



June 15, 2021

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: ESG Reporting Mandates Will Incentivize Whistleblowers to Report Violations to the SEC.

Dear Chair Gensler, Commissioners, and Director Jones:

On behalf of the National Whistleblower Center (“NWC”), we appreciate the opportunity to respond to the Securities and Exchange Commission’s (“SEC”) Request For Information on Climate Change Disclosures (“RFI”) issued by the Commission on March 15, 2021.¹ NWC is a tax exempt, non-partisan public interest organization that has been dedicated to protecting whistleblowers, for over 30 years. NWC is committed to educating whistleblowers about their rights as well as advocating for policy behalf of whistleblowers such as National Whistleblower Day, and supporting the addition of key whistleblower protections to the Dodd-Frank Act, the Sarbanes-Oxley Act, the Whistleblower Protection Enhancement Act, and numerous other federal laws. Most recently NWC and its leadership constructively engaged in prior SEC rulemaking proceedings related to the Dodd-Frank Act and whistleblower protections.²

We commend the SEC for the increased interest and initiative the agency has taken around sustainability-related financial disclosures, and are grateful for the opportunity to comment. Moreover, we know that employees who work for public companies have raised concerns over these issues, and it is imperative that SEC substantive rules provide the regulatory framework that will permit these employees to meaningfully raise issues that will result in successful enforcement actions.

¹ See Public Input Welcomed on Climate Change Disclosures, Hon. Allison Herren Lee, Sec. and Exch. Comm’n, Mar. 15, 2021, available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

² See Comments filed by NWC and/or its Chairman (Stephen Kohn) in rulemaking Release No. 34-83557, available at <https://www.sec.gov/comments/s7-16-18/s71618.htm> and Comments filed in rulemaking Release No. 34-63237, available at <https://www.sec.gov/comments/s7-33-10/s73310.shtml> and <https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml>.

The SEC whistleblower program has been an incredible success. The Commission unanimously acknowledged the tremendous value of the program while issuing its recent amendments to the SEC whistleblower program in early 2020. And, in a March of 2021 letter to Senator Grassley, Chair Gensler committed that “If confirmed to lead the SEC, [he] will build on the work of past Chairs to ensure continued strength in the whistleblower program.” And that, the Chair shares Senator Grassley’s goals “of ensuring that whistleblowers are encouraged to come forward when they see misbehaviour, and that they be protected from retaliation.”³

In this comment we explain how mandatory climate and environmental, social, and governance (“ESG”) disclosures are integral to the SEC’s mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, and how whistleblowers are impacted by the regulatory void that exists such mandatory reporting is not vigorously enforced.

I. Investors Care About ESG Metrics and Whistleblowers Can Reveal ESG Related False or Misleading Statements.

Investor demand for reliable, consistent, and comparable ESG disclosures is echoed by whistleblowers who report about actual environmental violations and material inconsistencies between what a company’s advertisements say about sustainability and what those practices are. Consumers and retail investors, in particular, rely on public information like advertisements to make more informed investment decisions. It is important to note that all of the top 10 Fortune 500 companies make ESG related statements in their advertising and other public materials, and in a study of these companies’ 10-K filings we found that none of these top 10 companies included meaningful discussions of whether these statements were true.

Investors know that information about companies’ exposure to company-specific sustainability risks and/or systemic climate risk should be taken into consideration when assessing the viability of a return—however, to properly make these assessments, investors must have access to effective, standardized disclosures about these issues which can only be mandated and enforced by the Commission.

Whether a company is implementing practices reflecting what it promises to the public is often revealed only by an investigation into the internal operations of the company. The outcomes of such investigations are never to be reported publicly and often shielded by possibly illegal non-disclosure agreements. Without mandatory reporting requirements enforced by the SEC, these companies can continue to maintain opaque internal standards and possibly make misrepresentations to investors – retail and otherwise – without being found out. This

³ See *WNN Exclusive: Gensler Pledges Strong Support for SEC Whistleblowers*, WHISTLEBLOWER NETWORK NEWS, available at <https://whistleblowersblog.org/2021/03/articles/corporate-whistleblowers/sec-whistleblowers/gensler-pledges-strong-support-for-sec-whistleblowers/> (March 19, 2021).

possibility arises out of a lack of mandatory reporting standards and skews the market. Without mandatory ESG reporting, companies that claim to invest in environmental protections on one hand, and do nothing to back up these claims on the other, have an unfair economic advantage for which there is no upside. Whistleblowers are best positioned to report on these inconsistencies. However until now the SEC has not taken meaningful action on tips exposing ESG misrepresentations and, to date, we are not aware of sanctions related to ESG Violations resulting in a Notice of Covered Action.

