



February 11, 2026

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

Re: Statement on Reforming Regulation S-K

Dear Ms. Countryman:

The U.S. Chamber of Commerce (“Chamber”) submits these comments regarding Chairman Atkins’ January 13th statement soliciting input for potential reforms to disclosure requirements under Regulation S-K (“Reg S-K”).¹

The Chamber commends the Securities and Exchange Commission (“SEC”) for prioritizing changes to Reg S-K. Chairman Atkins is correct to assert that the mandated disclosure requirements under Reg S-K have become so extensive that it is difficult for investors to determine the most salient information about a business. While Congress and the SEC have made some progress to eliminate outdated or duplicative requirements,² much more needs to be done to ensure that Reg S-K meets the needs of the modern investor.

The guiding principle for public company disclosure is, and should remain, materiality. “Materiality” in the context of the securities laws constitutes what is important to the *reasonable* investor, whose primary goal is to earn a return on capital. The Chamber has long defended the materiality standard as articulated under *TSC Industries v. Northway*³ and appreciates that the SEC is prepared to reorient Reg S-K’s requirements back upon this standard.

Included in this submission are previous reports and comment letters the Chamber has provided to the SEC that detail specific recommendations for how to modernize Reg S-K. The Chamber plans to provide additional comments in the coming weeks that incorporate further input and recommendations from our membership.

The addendum to this letter includes:

¹ Statement on Reforming Regulation S-K. Chairman Paul Atkins (January 13, 2026) <https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326>

² E.g. FAST Act Modernization and Simplification of Regulation S-K (August 2019)

³ 426 U.S. 438 (1976)

1. A 2014 Chamber report, “Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation”
 - This report contains 20 specific recommendations, including “near-term” improvements to eliminate or modify outdated and/or duplicative requirements, as well as “long-term” changes such as overhauling compensation discussion and analysis (CD&A), management’s discussion and analysis (MD&A), and risk factor disclosures. While some of the near-term recommendations in this report have been implemented, many others are still relevant to the current SEC effort;
2. Chamber recommendations regarding the SEC’s April 2016 concept release on business and financial disclosure requirements under Regulation S-K;
3. October 2019 Chamber comment letter regarding the SEC’s proposal to amend Reg S-K Items 101, 103, and 105;
4. June 2025 Chamber report, “Unlocking America’s Capital Markets: Fueling Economic Growth and Innovation” which contains 16 recommendations for how to improve the public company model, including several recommendations related to public company disclosure;
5. June 2025 Chamber comments and recommendations related to the SEC’s 2025 roundtable on executive compensation disclosures.

The Chamber appreciates the SEC’s ongoing work on this important topic, and we look forward to working with commissioners and staff of the SEC as this initiative moves forward.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Flood", is positioned above the typed name.

Mike Flood
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS



U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.



CENTER FOR CAPITAL MARKETS COMPETITIVENESS

Since its inception, the U.S. Chamber's Center for Capital Markets Competitiveness (CCMC) aims to maintain and advance America's global leadership in capital formation by supporting capital markets that are the most fair, efficient, and innovative in the world.

Corporate Disclosure Effectiveness:

Ensuring a Balanced System that
Informs and Protects Investors
and Facilitates Capital Formation

Table of Contents

Introduction	3
Recommendations: Near Term Improvements	7
Recommendations: Longer Term Improvements	15
Compensation Discussion & Analysis	16
Management’s Discussion & Analysis	17
Repetition	18
Risk Disclosure	19
Revised Delivery System.....	20
Conclusion.....	24

Introduction

The U.S. Chamber’s Center for Capital Markets Competitiveness (CCMC) has long encouraged effective communication between companies and investors, which empowers investors to make informed decisions as to how and where to deploy their capital. Accordingly, we believe that the time has come for the Securities and Exchange Commission (SEC) to modernize the public company disclosure regime under the federal securities laws so that it serves investors more effectively.

