

SEC Climate Disclosures

Key Takeaways

- In July 2021, SEC Chair Gary Gensler noted investors are demanding more information on climate change and asked SEC staff to develop a rule proposal for mandatory disclosure of climate risks. (See “Another Acronym: ESG” policy development backgrounder).
- On March 21, 2022, the Securities and Exchange Commission (SEC) proposed a rule requiring registrants, which are companies which register with the SEC, to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks which could impact their business, results of operations, or financial condition.
- Most notably for agriculture, the required information about climate-related risks would also require disclosure of the greenhouse gas emissions of the registrant and its entire value chain, which the SEC claims can help investors assess a registrant’s exposure to such risks.
- The SEC claims this requirement for greenhouse gas emissions disclosures would “provide investors with information useful in decision-making as an investor assesses a registrant’s exposure to, and management of, climate-related risks, and in particular transition risks.”
- The proposed rule would require public companies to disclose the emissions for each significant category of their value chain, expressed in metric tons of carbon dioxide equivalent. The disclosures would further need to be disaggregated by each constituent greenhouse gas (carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride).
- Farm Bureau continues to advocate against this proposal and submitted comments to the SEC.

Questions

1. Do you use paper records or management software on your operation?
2. Should Farm Bureau policy address this issue?
3. What obstacles would farmers in your community face if this rule went into effect?

Background

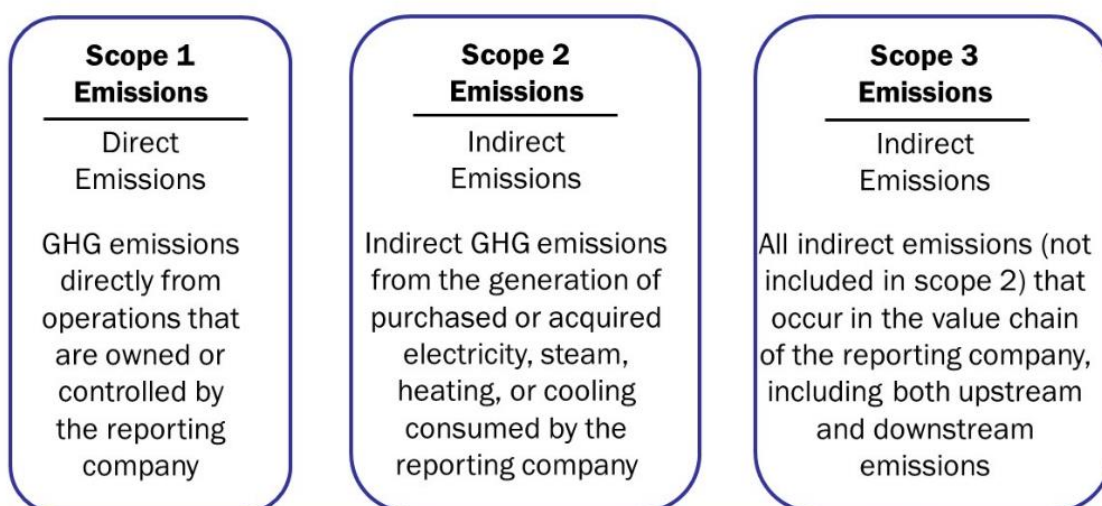
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Specifically, the proposed rule requires a registrant to disclose information about its direct greenhouse gas emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2). In addition, a registrant would be required to disclose greenhouse gas emissions from upstream and downstream activities in its value chain (Scope 3) under many – if not most – circumstances. **The SEC claims this requirement for greenhouse gas emissions disclosures would “provide investors with information useful in decision-making as an investor assesses a registrant’s exposure to, and management of, climate-related risks, and in particular transition risks.”**

SCOPE 1, SCOPE 2 & SCOPE 3 EMISSIONS



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Source: Environmental Protection Agency, Farm Bureau Compilation