Whistleblowers can continue to assist the Commission in protecting investors from being harmed by relying on inadequate or intentionally misleading information described above. In fact, according to the Annual Reports issued by the Office of the Whistleblower, employee-whistleblowers have been in the forefront of making these types of reports.⁴ Mandatory financial sustainability disclosures need to be adopted by the Commission so that employees who risk their jobs and careers to report public companies that are misleading their investors (and the public) by making false, incomplete, or misleading disclosures can be fully protected under the whistleblower program. By issuing mandatory filing requirements the Commission would enable whistleblowers to confidently take the risk required to expose environmental violations and misrepresentations about ESG issues.

It is without question that whistleblowers have played an essential role in protecting investors and the public.⁵ However, without strong and effective substantive rules prohibiting misleading corporate statements concerning climate and environmental commitments, whistleblowers will be very reluctant to report these violations. Further, without ESG reporting standards, that are clear, consistent, and enforceable, whistleblowers will continue to submit tips regarding environmental violations that require the expenditure of additional Commission resources to validate, whereas with clear standards these same tips could be quickly substantiated by identifying issues in that reporting.

Why would a whistleblower risk his or her career to report misleading statements without also knowing that such misleading statement, if proven, would constitute a violation of a law, rule, or regulation covered under the Dodd-Frank Act whistleblower Law? For this reason, NWC requests that the Commission act expeditiously to propose, adopt, implement, and enforce detailed disclosure requirements for all issuers. Furthermore, we request that in adopting such rules the SEC makes clear that the Commission will also ensure that whistleblowers are properly incentivized to report these violations.

⁴ For example, the SEC Office of the Whistleblower reported that “Corporate Disclosures and Financials” constitute the largest single category of reports filed by whistleblowers to the SEC. In 2020 the SEC received 1,710 such reports. See SEC, “2020 Annual Report to Congress: Whistleblower Program,” (Nov. 16, 2020), p. 40.

⁵ See *The 100 Whistleblowers Who Changed Wall Street*, National Law Review, available at <https://www.natlawreview.com/article/100-whistleblowers-who-changed-wall-street> (Sept. 20, 2020).

II. Mandatory Reporting Requirements are Necessary, and Whistleblowers can Best Assist the SEC when Requirements are Governed by SEC Whistleblower Protections.

Below we outline answers to questions 3, 6, and 10, these responses explain why it is essential that the SEC implement requirements that mandate companies to report directly to the SEC – rather than delegating a non-governmental organization – in order to effectively enable whistleblowers to report violations under the Dodd-Frank Act.

1. The SEC Must Govern and Enforce ESG Reporting Requirements to Ensure Whistleblowers Can Assist With Enforcement.

In response to Questions 3 and 6, regarding the possibility of tasking a non-government or self-governing body with standard setting and enforcement: NWC urges the Commission to directly establish mandatory disclosures in its rules and guidance, and enforce these rules excluding third-parties or self-regulators from the development, implementation, oversight, or enforcement of ESG disclosure obligations.

Whistleblowers, properly protected and incentivized will be in a position to help ensure oversight and compliance. Third-parties and self-regulators often lack critical regulatory experience and whistleblowers who report suspected violations to these non-SEC actors would, often unknowingly, be excluded from the Dodd-Frank Act's anti-retaliation provisions.⁶

The SEC cannot establish a regulatory regime that fails to take into consideration the Supreme Court's clear and unequivocal holding in *Digital Realty*: Congress wanted whistleblowers to report to the SEC, not to other non-Commission entities. This intent was so clear that the Supreme Court, in a unanimous decision by Justice Ginsburg, held that the Dodd-Frank Act's whistleblower law *only* prevented retaliation against employees who reported to the Commission.

The intake of anonymous whistleblower complaints, as well as the capability to protect and incentivize whistleblowers to come forward with indispensable information is needed to enforce violations of the climate-related disclosure rules. The SEC is the only body with these components already in place, and the Supreme Court has ruled that the agency is the proper venue for employee reports. In light of *Digital*, it would be dangerous to task a third-party with ESG enforcement responsibilities because whistleblowers would not be protected from retaliation or eligible for an award when they report ESG reporting violations to this body.

