NWC | NATIONAL WHISTLEBLOWER CENTER

April 22, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File Number S7-10-22
National Whistleblower Center Supports Proposed Climate Disclosure Rules.

Dear Secretary Countryman:

National Whistleblower Center ("NWC") formally submits this comment in response to the Securities and Exchange Commission's proposed rule, File Number S7-10-22, The Enhancement and Standardization of Climate-Related Disclosures for Investors (hereinafter "Climate Disclosure Rules" or "Proposed Rules").[1] NWC is supportive of the Commission's efforts to require registrants to disclose climate related information associated with their operations in registration statements and annual reports. Climate related issues are an increasingly large factor in investor decision making.[2] Clear reporting standards are critical to ensuring that investors and the public obtain accurate information about public companies' impact on the climate and their efforts to address ever increasing climate-related risks.

Whistleblowers will be central to the successful enforcement of the Proposed Rule, and any rule the Commission adopts regarding climate disclosures, as they are uniquely positioned to detect violations concerning inaccurate reporting. Accordingly, NWC supports the swift enactment of the Proposed Rules, and we urge the Commission to leverage the SEC whistleblower program, define materiality, encourage international whistleblowers, and encourage interagency cooperation by updating the "Related Action" rule to support whistleblowers who might report violations of the Climate Disclosure Rules:

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[1] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Mar. 21, 2022).

[2] *See* Deloitte Report: Inaction on Climate Change Could Cost the US Economy $14.5 Trillion by 2070, stating that "the United States economy could gain $3 trillion if it rapidly decarbonizes over the next 50 years." Available at https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-report-inaction-on-climate-change-could-cost-the-us-economy-trillions-by-2070.html, and The United States' turning point, DELOITTE, available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-the-turning-point-a-new-economic-climate-in-the-united-states-january-2022.pdf; *and* ESG: 2021 Trends and Expectations for 2022, SKADDEN, stating that "Throughout 2021, the importance of environmental, social and governance (ESG) matters proved to be even greater than many had expected, with ESG becoming a key area of focus for a range of stakeholders, particularly in the boardroom." (February 11, 2022), available at https://www.skadden.com/insights/publications/2022/02/esg-2021-trends-and-expectations-for-2022.

I. Leverage the Dodd-Frank Act Whistleblower Program for the Successful Enforcement of the Climate-Risk Disclosure Rules.

The SEC whistleblower program, enacted under the Dodd-Frank Act ("DFA"), has been remarkably successful in assisting the Commission in the detection and prosecution of securities law violations.[3] If the Climate Disclosure Rules are enacted, whistleblowers will play a vital role in bringing violations to light, as they possess inside information about whether a registrant's disclosures of climate-related risks accurately reflect the registrant's conduct.

In the context of protecting investors from frauds related to inaccurate climate related-disclosures the SEC should send a powerful message to the regulated community and potential whistleblowers that the Commission will act on climate-related whistleblower tips. This can be communicated by taking the following steps: (1) prioritize the review of climate-related intakes; (2) prioritize filing enforcement actions in climate-related cases, even when the potential recovery is small; (3) exercise its discretion to grant awards even when such grants may not be required under the law or regulations; (4) pay rewards at the 30% level in all cases unless factors exist that require the reduction of a reward under the current published rules.

To date, the SEC has acted on steps 1 and 2 by stating that ESG related violations would be a priority for the enforcement division in 2022.[4] This is the second year in a row which the SEC enforcement division has stated ESG violations as a priority, and if adopted, the Proposed Rules will better enable the SEC to realize this priority more fully. Without clear rules, it is difficult for investors to make informed decisions.[5] And, it is difficult for whistleblowers to come forward with actionable information and help the SEC engage in steps 3 and 4 of our recommendation. By taking the steps NWC recommends here, the Commission can leverage whistleblowers and the Commission's incredibly successful whistleblower program to create a strong deterrent against future climate-related securities violations and keep investors informed.

