



## Kohn, Kohn & Colapinto LLP

June 15, 2021

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

### **Re: ESG Reporting Mandates**

Dear Chair Gensler:

As attorneys who have represented whistleblowers for over 35 years, we are writing in strong support of the recommendations filed by the Duke University Climate Risk Disclosure Lab, the group letter submitted by Americans for Financial Reform Education Fund/Public Citizen, and the National Whistleblower Center. These letters identify the need for stronger protections for whistleblowers as a key component to any successful ESG reporting rule.

Our law firm has participated in all aspects of the SEC's whistleblower programs. In 2002, we worked with Congress in helping to draft the Sarbanes-Oxley whistleblower protection law, and we also assisted in the drafting process for the Dodd-Frank Act in 2010. Thereafter, we were active participants in the two whistleblower rulemaking proceedings conducted by the SEC. Our experience in representing corporate whistleblowers, including environmental whistleblowers, enabled us to participate in these processes.

The basic program recommended by the above-referenced organizations is entirely consistent with Congress's intent to incentivize whistleblowers and use whistleblower disclosures to help enforce the law. These basic concepts are:

- [Encouraging direct reporting to the SEC](#). Any attempt to encourage whistleblowers to file reports to non-SEC entities is inconsistent with the Dodd-Frank Act's explicit statutory requirements, as interpreted by the U.S. Supreme Court. *See Digital Realty v. Somers*, 138 S.Ct. 767 (2018). Although the SEC and the whistleblower community urged the Court to take a broad view of whistleblowing in the *Sommers* case, the Supreme Court rejected this approach. It explained that Congress wanted to incentivize direct reporting to the SEC. Regardless of any other policies of the Commission, when it comes to whistleblower reporting, the Dodd-Frank Act sets forth a firm and unequivocal standard: Reports should be made directly to the SEC. Thus, in implementing *any* ESG

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reporting requirements, whistleblowers must be urged to contact the SEC directly before making any other reports to a non-Commission entity.

Furthermore, in rules adopted by the Commission in September of 2020, the SEC mandated that any whistleblower who seeks a reward under the Dodd-Frank Act must file a TCR within 30-days of any communication with any SEC employee or department. Thus, the ESG rule should not only establish a clear channel for employee reporting to the Commission, but it must also include specific instructions to employees regarding the TCR filing process.

After an employee files a tip, complaint, or referral to the SEC, they can then be directed to other potential programs outside of the Commission to assist in the review of their allegations. These programs could include a corporate compliance program. However, in order to fulfill Congress's clear intent to encourage direct reports to the SEC, any such non-SEC reporting can only be encouraged *after* filing an initial claim SEC. Significantly, the U.S. Chamber of Commerce, and other members of the regulated community, all strongly urged the Supreme Court to require initial reporting to the SEC for an employee to be covered under the Dodd-Frank Act. No regulated company urged the Court to protect or cover non-SEC filings under the Dodd-Frank Act. Thus, to be consistent, the regulated community should also endorse a mandatory SEC-reporting process for employees.

- [Use the Whistleblower Program to Enforce Climate-Related Rules](#). Concerning Question 10, we strongly endorse the recommendation of the National Whistleblower Center (and others) “to keep the Dodd-Frank Act whistleblower program at the forefront of enforcement plans.” The record is clear and beyond dispute: The SEC whistleblower program works remarkably well. In the context of protecting investors from frauds related to inaccurate climate disclosure and protecting the economy from the harms caused by climate change, the SEC whistleblower program should play a vital role in protecting the American people by helping to enforce the law.
- [Exercise Discretion to Implement the Whistleblower Program to have the Maximum Impact on Climate Related Crimes/Violations](#). The SEC should send a *powerful message* to the regulated community and potential whistleblowers that the Commission will prioritize climate-related cases within its Dodd-Frank Act program. This implementation would include 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; (d) pay rewards at the 30% level in all cases unless factors exist that require the reduction of a reward under the current published rules. By exercising the broad discretion Congress granted to the SEC to implement its whistleblower program, the Commission can use these authorities to create a strong deterrent against future climate-related securities violations.

- [Prioritize FCPA cases that impact climate.](#) Foreign bribery related to mineral and resource extraction is commonplace. The SEC should prioritize cases under the Foreign Corrupt Practices Act (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.
- [Fully Implement the “Related Action” Rule.](#) 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. 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.

The “related action” concept is a perfect fit for policing climate-related crimes. When a company violates a climate disclosure rule, these violations may also impact actual environmental violations within 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 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 the fraudster(s) can be held fully accountable.

As demonstrated in the above outline, the Commission should use its discretion to implement the whistleblower program in a manner that fulfills the policy of the United States to combat climate change and enforce laws, rules and regulations designed to protect the economy and the public from the adverse impacts of climate change.

We look forward to working with the Commission in implementing regulatory amendments or policy changes necessary to ensure that the enforcement tools provided to the Commission under the Dodd-Frank Act’s whistleblower program are effectively used to serve the public interest.

Respectfully submitted,

/s/

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CC: Hon. Hester Peirce, Commissioner  
Hon. Allison Herren Lee, Commissioner  
Hon. Elad Roisman, Commissioner  
Hon. Caroline Crenshaw, Commissioner  
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