⁶ See *Digital Realty Trust Inc. v. Somers*, 583 US __ (2018), excluding whistleblowers from Dodd-Frank Act protections unless they have reported to the SEC.

Proponents of delegating the critical work of development to third-parties cite the following grounds to justify the delegation, claiming that:

- third parties have specialized expertise, or could quickly gain such expertise to support the standard setting or enforcement work;
- given their proximity to industry, their rules and standards will receive an early buy-in of the industry and therefore be less frequently challenged and de-railed in courts;
- they will be relatively removed from the cyclical political gyrations (*i.e.*, from regulations to de-regulations to re-regulations) that risks destabilizing both the disclosure and enforcement regime necessary to produce the climate and ESG information demanded by investors;
- because they will not be subject to the time-consuming and unpredictable notice and comment process as dictated by the Administrative Procedure Act, they will more quickly erect or update necessary standards and frameworks, and;
- because they are outside of the jurisdiction of the D.C. Circuit, their rules, standards, or enforcement actions may not be easily challenged in court.

These or similar arguments are not new, and have been made in the past to justify the delegation of rule-setting, standard setting, or enforcement functions to third-parties and self-regulatory organizations. But a critical review of the history of non-governmental regulators would reveal that—taken together—these benefits do not result in a more effective policymaking and enforcement outcomes. Instead, nearly invariably, *anytime the Commission has outsourced vital governmental functions to non-governmental entities, the results have fallen far short of the promises.*

History has shown that when non-governmental bodies are tasked with enforcing compliance:

- investors and consumers have been less protected;
- pace of policymaking has been glacially slow;
- the policymaking has been compromised by conflicts of interest inherent in the self-regulatory model;
- the non-governmental rules (that have to none-the-less be approved by the Commission) have still been subject to lawsuits;
- eventually, the very industry these self-regulators have been charged to police has effectively co-opted or, worse, captured these regulators.

Most importantly, and most relevantly from our perspective, third-parties or self-regulators do not have the necessary incentives and protections in place to attract whistleblowers to come forward with original information that would be indispensable for any regulatory body concerned with enforcing violations of ESG disclosure rules. In particular, as they are constituted, neither the Financial Accounting Standards Board (“FASB”) nor the Financial Industry Regulatory Authority (“FINRA”) have whistleblower protection and rewards program—

as does the Commission—to support the compliance and enforcement programs that would underpin the ESG disclosure regime.

If the enforcement and/or creation of ESG reporting requirements is outsourced to a non-governmental standard setter or a self-regulatory body, we firmly believe that these standards and the enforcement mechanism will not inspire confidence among would-be-whistleblowers and the credibility of the program would suffer, investors would experience needless harm while violations of the new standards would go largely undetected and unenforced. By adopting a mandatory reporting framework to be enforced by the SEC, the Commission would establish a leading regime for keeping corporations honest about how their conduct impacts the environment and enable insiders to come forward with the truth.

Worse still, any SEC program that may directly or indirectly encourage employees to report violations outside of the SEC opens whistleblowers to retaliation, and directly contradicts the clear legislative intent of the Dodd-Frank Act as recognized by the unanimous Supreme Court ruling in *Digital*. The holding of the Supreme Court, interpreting the unquestionable intent of Congress in passing the Dodd-Frank Act, could not be clearer:

Our charge in this review proceeding is to determine the meaning of "whistleblower" in § 78u-6(h), Dodd-Frank's anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A "whistleblower" is "any individual who provides ... information relating to a violation of the securities laws *to the Commission*." § 78u-6(a)(6) (emphasis added). Leaving no doubt as to the definition's reach

The "core objective" of Dodd-Frank's robust whistleblower program, as Somers acknowledges, Tr. of Oral Arg. 45, is "to motivate people who know of securities law violations to *tell the SEC*," S. Rep. No. 111-176, at 38 (emphasis added). By enlisting whistleblowers to "assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws," Congress undertook to improve SEC enforcement and facilitate the Commission's "recover[y][of] money for victims of financial fraud." *Id.*, at 110. To that end, § 78u-6 provides substantial monetary rewards to whistleblowers who furnish actionable information to the SEC. See § 78u-6(b).

Any rule or policy statement implementing climate-related disclosure rules must be consistent with the Dodd-Frank Act's understanding of a protected disclosure and the law's intent to encourage reporting directly to the SEC.

