



National Cattlemen's
Beef Association



April 17, 2023

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

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

The undersigned agricultural groups write to supplement the comments we filed along with other national agricultural associations on June 17, 2022, to the Securities and Exchange Commission's (the "SEC" or the "Commission") request for public input on the enhancement and standardization of climate-related disclosures for investors (File No. S7-10-22) (the "Climate Rule").¹

In that letter, we detailed our concerns that Scope 3 reporting could have devastating consequences for farmers and ranchers. In short, public companies that are required to report emissions from agricultural production will inevitably require farmers and ranchers to track and report their emissions information to those companies. This tracking will be extremely expensive, invasive, and burdensome for farmers and ranchers, at the cost of improved production practices that generate actual environmental gains. Family farms, particularly smaller ones, will be hardest hit, with the rule driving greater consolidation and fewer family farms. The easiest path for registrants will be to source their inputs from larger corporate operations with greater resources and more sophisticated data-gathering and reporting systems. Alternatively, registrants may simply vertically integrate their supply chains, leading to further consolidation. To address these concerns, we urged the Commission to either a) remove the Scope 3 emissions disclosure requirement, or b) substantially revise the Scope 3 requirement to include an explicit exemption for agricultural production.²

Since that time, Chair Gensler has testified and publicly stated several times that the intent of the Commission is to not force non-registrants – and in particular farmers – to

¹ See Comments by National Agricultural Associations on SEC's Proposed Rules on the Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22) (June 17, 2022) available at <https://www.sec.gov/comments/s7-10-22/s71022-20132020-302492.pdf>.

² *Id.* At 5-7.

carry the compliance costs or otherwise be burdened by the rule.³ Importantly, he has stated that the intent is not to have public companies ask farmers for their emissions. Chair Gensler has also acknowledged that the SEC's remit is over public companies, not farmers.⁴ And he has acknowledged that Scope 3 data is not as well developed as Scope 1 and 2.⁵

We greatly appreciate the Chair's commitment to ensure that farmers and ranchers do not carry the burden of the Climate Rule. However, as we have seen with countless regulatory regimes over the years, an agency's benign intent concerning farmers and ranchers is meaningless without an explicit exclusion in the regulatory text. This is all the more important for rules of such broad scope,⁶ wherein it becomes impossible to predict all of the indirect effects, particularly to those entities outside of the Commission's jurisdiction. The only way to ensure that farmers and ranchers are not forced to bear the cost of Scope 3 is to either (1) eliminate Scope 3 altogether, or (2) explicitly exclude agricultural production from the Scope 3 reporting requirements.

As explained below, the Commission has ample legal authority to eliminate Scope 3 or explicitly carve out agriculture from Scope 3 reporting requirements. To fulfill the Commission's intent that farmers and ranchers not bear the costs of this rule, the final rule must either eliminate Scope 3 or explicitly exclude agricultural emissions from the reporting requirements.

³ See Senate Committee on Banking, Housing, and Urban Affairs meeting, "Oversight of the U.S. Securities and Exchange Commission," Sept. 15, 2022, available from 34:15-39:50 at https://www.youtube.com/watch?v=Jkz_NxbTnDE. ("That public company you sell to does not have any obligation to ask you specifically.... The intent, Senator, is not that, whether it's the farm community or other community, if they are not public companies, they are not under this rule.... [With regard to public companies demanding small companies for their emissions information] that is not the intent of what we did.")

⁴ See House Committee on Appropriations, Subcommittee on Financial Services and General Government, "Budget Hearing – Fiscal Year 2024 Request for the U.S. Securities and Exchange Commission," (March 30, 2023) available from 1:05:30-1:07:15 ("Our remit is just over the public companies, the 7 or 8,000 companies. It is not the farmers that you are referencing.... There is no intent or focus of the Securities and Exchange Commission to ask for disclosures from private sector farmers in Iowa or in any of your states."), 1:47:48-1:48:49 ("We oversee the disclosure of these 7,000 or so public companies, not other companies."), and 1:49:40-1:52:20 ("We look at the impact on small business.... We are looking at that because ... our remit is just about those companies that are publicly filing, publicly raising money, and their climate risk disclosures.") at <https://www.youtube.com/watch?v=BPT68conmQ4&t=1s>.

⁵ *Id.* at 1:24:50-1:31:20 (Scope 3 "is not as well developed"); see also Council of Institutional Investors "CI 2023 Spring Conference Plenary 3: Fireside Chat with Gary Gensler" (March 22, 2023) available from 28:40-29:52 (Scope 3 "is not as well developed") at <https://www.youtube.com/watch?v=2svSQ6qLZOw>.

⁶ Based on the SEC's own estimates, the Climate Rule would multiply the current compliance costs on registrants by 2.6x. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21461 (April 11, 2022). Given that federal agencies (including the Commission) are notorious for underestimating compliance costs, we expect this number to be even higher.