Impact on Agriculture

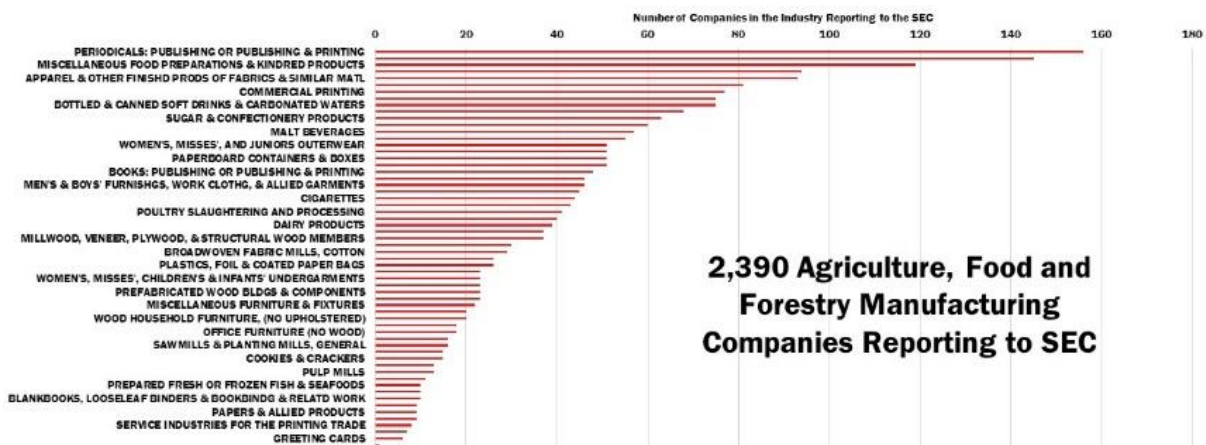
The SEC has a three-part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. To accomplish this mission, the SEC requires companies to disclose important financial information with an accurate picture of the company’s present and potential performance. The SEC’s proposed climate rule is said to only apply to registrants with the SEC, meaning a company goes public with offerings.

There are an estimated 63,485 companies listed on the SEC website with some sort of registrant reporting requirements, with industries ranging from life sciences to energy and transportation, real estate and construction, manufacturing, technology, trade and services, finance, structured finance, and international corporate finance.

Looking further into the companies registered with the SEC, each company is classified with a specific industry title and assigned a standard industrial classification (SIC) code indicating the company’s type of business. Notably, none of the registrants listed on the SEC’s website have an SIC code corresponding to agricultural production. That is, for the SIC codes titled “Agricultural Production-Crops,” “Agricultural

Production-Livestock & Animal Specialties,” “Agricultural Services,” “Forestry,” and “Fishing, Hunting and Trapping,” there are no reporting companies which disclose to the SEC. **However, all five of these industries produce most of the raw products used by publicly traded companies and is, therefore, part of the value chain of the publicly traded company (i.e., Scope 3).** For agriculture, food and forestry manufacturing alone, there are nearly 2,400 companies registered with the SEC subjected to reporting Scope 3 emissions from its farm suppliers. There are several potential impacts to farmers from being included in a public company’s Scope 3 emissions value chain.

Agriculture, Food and Forestry Manufacturing Industries with Companies Reporting to SEC



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Source: Securities & Exchange Commission, Farm Bureau Compilation

Compliance Concerns

For Scope 3 emissions disclosures, the proposed rule would require public companies to disclose the emissions for each significant category of their value chain, expressed in metric tons of carbon dioxide equivalent. The disclosures would further need to be disaggregated by each constituent greenhouse gas (carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride).

For farmers to stay compliant with the companies purchasing 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. This could force farmers of all sizes, but particularly those with small and medium-sized operations, to report data they may be unable to provide, which would result in a costly additional expense or a loss of business to larger farms.

Data software packages and other business management tools may be available for farmers to use, but the adoption rates of these tools are quite low. **According to AgFunder Network, a survey of 1,490 farmers conducted by ag-tech market research company Alpha Brown in January 2018 indicated farm**

management software platforms are only used by 31% of farms, while the remainder of farmers still rely on pen, paper and non-computerized tools, with about 56% of those farms adding in standard software like Microsoft Excel or general accounting software.

It is important to note farm management software is different from other precision agriculture products many farmers utilize to be more efficient and sustainable. Farm management software tools are used for the overall operation and production management activities. In contrast, precision agricultural information technologies are primarily tools used directly in farm production, the three most common being GPS guidance systems, GPS yield and soil monitors/maps, and variable-rate input application technologies.

Slow adoption rates of farm management software have primarily been attributed to the lack of rural broadband connectivity and the increased costs associated with the tools. Additionally, many agribusinesses farmers do business with, for example the grain facility a farmer would deliver their products to, are still using paper receipts a farmer would need to maintain as records for tax and business purposes. **Not to mention, this SEC rule as proposed has the potential to require very detailed information from each farm which is not captured anywhere else, down to how many gallons of fuel are put into each piece of machinery and each machine's emissions.**

Privacy Concerns

In addition to the massive amount of business data this SEC rule could potentially ask of farmers, there is also the issue of data privacy, particularly personal identifying information. Unlike public companies and corporations, farmers work and raise families in their place of business. There are many questions about how their privacy will be protected.