2. Whistleblower Rules Would Incentivize Reporting of Improper Climate and ESG Related Disclosures and would Deter Public Companies from Misleading the Public and Investors.

In response to Question 10, regarding Enforcement: NWC urges the Commission to keep the Dodd-Frank Act whistleblower program at the forefront of enforcement plans as Whistleblowers have proven critical to successful enforcement of SEC regulations under this program. The SEC recognizes by inclusion of the SEC Whistleblower Office in the Climate and ESG Task Force, that without access to information from whistleblowers the SEC's ability to enforce climate and ESG-related disclosure requirements will be severely handicapped. Because of this, the SEC should utilize its authorities under the Dodd-Frank Act (hereinafter "Dodd-Frank") to ensure that whistleblower allegations impacting climate and ESG disclosure rules are prioritized within the Office of Enforcement, and that whistleblowers who disclose climate-related violations are fully incentivized and protected.

The Commission, through a policy statement, should clarify how it will interpret Dodd-Frank rules on whistleblowers in light of its emphasis on climate and ESG disclosures. By making it clear that the Commission is interested in obtaining complaints concerning climate-related violations, the Commission would both incentivize high-quality tips, and further send a message to the regulated community that would have a strong deterrent effect. Furthermore, paying large whistleblower rewards in climate related cases would further create a deterrent on future violations and send the precise message that Wall Street needs to hear when it comes to misleading the public on issues central to the health of the U.S. economy, such as climate.

The importance of using the SEC's whistleblower program to aid in the detection of any climate and ESG related securities violation is well established. For example, in August 2020 the Director of the SEC's Enforcement Division lauded the program's success: "[The whistleblower program is critically important to the SEC and to the Enforcement Division. It is important to reward whistleblowers and to do it timely. Since the enactment of the program in 2011, whistleblower tips have resulted in numerous high-quality enforcement actions . . . Given the success of this program, we have been flooded with increasing numbers of quality tips."⁷

Similar strong public support for the program has been stated by SEC Commissioners on a bipartisan basis.⁸ Similarly, Chair Gensler, during the confirmation process, demonstrated strong support for the program in answers to questions filed by Senator Charles Grassley.⁹ His support

⁷ See *Director of the SEC's Division of Enforcement Lauds Success of Whistleblower Program Ahead of Vote on Proposed Changes to the Program*, WHISTLEBLOWER NETWORK NEWS, available at <https://whistleblowersblog.org/2020/09/articles/whistleblower-news/director-of-the-secs-division-of-enforcement-lauds-success-of-whistleblower-program-ahead-of-vote-on-proposed-changes-to-the-program/> (Sept. 22, 2020).

⁸ See *The 100 Whistleblowers Who Changed Wall Street*, NATIONAL LAW REVIEW, available at <https://www.natlawreview.com/article/100-whistleblowers-who-changed-wall-street> (Sept. 20, 2020).

⁹ See *WNN Exclusive: Gensler Pledges Strong Support for SEC Whistleblowers*, WHISTLEBLOWER NETWORK NEWS, <https://whistleblowersblog.org/2021/03/articles/corporate-whistleblowers/sec-whistleblowers/gensler-pledges-strong-support-for-sec-whistleblowers/> (March 19, 2021).

echoed the strong endorsements of the whistleblower program by his predecessors, Jay Clayton and Mary Jo White.¹⁰

Based on the universal recognition of the central role whistleblowers play in enforcement it is vitally important that whistleblowers be specifically incentivized and encouraged to disclose violations of securities law that impact climate, including climate disclosure rules. Using the following Dodd-Frank rules to facilitate reporting on climate-related violations are particularly relevant for this purpose.

a. Rule on Determining the Amount of an Award

The SEC has broad discretion on setting the amount of a reward paid to a fully qualified whistleblower. Congress set forth specific criteria that the Commission was required to apply, and the SEC adopted implementing rules.

The Dodd-Frank Act states as follows:

In determining the amount of an award . . . the Commission shall take into consideration . . . the programmatic interest of the Commission in deterring violations of securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws.” 15 U.S.C. § 78u-6.

The Commission’s Dodd-Frank rules are consistent with this Congressional mandate. In Rule 17 C.F.R. § 240.21F-6(a)(3) the SEC stated that it could increase the amount of an award based on “law enforcement interest.” Among the factors the Commission stated it would apply when considering whether to increase the amount of an award was the “degree to which an award encourages the submission of high-quality information from whistleblowers” and “**whether the subject matter of the action is a Commission priority.**” (emphasis added).