II. Define the Materiality Standard to Provide Whistleblowers, Investors, and Registrants Clarity about the Types of Disclosures That Are Required.

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[3] *See, e.g.*, Press Release, SECURITIES AND EXCHANGE COMMISSION, SEC Surpasses $1 Billion in Awards to Whistleblowers with Two Awards Totaling $114 Million (Sept. 15, 2021), available at https://www.sec.gov/news/press-release/2021-177.

[4] *See* Press Release, Securities and Exchange Commission, SEC Division of Examinations Announces 2022 Examination Priorities, Enhances Focus on Private Funds, ESG, and Operational Resiliency (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-57.

[5] ESG Investing and Climate Transition, OECD, stating "In order to further unlock material information that could effectively contribute to long-term value, improving transparency, comparability and materiality of ESG approaches will be integral . . . in their current form, it is difficult for all but the most sophisticated investors – even with transparent and comparable data – to assess the ESG contribution to portfolio returns relative to other factors." And that "Notably, ESG ratings and E[nvrionmental] pillar scores differ substantially in their calculation across various rating providers, not only in terms of the underlying data on which scores are based, but how these data are used, weighted and – in places – extrapolated in the calculation of the overall rating" at pgs. 10 and 11. (2021), available at https://www.oecd.org/finance/ESG-investing-and-climate-transition-market-practices-issues-and-policy-considerations.pdf.

The proposed rules would require a registrant to disclose whether any climate-related risk is reasonably likely to have a "material impact" on a registrant, including its business or consolidated financial statements, which may manifest over the short, medium, and long term.[6] In applying the materiality standard with respect to climate-related disclosures it is essential that the Commission provides clear guidance in regard to "materiality", if it adopts this standard, to provide investors—and potential whistleblowers—with clarity about what constitutes a violation.

In Question 9 of the Proposed Rule, the Commission seeks comment regarding the types of climate-related risks that would be considered "material."[7] A holistic approach to analyzing the materiality of climate-related misrepresentation would allow the SEC to consider the full environmental impact associated with a registrant's operations – rather than breaking risk up into pieces. As such, the SEC's definition of "climate-related risks" must include both actual and potential risks as well as physical and transition risks. Failure to do so would undermine the effectiveness of the Proposed Rule because it would not consider the full scope of climate-related risks thereby depriving investors of the full picture of a registrant's climate-related impact. By being empowered to take a holistic approach, enforcement agents may be open to reviewing more complex tips from expert insiders.

The materiality of certain components in any given climate disclosure might take on different weight when put into context. Whistleblowers are the key to understanding the materiality of various aspects that might seem innocuous when reported on their own. For this reason, a holistic approach to materiality would enable whistleblowers to be of greater assistance and enable the SEC to deter misrepresentations that are intended to obfuscate the significance of information being — or not being — shared.

In Question 8 of the Proposed Rule, the Commission seeks to determine how climate-related risks should be disclosed based on their manifestation over the short-, medium-, and long-term.[8] As currently proposed, the SEC intends to allow registrants to determine how they define these timelines. NWC believes this approach is flawed as it could provide registrants with free rein to define which types of climate-related risks are considered material and create an environment in which whistleblowers would be less confident coming forward. Allowing regulated parties to self-define the timelines of climate impacts can lead to a chilling effect where potential whistleblowers are silenced internally because their concerns are explained away by issues around time horizons.

III. The SEC Must Prioritize International Whistleblower Tips.

The proposed Climate-Risk Disclosure Rules would impact public companies who conduct operations abroad. These companies often commit environmental violations in countries with weaker or nonexistent environmental regulations. Moreover, many countries lack basic whistleblower protection mechanisms making it difficult, and potentially dangerous, for whistleblowers to come forward with information regarding climate-related violations that have a financial impact. Therefore, if the Proposed Rule is enacted, the Dodd-Frank Act whistleblower

[6] *See* proposed Item 1502(a) of Regulation S-K.
[7] Proposed Rule, 87 Fed. Reg. 21334, 21352.
[8] *Id.*

program will be able to leverage its proven global reach to ensure that whistleblowers who reside outside the United States are fully protected, even if the legislation in their home countries is not as rigorous as requirements in the United States, and even if local regulators do not enforce climate laws.