Disclosure is the foundation of the federal securities laws. The purpose of disclosure is to provide investors with the material information they need to make informed investment and voting decisions—the kinds of decisions that allow investors to protect and advance their interests, that shore up investor confidence, and that facilitate capital formation and spur growth throughout our economy. Disclosure effectiveness, accordingly, should be measured by the degree to which the disclosure regime helps investors understand and evaluate a business when making these decisions. An effective disclosure regime provides all investors—including retail investors and institutional investors—the information they need but does not overwhelm them with extraneous information that can obscure what is material and distract investors from what really matters about a company.

Over the decades since the securities laws were enacted, and especially in more recent years, the disclosure documents that companies file with the SEC have continued to expand, as reflected, for example, by the lengthy annual reports on Form 10-K and proxy statements provided to investors. As many have pointed out, disclosure documents are laden with too much information that is obsolete, unnecessarily repetitive, or otherwise not useful to investors. It should come as no surprise, then, that “information overload” has been identified as a pressing concern with the current disclosure regime. As SEC Chair Mary Jo White explained not long ago, “When disclosure gets to be ‘too much’ or strays from its core purpose, it could lead to what some have called ‘information overload’—a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant.”¹

Information overload strikes a blow to the effectiveness of the disclosure regime that the SEC administers. The essential problem is that investors become inundated with information that is not useful, making it difficult to identify important information about a business. In some instances, investors simply ignore long, dense documents altogether as

¹ Mary Jo White, Chair, U.S. Securities & Exchange Comm’n, “The Path Forward on Disclosure,” Remarks at the National Association of Corporate Directors Leadership Conference (Oct. 15, 2013), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.U7ladhbs7wI>.

they find much of the information unhelpful or too time-consuming to go through. The problem worsens when disclosures become too complicated. A disclosure that is incomprehensible – even to the most sophisticated investor – can hardly help an investor make an informed decision.

To have an effective disclosure regime that promotes transparency and the interests of all investors and American business, we must address the problem of information overload. Even as the SEC makes efforts to address this problem, we recognize that there may be calls for the disclosure of *additional* information in certain areas. It is appropriate for new disclosures to be considered from time to time. That said, when doing so, we must be vigilant in applying the test of materiality to ensure that any expanded disclosure requirements help investors make better-informed investment and voting decisions.

Modernizing the disclosure regime requires us to rethink what information should be disclosed—as well as how it should be disclosed—with this in mind. We need to streamline and simplify disclosure documents so that SEC filings are more user-friendly and readable for investors. We also need to recognize that not all disclosures are rooted in SEC mandates. Companies often disclose more than is mandated in order to reduce the risk of being second-guessed for having left something out, even if the “something” disclosed is not useful to investors.

Whatever the substantive content of Regulation S-K’s disclosure requirements may be, information should be disclosed in a way that makes it easier for investors to access the information and understand it. Accordingly, as we evaluate disclosure effectiveness, we should consider how technology can be used to improve the way information is presented and delivered to investors.

In rethinking the disclosure regime, the guiding principle should be materiality. Materiality has long been the touchstone for determining the line between what should be disclosed (material information) and what should not have to be disclosed (immaterial information) under the federal securities laws. Almost 40 years ago, the U.S. Supreme Court refused to find that a fact is material just because an investor “might” find it important. Justice Thurgood Marshall, writing for the court in *TSC Industries v. Northway*, explained, “[M]anagement’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking.”² Marshall was concerned about information overload harming investors and therefore set a more demanding test of materiality. A fact is material, the Court held, if “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”³

² *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 448-49 (1976).

³ *Id.* at 449.

Considering materiality through the eyes of a reasonable investor is significant. Such an approach reduces the risk that disclosure documents will become even more difficult for investors to wade through, as they surely would if disclosure mandates increased based on the almost endless unique or personal interests of different investors. Furthermore, a focus on the reasonable investor helps ensure that what is disclosed is tied to advancing the goals of the federal securities laws, as reflected in the SEC’s mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. Disclosures should not be mandated to advance policy goals that are far afield from those reflected in the SEC’s tripartite mission.