As the SEC is prioritizing climate and ESG disclosures, the SEC should explicitly state that it will increase the whistleblower reward to the maximum 30% in climate and ESG disclosure cases. The Commission adopted a similar rule in September 2020 when it ruled that it would presumably pay a 30% reward in certain cases where the sanctions collected were small. Rewards in climate and ESG disclosure cases should similarly presumably be paid at the 30% rate, unless other factors are present that justify a lower amount.

¹⁰ See Jay Clayton, <https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23>; and Mary Jo White [https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/Mary-Jo-White-The-SEC-as-the-Whistleblower s-Advocate.pdf](https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/Mary-Jo-White-The-SEC-as-the-Whistleblower-s-Advocate.pdf).

b. Related Action Rule

The Dodd-Frank rules on related actions is particularly relevant to climate and ESG disclosure cases. Under Dodd-Frank, if the Commission issues a sanction of \$1 million or more for a violation of the securities laws, whistleblowers can thereafter obtain rewards based on violations of other federal laws, provided that the other federal agencies relied upon the information provided to the Commission by the whistleblowers. 15 U.S.C. § 78u-6(b)(1). For example, if the SEC sanctions a public company \$1 million for violating a climate and ESG disclosure rule, and the U.S. Environmental Protection Agency uses the whistleblower's information to sanction the company another \$9 million, the whistleblower is entitled to a full award based on \$10 million in total sanctions. See 15 U.S.C. § 78u-6(h)(2)(D)(i)(II), permitting related action awards based on sanctioned issued by any U.S. "appropriate regulatory authority."

The related action rule is particularly relevant to climate and ESG disclosure cases. It is imperative that the whistleblower be incentivized not only to disclose information to the SEC, but also to work closely with federal criminal and regularly authorities whenever the climate-related financial disclosure violation also constitutes violations of other federal laws. The related action provision will encourage whistleblowers to fully cooperate with all federal agencies with an interest in policing climate-related financial disclosure violations. In this regard the Commission should also adopt a climate related Memorandum of Understanding with government departments such as the Environmental Protection Agency.

c. Sharing Anonymous Information

Dodd-Frank authorizes whistleblowers to file anonymous complaints with the Commission. This rule has proven to be critical in incentivizing employees to take the risk associated with becoming a whistleblower.

The SEC can share a whistleblower's information with other federal law enforcement agencies whenever the sister agency agrees to honor the confidentiality and anonymity of the whistleblower in a manner consistent with Dodd-Frank rules. 15 U.S.C. § 78u-6(h)(2)(D)(ii). In practice this sharing requirement has been problematic, as many agencies do not understand this requirement or are reluctant to enter into confidentiality agreements.

The SEC should enter into sharing agreements with other federal agencies directly involved in climate and ESG disclosures, to allow for the sharing of confidential information from whistleblowers, without forcing the whistleblowers to waive or compromise their right to confidentiality or anonymity. This is critical to effectuating the related action provision in the Dodd-Frank Act.

III. Conclusion

In conclusion, NWC supports the SEC's efforts to ensure that investors and markets have access to consistent, comparable, reliable information on financially material risks and opportunities related to climate change and other sustainability factors. The questions posed by the Commission touch on many important issues, and NWC welcomes further engagement on these and other topics. NWC's work is founded on the idea that whistleblowers can be a highly valuable and effective component in any regulatory effort and history has proven this to be true. Further, with clear and enforceable mandatory reporting standards, the SEC can continue its fantastically successful whistleblower program by ensuring that ESG whistleblowers are covered by Dodd-Frank Act protections and incentivized by rewards when they report environmental violations. We welcome the SEC's growing interest in the role sustainability standards can play in advancing its tripartite mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation and are eager to work together to ensure whistleblower protections are included in any ESG reporting framework the SEC chooses to adopt.

We would be immediately available to meet and discuss these recommendations with the Commission. 


Sincerely,

Siri Nelson, Executive Director, National Whistleblower Center
Karen Torrent, Policy Counsel, National Whistleblower Center
Stephen Kohn, Chairman of the Board, National Whistleblower Center

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Cc:

Hon. Hester Peirce, Commissioner
Hon. Allison Herren Lee, Commissioner
Hon. Elad Roisman, Commissioner
Hon. Caroline Crenshaw, Commissioner
Ms. Renee Jones, Director of Corporation Finance