Finally, any final rule must include text that registrants cannot compel non-registrants in their value chain to supply the emissions information required by the rule. The failure to do so will result in farmers being forced to bear those costs.

I. The SEC Has Authority for a Scope 3 Agriculture Carveout

The SEC has authority to create a carveout for the agriculture industry from the burdens of the Climate Rule’s Scope 3. In issuing the proposed Climate Rule, the Commission relied on its authority to promulgate disclosure requirements that are “necessary or appropriate in the public interest or for the protection of investors.” *See* 15 U.S.C. § 77g; 15 U.S.C. §§ 78l, 78m, and 78o; *see also The Enhancement and Standardization of Climate-Related Disclosures for Investors* at 7, available at <https://www.sec.gov/rules/proposed/2022/33-11042.pdf> (“The Commission has broad authority to promulgate disclosure requirements that are “necessary or appropriate in the public interest or for the protection of investors.”). As then Judge Kavanaugh recognized, “Courts generally have interpreted such language as granting agencies significant discretion.” *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. Aug. 31, 2010) (collecting authorities) (concurring in denial of rehearing en banc).

Consistent with this discretion, the SEC has adopted rules and regulations specific to certain industries, such as real estate, oil and gas, mining, and banking. For example, in 1961, the Commission adopted Form S-11 for the registration of securities issued by real estate investment trusts or securities issued by other issuers whose business is primarily that of acquiring and holding for investment real estate or interests in real estate. *See* Securities Act Release No. 4422 (1961).

In 2008, the Commission codified oil and gas reporting disclosures in Subpart 1200 to Regulation S-K to reflect significant changes in the oil and gas industry and markets, including technological advances, and changes in the types of projects in which oil and gas companies invest their capital. At the time, the Commission was responding to concerns by many industry participants that SEC disclosure rules were no longer in alignment with current industry practices and therefore limited in their usefulness to the market and investors. *See* Modernization of Oil and Gas Reporting, Release No. 33-8995 (effective Jan. 1, 2010).

As recently as 2019, the Commission codified mining property disclosure requirements in new Subpart 1300 of Regulation S-K citing “global developments and industry participants’ concerns.” The SEC codified these mining disclosures to better align the Commission’s disclosure rules for properties owned or operated by mining companies with industry-based codes and standards. *See* Modernization of Property Disclosures for Mining Registrants, Release No. 33-10570 (effective Feb. 25, 2019).

Finally, in 2020, the Commission updated and codified disclosure requirements for banks, bank holding companies, savings and loan associations, and savings and loan holding companies in new Subpart 1400 of Regulation S-K. The SEC updated and codified these disclosure requirements in light of sector changes over the past 30 years. *See* Update of Statistical Disclosures for Bank and Savings and Loan Registrants, Release No. 33-10835 (effective Nov. 16, 2020).

Moreover, in the Climate Rule itself, the Commission entirely exempted Small Reporting Companies (SRCs) from Scope 3’s obligations. *See The Enhancement and Standardization of Climate-Related Disclosures for Investors* at 212 (“we are proposing to exempt SRCs from the proposed Scope 3 emissions disclosure requirement.”).

The Commission’s discretion is not limitless, of course. Among other things, any carveout or industry-specific provisions must be the product of “reasoned decision making.” *Am. Petroleum Institute v. SEC*, 953 F. Supp. 2d 5, 22 (D.D.C. 2013) (“an agency decision as to exemptions must, like other decisions, be the product of reasoned decision making.”). 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 choice made.’” *Motor Vehicle Mfrs. Ass’n of US, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

The National Agricultural Associations’ comments provide a considerable record to carve agriculture out of Scope 3 requirements. In particular:

- Congress has explicitly prohibited federal agencies from requiring mandatory reporting of greenhouse gas emissions from manure management systems,⁷ demonstrating that Congress treats the agriculture industry uniquely. Moreover, such systems are ubiquitous features of farms and ranches, making it extremely difficult or even impossible to separate farm emissions unrelated to manure management systems.
- Agriculture largely does not face the carbon transition risks that form the basis of the Climate Rule. The purpose of reporting Scope 3 emissions data is to help investors understand a registrant’s exposure to “climate-related transition risks.”⁸ But there is no transitioning from food, feed, and fiber, and there are no alternatives to agriculture in sourcing those necessities.
- While farmers and ranchers play a vital role in America’s supply chain, 98% of farms are family owned and 90% of those are small. This means that a considerable part of the agriculture industry does not fall within the SEC’s direct regulation of disclosure information, which extends to regulating public companies (registrants and issuers). *See, e.g.*, 15 U.S.C. § 78I(b) (Commission may adopt rules governing “issuer”). And worse, forcing family farmers and ranchers to invest in emissions tracking devices and software will reduce their

⁷ *See Consolidated Appropriations Act, 2022, H.R. 2471—372, 117th Cong. § 437 (2022).* *See also National Agricultural Associations Letter* at 8-9.