The SEC has on several occasions assessed the disclosure regime under the federal securities laws. The most recent study is the thoughtful “Report on Review of Disclosure Requirements in Regulation S-K” that the Jumpstart Our Business Startups Act (“JOBS Act”) directed the SEC to undertake.⁴ The S-K Report, prepared by the SEC staff, determined:

[T]he Commission’s disclosure requirements should be reevaluated in order to ensure that existing security holders, potential investors and the marketplace are provided with meaningful and, to the extent possible in the Commission’s rules, non-duplicative information upon which to base investment and voting decisions, that the information required to be disclosed by reporting companies continues to be material and that the disclosure requirements are flexible enough to adapt to dynamic circumstances.⁵

Chair White and other Commissioners have individually stressed that it is time to make our disclosure regime more effective.

The CCMC commends the SEC for prioritizing disclosure effectiveness. With sound reforms, investors should be provided with material information about a company in a manner that they can readily access and more easily understand, capital should be raised and allocated more efficiently, and market discipline and corporate governance should improve. Of special note, given the purpose of the JOBS Act, emerging growth companies—those newer and smaller businesses that are a vital source of entrepreneurship, innovation, and job creation in the United States—stand to benefit along with the individuals and institutions

⁴ “Report on Review of Disclosure Requirements in Regulation S-K” (Dec. 2013), available at <http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf> (hereinafter “S-K Report”).

⁵ S-K Report at 93.

that invest in them. Indeed, last year's spike in initial public offerings may be a positive sign of the success of the JOBS Act.

This Report on Corporate Disclosure Effectiveness sets forth concrete ideas for modernizing the disclosure regime under the federal securities laws. Two categories of reforms are discussed for enhancing the utility and value of disclosure documents as the primary channel for public companies to communicate with investors. First, we offer a series of near-term improvements to Regulation S-K that we believe the SEC can enact expeditiously with the widespread support of multiple stakeholders. Second, we discuss several longer-term projects that reflect more fundamental change.

We hope that this report helps advance a constructive collaboration as other parties offer their own suggestions for modernizing the disclosure regime. We look forward to working with the SEC and all market participants and stakeholders with an interest in disclosure effectiveness.

Recommendations

The CCMC has long believed in modernizing the disclosure regime under the federal securities laws. Indeed, this is not the SEC's first attempt to tackle disclosure reform. The S-K Report reviews various SEC reform efforts over the years.⁶ Some of the more recent notable efforts have included the Task Force on Disclosure Simplification (1995–1996), the so-called Aircraft Carrier concept release (1998), Securities Offering Reform (2005), and the 21st Century Disclosure Initiative (2008–2009). Each of the SEC's prior initiatives sought to improve the content, relevance, and usability of disclosure documents provided to investors.

The CCMC responded to the current momentum for disclosure reform by conducting a number of meetings and interviews with representatives of various public companies and law firms, investment analysts, asset managers, and other market participants and stakeholders with an interest in disclosure. This gave us a wide range of perspectives on this important issue and helped to better inform this report. Several individuals that the CCMC worked with on this project previously worked at the SEC.

The CCMC's disclosure effectiveness project has focused its attention, for now, on Regulation S-K and the periodic reports under the Securities Exchange Act of 1934 (Exchange Act). We recognize, however, that financial reporting requirements, Regulation S-X, and registration statements under the Securities Act of 1933 (Securities Act) also are worth rethinking to ensure that investors are receiving, in a user-friendly way, the material

⁶ See generally *id.* at 8–29.

information they need to make informed investment and voting decisions without facing an “avalanche of information.”⁷

Just as the CCMC is offering its ideas, we understand that other parties are exploring ways to improve disclosure effectiveness. We welcome all suggestions, whatever their source, to modernize the disclosure regime. Progress can best be achieved through a dialogue among all interested parties. But we reiterate that for disclosure effectiveness to be achieved, disclosure must be grounded in the principle of providing material information to the reasonable investor.

Near-Term Improvements

The first category of reforms targets disclosure improvements that the CCMC believes the SEC can accomplish quickly and with broad support.