The Dodd-Frank Act whistleblower program is the premiere whistleblower program that affords non-U.S. citizens a well-managed confidentiality program, a rewards program, and a highly effective Whistleblower Office. Non-U.S. whistleblowers already comprise a significant source of total tips received by the SEC, and it is essential that the Commission continues processing international whistleblower claims concerning climate-related violations.[9] This number grows year after year as awareness about the SEC program continues to be amplified by the issuance of large awards and grassroots efforts by non-profit organizations like NWC.

Further, it is important that the Commission prioritize Foreign Corrupt Practices Act (FCPA) violations that impact climate. Foreign bribery related to mineral and resource extraction is commonplace. The SEC should prioritize cases under the FCPA where evidence exists that bribes have been paid in any climate-related industry. These violations include illegally extracting minerals from protected areas, the illegal timber trade, and bribes paid to extract, obtain leases, ship, or import oil and gas. Historically, the extraction of natural resources from developing countries has been a significant area of corruption and bribery. The Commission should adopt a zero-tolerance policy for bribery paid in all areas that could impact climate.

IV. Fully Implement the Proposed Whistleblower "Related Action" Rule.

By mandating the disclosure of climate-related impacts in registration statements and annual reports, as we strongly encourage the Commission to do, the Proposed Rules will likely result in regulatory overlap with other federal environmental agencies, many of which already operate their own whistleblower programs. In enacting the DFA whistleblower program, Congress intended that whistleblower information filed with the SEC also be shared with other agencies. To achieve this goal, Congress requires that whistleblowers be paid for "related action" recoveries based on the information provided to the Commission, even when another agency sanctions the fraudster.[10]

In other words, if the Environmental Protection Agency or Department of Justice issues a sanction based on information a whistleblower submitted to the SEC, that whistleblower is fully qualified to obtain a reward based on the sanction issued by the non-SEC regulator. Furthermore, the Dodd-Frank Act contains specific rules permitting the SEC to share confidential and anonymously filed information with sister regulatory and law enforcement agencies.[11]

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[9] *See* 2021 Annual Report to Congress, Office of the Whistleblower, Securities and Exchange Commission, (2021) (finding that, since the beginning of the whistleblower program, the Commission has received whistleblower tips from individuals in approximately 133 countries outside the United States.) available at https://www.sec.gov/files/owb-2021-annual-report.pdf.

[10] *See* 15 U.S.C. § 78u-6(b).

[11] *See* 15 U.S.C. § 78u-6(h)(D).

Rewarding whistleblowers for related actions brought by other entities will bolster the effectiveness of the Climate Disclosure Rule. The "related action" concept is a perfect fit for policing climate-related crimes. When a company violates a climate-risk disclosure rule, it is apparent that these violations may also implicate conduct withing the jurisdiction of the EPA.

For example, an oil company may make false disclosures to the public and investors about their environmental compliance. That same company may also have covered up or committed specific environmental violations (such as oil spills) within the jurisdiction of the EPA. The SEC must ensure that whenever a climate-related disclosure may also impact a "related action" violation, the Commission will take affirmative steps to ensure that the whistleblower's information is provided to the sister regulatory or law enforcement agency. The sharing of the whistleblower's information ensures that violators can be held fully accountable.

For example, the proposed rules would require a registrant to disclose its GHG emissions for its most recently completed fiscal year.[12] Specifically, this would include direct GHG emissions from operations that are owned or controlled by a registrant (Scope 1 emissions)[13] and indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant (Scope 2 emissions).[14] Importantly, the disclosure of these emissions as well as other types of environmental impacts are already required under existing environmental statutes administered by the EPA. For instance, under the EPA's Greenhouse Gas Reporting Program (GHGRP), nearly 8,000 industrial facilities and other sources in the United States already must report their direct emissions to the agency. When a whistleblower reports these violations to the SEC, the EPA will also benefit. When sanctions are issued, whistleblowers are entitled under the DFA to a mandatory minimum of the entire sanction amount — not just the amount the SEC action gave rise to.