Researchers point out the use of agricultural data analytics “can be used as a form of manipulative power to initiate cheap land grabs and acquisitions” and could even pressure “farmers into situations they would not have otherwise chosen.” **Above all, many academics raise the concern access to this kind of data could “force farmers into precarious and vulnerable positions.”** Specifically, farmers could be pitted against each

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other based on each one's willingness to share data putting one farmer at a competitive advantage over the other.

A 2016 AFBF survey showed 77% of farmers are "concerned" or "extremely concerned" about the entities which can access the data generated by new precision technology on-farm machinery and whether the information could be used for regulatory purposes. A similar survey in 2014 had the figure at 78%. This proposed rule compounds this concern. Of those surveyed, 61% shared concern data of how could be used by companies or individuals to influence their decisions in the marketplace.

Past court cases, like *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (8th Cir. 2016), have held the public disclosure of farmers' personal information constitutes a "substantial" and "clearly unwarranted invasion of privacy." As such, farm data should continue to remain protected from any disclosures, directly or indirectly, in a company's public filings.

Pushing Small Producers Out

The concern of onerous reporting requirements is not only an issue in regard to disclosing private data and having to find ways to comply with burdensome reporting. **It could also disqualify small, family-owned farms from doing business with companies procuring the products grown on that farm. This could lead to more consolidation in agriculture.**

If a farmer is not able to provide the necessary data and information required by the SEC registrant who now has to disclose their Scope 3 emissions, this registrant could be forced to look elsewhere to purchase its raw inputs from an entity with the information. This search for supply could push small and medium-sized farmers out of business and force companies to look for food products outside of the United States, adding additional costs to food and limiting food availability.

Potential Liability Implications

A major flaw with the proposed rule is the arbitrary standard for materiality of Scope 3 emissions. While the draft rule does not set a standard, quantitative threshold for determining materiality, it does suggest if a company's Scope 3 emissions constitute at least 40% of a company's total greenhouse gas emissions, then such emissions might be material. Of note, in *TSC Industries v. Northway*, Supreme Court Justice Thurgood

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Marshall held an item is material if there is a substantial likelihood a reasonable investor would consider the information important in deciding how to vote or make an investment decision.

The proposed SEC climate rule could potentially add liability to farmers in which their activities could be considered material in a reporting company's financial disclosures. The additional issue of this, too, is the quantification of Scope 3 emissions, and agricultural emissions lack accuracy and consistency. Not to mention the time period proposed in the rule to comply with Scope 3 emissions reporting, within the next three years, is effectively unattainable.

One of the few ways to quantify Scope 3 emissions is through modeling, which can be wildly unreliable and varies across academic and scientific institutions. The other possibility for monitoring Scope 3 emissions would be through direct monitoring and third-party auditors, which brings another layer of liability to on-farm activities in regard to privacy or the potential liability of injury. As farmers already comply with an expansive regulatory regime, these audits would be yet another layer of mandated regulation potentially includes more regulators coming to farms to monitor day-to-day activities.

Overreach Past Congress

As mentioned above, farmers already comply with expansive legislative and regulatory directives existing at the local, state, and federal levels. **The SEC's proposed rule seeks to further extend regulatory burdens on farmers, all while lacking appropriate statutory authority.** In fact, Congress has been very clear agencies may not require mandatory reporting of greenhouse gas emissions from livestock.

The SEC has exceeded its area of regulatory authority and is seeking to regulate industries which have never been under the SEC's jurisdiction in an apparent attempt to regulate climate activities.

Policy

American agriculture continues to be a positive influence on the environment. We support the education of and full inclusion of agriculture producers as the leaders in the evidence-based research, development, and education regarding the tools and resources related to measurement, management, and implementation of conservation practices in production agriculture.

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This policy development backgrounder is adapted from American Farm Bureau's *Market Intel*. Sign up to receive more information like this here:



We are concerned with the open-ended, vague definition of “Sustainable Agriculture.” Because of the lack of a consensus definition, the interpretation by farmers and environmental extremists is completely different. We urge the AFBF to take the lead in developing a sufficient definition of sustainable agriculture that will lead us in the direction of a truly sustainable agriculture that makes wise use of all resources.

Corporate sustainability initiatives within the food and fiber industry will influence production practices of all commodities. These initiatives were created to meet changing consumer demands regarding the environment. However, farmers need clarity, consistency, and incentives to meet these expectations. We encourage TFBF, AFBF, and the UT Institute of Agriculture to engage in these initiatives and provide information to farmers regarding future challenges and opportunities.

All life on earth is supported by the soil. As the world population increases, more demands are placed on our soil resources. Maintaining soil health is a priority of all farmers. New technology, research, and education will provide tools farmers need to achieve a reality based sustainable production of food, fiber, and energy needs around the world. We encourage farmers to use soil health management systems and support soil health initiatives.