendment's prohibition on compulsion of speech—especially speech regarding a controversial political topic like the one at issue here. The Agency should abandon its proposal, and simply enforce existing prohibitions of fraud and requirements of material disclosures.

Cordially,

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[29] *Id.* at 371.

[30] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 803 (1988) (Scalia, J., concurring).