It is therefore critical that whistleblowers who report violations of climate disclosure rules to the SEC be eligible for rewards stemming from related enforcement actions brought by other agencies, such as EPA. Doing so will provide greater incentives for whistleblowers to come forward thereby increasing the efficacy of the Climate Disclosure Rule.

Lastly, to further incentivize whistleblowers who may be eligible under multiple whistleblower programs, the SEC must swiftly enact its proposed rulemaking concerning related actions.[15] The SEC is currently grappling with whistleblower award eligibility for related actions in its proposed whistleblower program amendments published in February. The Commission's 2020 rule guides the Commission to factor whether an alternative whistleblower program has the more "direct or relevant connection to the [non-Commission] action" when the whistleblower has cooperated with multiple successful agency actions.[16]

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[12] *See* proposed 17 CFR 229.1504(a).
[13] *See* proposed 17 CFR 229.1500(p).
[14] *See* proposed 17 CFR 229.1500(q).
[15] The Commission's Whistleblower Program Rules, 87 Fed. Reg. 9280 (proposed Feb. 10, 2022) (to be codified at 17 C.F.R. pt. 240).
[16] *See* SEC Rule 21F-3(b)(3)(i) through (ii).

NWC disputed the legality of this provision in 2018 and 2020 and critiqued its adoption in 2020. The Commission imposed this limitation notwithstanding the clear statutory requirement that eligible whistleblowers be paid awards for both covered and related actions—without any distinction being made in the statute between the two types of actions.[17] Now, the Commission is revisiting the policy, and NWC salutes the clear thinking of Chair Gensler and the SEC staff. The addition of language specifically recognizing the Commission's commitment to DFA award minimums is worthy of support, and NWC expressed our support for these proposed amendments in our April 7 letter.[18]

The positive impacts of amending the related action rule will encourage all whistleblowers to collaborate with any interested agency — maximizing the deterrent effect of the SEC's incredibly successful program and further safeguarding investors. Whistleblowers who report climate-related violations to the SEC may also be eligible under various whistleblower programs. However, such programs often lack the same financial incentives as the SEC whistleblower program, such as guaranteed awards and mandatory minimum award amounts. For this reason, NWC encourages the Commission to adopt the related action rules proposed in 2022 which would fully align the SEC whistleblower rules with the DFA mandatory minimum award provisions — as Congress intended — in order to give climate whistleblowers the assurance that they will be rewarded for cooperating with agencies like the DOJ and EPA.

V. NWC Fully Supports the SEC Propose Disclosure Requirements and Enforcement Priorities.

NWC commends the SEC for taking action to require more accurate disclosures regarding public companies' climate-related impacts. Whistleblowers will be key to the successful enforcement of the Climate-risk Disclosure Rule, and their utility would be bolstered by clear standards, prioritization of transnational whistleblowers, and an improved related action rule. We urge the Commission to take the foregoing steps to ensure that the Dodd-Frank Act whistleblower program is at the forefront of its enforcement strategy.

NWC would be happy to meet and further discuss our support for the Climate Disclosure Rules including how whistleblowers are critical to its successful enforcement. Please contact us at info@whistleblowers.org with any questions; we would be happy to clarify or develop on anything in this letter.

Respectfully submitted,

/s/
Siri Nelson
Executive Director
National Whistleblower Center

[17] *See* 15 U.S.C. § 78u-6(b).
[18] National Whistleblower Center, Comment Letter on Proposed Whistleblower Program Rules Concerning Related Actions and Award Caps, File Number S7-07-22 (April 7, 2022), available at https://www.sec.gov/comments/s7-07-22/s70722-20122789-279113.pdf.

CC:

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