⁸ 87 Fed. Reg. at 21379. *See also id.* at 21344, 21373-75; 21379.

capacity to invest in renewable or sustainable technology that could actually reduce their environmental footprint.

- Unlike many other industries, agricultural emissions can be extremely variable, making it difficult to track. GHG emissions can shift radically on a farm between day-to-day, season-to-season, and year-to-year based on factors such as rotating crops, rainfall, temperature, and countless other factors. Similarly, improvements to technology and production practices continually reduce farm emissions.

These examples and characteristics firmly distinguish agriculture in the context of Scope 3’s obligations from other industries.

“Congress has endowed the Commission with authority to make exemptions from certain Exchange Act provisions.” *Am. Petroleum Institute*, 953 F. Supp. 2d at 21. For instance, Section 12 of the Exchange Act—one of the sections invoked by the SEC in adopting the Climate Rule—provides that the “Commission may by rules and regulations, or upon application of an interested person, ... exempt in whole or in part any issuer or class of issuers ... from section 78m, 78n, or 78o(d) of this title ... upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds ... that such action is not inconsistent with the public interest or the protection of investors.” 15 U.S.C. § 78l(h). Indeed, courts have concluded that while the Commission’s exemption authority is discretionary, “exercising it could, in some circumstances, be required by the Commission’s competing statutory obligations, such as the requirement that the Commission ‘shall not adopt any ... rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.’” *Am. Petroleum Institute*, 953 F. Supp. 2d at 21.

In sum, the Commission has legal authority to carve the agriculture industry out of Scope 3’s obligations and should do so.

II. Any Final Rule Should Specify That Registrants Cannot Compel Companies in Their Value Chain to Supply the Emissions Information

Any final rule must specify in regulatory text that those subject to Scope 3 cannot compel independent agricultural entities, especially family farmers, within the supply chain to provide the needed emissions information. That is, the SEC should prevent public companies from imposing the burdens of Scope 3 on agricultural entities. The U.S. Small Business Administration Office of Advocacy has made a similar request asking the SEC to “clarify the proposed rules to ensure that public reporting companies do not request GHG emissions data directly from small, private entities.” *See* Letter dated June 17, 2022, at <https://www.sec.gov/comments/s7-10-22/s71022-20131758-302192.pdf>

This type of provision has a strong basis in core principles of administrative law. In the proposed Climate Rule, the SEC creates an exemption for smaller reporting companies (SRCs) from Scope 3’s obligations. *See* proposed 17 CFR 229.1504(c)(3); Climate Rule Section II.G.3. SRCs are public companies that have a public float of less than \$250 million, or those that have less than \$100 million in annual revenues and either no public float or public float of less than \$700 million. *See* 17 CFR 229.10(f)(1), 230.405, and 17 CFR 240.12b-2. The SEC proposes “to exempt SRCs from the proposed Scope 3 emissions disclosure requirement.” *The Enhancement*

and Standardization of Climate-Related Disclosures for Investors at 212. According to the Commission, “exempting SRCs from the proposed Scope 3 emissions disclosure requirement would be appropriate in light of the proportionately higher costs they could incur, compared to non-SRCs, to engage in the data gathering, verification, and other actions associated with Scope 3 emissions reporting, many of which may have fixed cost components.” *Id.* at 212–13.

This exemption for SRCs favors an exemption to small agricultural entities. Under the Administrative Procedure Act, “[i]t is axiomatic that ‘[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.’” *Kreiss v. Sec’y of Air Force*, 406 F.3d 684, 687 (quoting *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)). Indeed, a “fundamental norm of administrative procedure requires an agency to treat like cases alike,” *Westar Energy, Inc. v. Federal Energy Regulatory Com’n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007), and an agency “must provide an adequate explanation to justify treating similarly situated parties differently.” *Burlington Northern and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005). Here, the SEC proposes to exempt SRCs from Scope 3 because of the enormous burden it would impose. Farmers and ranchers are magnitudes smaller than SRCs (and not subject to the Commission’s jurisdiction) and would face an even greater burden should those subject to Scope 3 reporting pass on the reporting cost to farmers and ranchers.

To resolve this dilemma, the SEC should adopt provisions making clear that companies subject to Scope 3’s disclosure requirements cannot compel information from small or independent entities in their supply chain. This would avoid “the proportionately higher costs they could incur, compared to non-SRCs, to engage in the data gathering, verification, and other actions associated with Scope 3 emissions reporting.” *The Enhancement and Standardization of Climate-Related Disclosures for Investors* at 212–13.

There are many ways the SEC could define the class of entities from which registrants cannot compel disclosure information. One option is to simply borrow the definition of SRCs. That is, any agricultural entity with less than \$100 million in annual revenue cannot be compelled to supply information to a public company that is obligated under Scope 3.

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We appreciate the opportunity to provide comments on the Climate Rule 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,

Agricultural Retailers Association
American Farm Bureau Federation
American Soybean Association
National Cattlemen's Beef Association
National Corn Growers Association
National Pork Producers Council
North American Meat Institute

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