NORTH CAROLINA
FARM BUREAU FEDERATION, INC.

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June 16, 2022

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

Re: Comments by North Carolina 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,

North Carolina Farm Bureau Federation ("NCFB") appreciates the opportunity to submit our 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").

With over 600,000 members, NCFB is North Carolina's largest general farm organization, representing the interests of farm and rural people throughout our state. Agriculture is North Carolina's number one industry, contributing nearly $100 billion to our state's economy annually. Increasingly, farmers are being asked to produce more using fewer resources all the while decreasing agricultural greenhouse gas ("GHG") emissions. Therefore, we believe that this illustrates that *voluntary*, *market-based* incentives are helping farmers accomplish these milestones all while making real progress on climate-change.

North Carolina farmers have experienced the impacts of a changing climate first-hand through hurricane-driven flooding events, droughts, and sea level rise along the coast. Our members are willing to work with various stakeholders to address climate-change in a manner consistent with existing practices in the agriculture industry. However, without changes and clarifications, the Proposed Rules would be wildly burdensome and expensive, if not altogether impossible for many small- and mid-sized farmers to comply with, because they require reporting of climate data at the local level. Farmers who cannot afford to comply with the Proposed Rules will be forced to consolidate their operations. This would have far-reaching economic consequences, including further reduction of small- and medium-sized farms. We do not believe the SEC fully considered nor has sufficiently sought to mitigate the potential economic impact of the Proposed Rules on agricultural communities. We also believe that the Proposed Rules will not only adversely impact farmers, but also harm consumers and erode the strength of America's agricultural industry.

With these preliminary comments in mind, here are seven specific concerns that NCFB has with the Proposed Rule and recommended ways to resolve them.

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

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 harm many North Carolina farmers.

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, regardless of the size of their operations, will, 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 feed versus ethanol). Forcing the agriculture industry to disclose the myriad ways in which farm 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 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 or engage only with larger agricultural operations that have more sophisticated data gathering and reporting systems. Others will 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.

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

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 farmers 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. This is particularly problematic for our small- to medium-sized farms, which are already dealing with increased production costs due to inflationary pressure and global supply chain disruptions. In North Carolina, 98% of our farms are family-owned and operated. They would struggle to provide the Proposed Rules' disclosures and the estimation process would be hard to overcome. The average family farm already requires 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 increases with scale.[1] Small- and medium-sized members often deal with thinner profit margins compared to larger operations.[2] Therefore, the Proposed Rules will likely 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.[3]

This result would be disastrous for our small- and medium-sized farms, lead to further monopolization and vertical consolidation within the agriculture sector (thus harming farmers and consumers) and severally erode the gains made by farmers from historically underrepresented backgrounds.

Farmers who can afford to invest in such technology and controls will be less able to invest in renewable or sustainable technology that could actually reduce the environmental footprint of their farms. For example, precision application equipment that can result in fewer nitrogen fertilizer applications, or equipment to facilitate cover cropping and no-till production systems that would result in fewer GHG emissions, will be put aside in favor of emissions reporting and tracking software so that these farms do not risk losing business with their registrant partners.

Therefore, we urge the Commission to remove the Scope 3 emissions disclosure from the Proposed Rules in their entirety, or, alternatively, provide a specific carve out for the agricultural industry. A carve out 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).[4] By carving out the agricultural industry, the Commission would avoid the externalities associated with the Rules' complex and difficult reporting regime, while also preserving the competitiveness of the agricultural industry.

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[1] *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/.

[2] *See id.*

[3] 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.

[4] *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 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.[5] Section 437 of the CAA states that "[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."[6] Section 437 prohibits all agencies government-wide—including the SEC—from using funds to require mandatory reporting of GHG emissions from manure management systems.[7] However, under the Proposed Rules, registrants presumably would be required to disclose GHG emissions from manure management systems.

Manure management systems are ubiquitous in North Carolina, and our members are concerned about the Proposed Rules' lack of guidance with respect to the CAA prohibition. Therefore, our members ask that the SEC clearly indicate that registrants that operate 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 asks whether the SEC should require registrants to provide location data for its GHG emissions in the Final Rules.[8] We urge the SEC reject such a requirement in Final Rules as it 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

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

[6] *Id.*

[7] *See id.*

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

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.[9]

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 the disclosures are made or reaffirmed "without a reasonable basis" or disclosed "other than in good faith." However, these general protections do not provide meaningful roadblocks to litigation because plaintiffs' lawyers routinely plead around similar requirements.

To remedy these concerns, the SEC 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 SEC's authority to dis-imply 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.[10] 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. 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

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[9] *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)).

[10] *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).

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.[11] The SEC should strongly consider these and other legal principles before finalizing a climate-related disclosure rule.

Thank you for the opportunity to provide comments on the Proposed Rules. We 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,

Shawn Harding

Shawn Harding, President
North Carolina Farm Bureau Federation

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