

[Securities Regulation Daily Wrap Up, PUBLIC COMPANY REPORTING AND DISCLOSURE—House FSC reports climate, employee disclosure, civil penalty bills on close votes; whistleblower bill easily approved, \(Jul. 17, 2019\)](#)

Securities Regulation Daily Wrap Up

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The House FSC advanced bills that would impose new climate change and employee count disclosures while also raising civil penalties and extending the SEC's time to obtain such penalties. The committee also approved a bill to create a PCAOB whistleblower program.

The House Financial Services Committee approved five securities bills dealing with a variety of topics, including PCAOB whistleblowers, climate and outsourcing disclosures, and enhancing civil monetary penalties while also imposing an extended limitations period on such actions. With the exception of the vote on PCAOB whistleblowers, all of the remaining securities bills were [approved](#) on party line votes.

Climate, outsourcing disclosures. Senator Warren (D-Mass) and Rep. Casten (D-Ill) stole some of the thunder from the House FSC on the topic of climate change by [announcing](#) their companion bills a week before the markup. The Climate Risk Disclosure Act of 2019 ([H.R. 3623](#); [S. 2075](#)) would require the Commission to adopt rules to implement new disclosures for public companies, regarding: (1) the identification and evaluation of the potential financial impact of climate change; (2) a description of corporate governance measures taken to address climate change; and (3) a description of how the company mitigates its identified risks. (The text of an amendment to the bill was not immediately available for review online). The Senate version also includes requirements regarding an issuer's resiliency and how the issuer factors climate risk into its overall risk management strategy.

The Commission would have to consult with "climate principles" such as the EPA, the Energy Department, and the National Oceanic and Atmospheric Administration. Within two years of enactment, the Commission must issue rules to implement the required disclosures. The bill was reported by a vote of 34-25.

"Climate change is a risk to the stability of the global financial system. This bill presents a market-based solution to understand the impact of a changing climate on companies and provide investors, lenders, and insurers with better information," [said](#) Rep. Casten. He added that the contemplated disclosures would help investors in a variety of fields, including those who want to know how rising sea levels may impact properties on the eastern seaboard or how rising temperatures may impact the germination of seeds.

Representative Bill Huizenga (R-Mich) countered that the SEC lacks ESG expertise and that mandates, such as those in the bill, discourage companies from going public and do more harm than good. "The SEC does not do this. The SEC is not equipped to do this.," said Rep. Huizenga. "And I understand over the last several decades activist shareholders and corporate gadflies have hijacked the SEC, or attempted to, to operate well outside its mandate and push non-material social and political policies."

The House FSC also advanced a bill, the Outsourcing Accountability Act of 2019 ([H.R. 3624](#)), sponsored by Rep. Cindy Axne (D-Iowa), that would require public companies to disclose the total number of employees who are domiciled in the U.S. and the number of employees who physically work in and are domiciled in countries outside the U.S. The SEC would be authorized to adopt rules to implement the provision. Each data set would have to be disaggregated by state or country and data would have to be compared using a percent change calculation. The bill was reported by a vote of 33-25.

PCAOB whistleblowers. The PCAOB Whistleblower Protection Act of 2019 ([H.R. 3625](#)), sponsored by Rep. Sylvia Garcia (D-Texas), would establish a whistleblower tip and reward program at the Public Company Accounting Oversight Board. The bill is modeled largely after the Dodd-Frank Act whistleblower provisions applicable to the SEC. The committee approved the bill by voice vote.

"Whistleblower" would mean any person, or two or more persons acting jointly, who provide information about violations of PCAOB rules, securities rules for audits, or professional standards. A special rule would ensure that whistleblowers are protected from retaliation by their employers. Significantly, the definition does not specify to whom whistleblowers must report information about violations, a nod to the issues faced by the SEC regarding the Supreme Court's interpretation in [Somers](#) that the Dodd-Frank Act provision for the SEC requires a report to the SEC in order to invoke the anti-retaliatory protections of the Dodd-Frank Act. The House has passed legislation ([H.R. 2515](#)) by a [vote](#) of 410-12 to reverse the holding in [Somers](#).

Much like the SEC's whistleblower program, a PCAOB whistleblower could receive between 10 to 30 percent of any monetary sanctions imposed. "Original information" would have the same meaning as the Dodd-Frank Act provision for the SEC. "Covered proceedings" would include those initiated after enactment and which result in monetary sanctions of more than \$250,000.

Higher civil penalties, limitations period changes. The House FSC also mulled two bills that would address SEC civil penalties. Both bills were approved by votes of 33-25.

With respect to SEC enforcement, the Stronger Enforcement of Civil Penalties Act of 2019 ([H.R. 3641](#)), sponsored by Rep. Katie Porter (D-Calif), would revise upward certain monetary penalties (the Senate companion bill is [S. 1854](#)). Much like the climate disclosures, some of the committee's thunder was stolen in advance of the markup by the North American Securities Administrators Association, which [expressed support](#) for the bill.

Another enforcement-related bill, the Strengthening Fraud Protection Provisions for SEC Enforcement Act of 2019 ([H.R. 3701](#)), sponsored by Rep. Vicente Gonzalez (D-Texas), would impose a 10-year limitations period on Commission actions for civil monetary penalties. The bill would revise portions of the Securities Act, the Exchange Act, the Investment Company Act, the Investment Advisers Act, and the Sarbanes-Oxley Act. An additional conforming amendment would eliminate the 5-year limitations period currently provided for in Exchange Act Section 21A regarding civil penalties for insider trading.

The bill would legislatively overturn the Supreme Court's [Gabelli](#) decision, in which the court found the SEC had a five year period during which to obtain civil penalties in enforcement cases. The unanimous [Gabelli](#) court interpreted the phrase "five years from the date when the claim first accrued" in 28 U. S. C. §2462, the general federal limitations period, to mean the time when the allegedly fraudulent conduct occurs. The government had argued unsuccessfully that the statute included a discovery rule. According to the justices, the difference is that in private fraud suits, the victim needs a discovery rule because she may be unaware of her injury due to the "self-concealing" nature of fraud, but the government is in a state of constant vigilance against fraud and should know when misconduct has occurred.

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