The requirement to disclose in a company’s Form 10-K the “general development” of a business, including the nature and results of any bankruptcy, acquisition, or other significant development in the lifecycle of a business (Item 101(a)(1) of Regulation S-K)

The information included under this requirement, the origins of which date back to the earliest days of federal securities law,⁸ is undoubtedly useful. Investors would be interested in knowing about the development of a company’s business, including whether a company is going through a merger or has undergone a recent bankruptcy proceeding.

However, in the case of a company that is subject to the reporting requirements of the Exchange Act, information regarding material acquisitions, dispositions, or bankruptcies should already be disclosed in a Form 8-K or other filing given its materiality to the company’s business. Redundant disclosure in reports subsequent to the Form 8-K should not be required. The SEC might choose to make a distinction under this S-K item between new registrants (who may be disclosing the general development of their business, including

⁷ While the CCMC’s efforts to date have not focused specifically on reforming accounting standards and financial reporting, we acknowledge the Financial Accounting Standards Board’s (FASB’s) initiative to find potential areas for simplification under U.S. generally accepted accounting principles (U.S. GAAP). We are hopeful that the FASB’s efforts will be complementary to those of the SEC.

⁸ S-K Report at 32.

prior mergers or bankruptcies, for the first time in a registration statement) and established registrants (who would have disclosed such information in a previous filing).

As a general matter, requiring a company to disclose the same or very similar information on multiple occasions is not warranted.

The requirement to disclose financial information for different geographic areas in which a company operates (Item 101(d) of Regulation S-K)

The disclosure requirement under Item 101(d) is duplicative of other mandated disclosures, or at least is superfluous. Investors certainly may have an interest in understanding the financial information of the different operating segments of a company that has business lines in different parts of the world.

However, if a company has operations in a particular region that are material to its business, the company typically would discuss those operations as part of Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) under Item 303 of Regulation S-K. Furthermore, U.S. generally accepted accounting principles (U.S. GAAP) require financial disclosures by operating segment. Thus, any disclosures under Item 101(d) that are redundant with other disclosure obligations under Regulation S-K or financial reporting requirements should not be separately required under this item.

The requirement to disclose whether investors can obtain a hard copy of a company's filings free of charge or view them in the SEC's Public Reference Room (Items 101(e)(2) and (e)(4) of Regulation S-K)

When investors today want to find a copy of a document a company has filed with the SEC, they can turn to the company's website, a financial website, or the SEC's Edgar database. It is widely known that historical SEC reports are available through these media free of charge. Additionally, it does not appear that investors have a great interest in traveling to the SEC's public reference room (a bank of computers in the Louis Loss Library at SEC headquarters in Washington, D.C.) to view documents they can easily obtain online.

Like many other requirements discussed in this report, before the proliferation of modern technology there was a time when investors found it useful to go to one of the many public reference rooms that the SEC maintained around the country. Likewise, in the past, investors may have been interested in whether an issuer could provide them with free copies of a filing via regular mail. Times have changed.

Because technology has rendered the requirements under Items 101(e)(2) and (e)(4) obsolete, they should be deleted from Regulation S-K.

The requirement to describe principal plants, mines, and other materially important physical properties (Item 102 of Regulation S-K)

In 1935, the SEC adopted a requirement for companies to disclose a general description of the location and condition of their “principal plants and other important units,” as well as a description of how the property was held (e.g., whether it was leased by the company). In 1977, the SEC included this requirement as one of two initial requirements in Regulation S-K. There have been some industry-specific alterations to this item since then, but the requirement remains largely the same as it was in 1977.⁹

If a property lease or physical property (e.g., plant, mine, other facility) is material to the company’s business, the company’s MD&A—whether as part of the description of its business, results of operations, or financial condition—would discuss the importance of the property or facility to the company. The Item 102 disclosure requirement—particularly for a company for which physical property is not material to its business—may lead to the disclosure of immaterial information to the extent a company ends up disclosing more than is mandated.¹⁰ At a minimum, Item 102 requires companies to disclose information that is duplicative with information otherwise disclosed in accordance with Item 303 of Regulation S-K.

More generally, the scope and nature of American businesses has changed dramatically since the SEC adopted the first version of this disclosure requirement in the 1930s. As businesses have moved away from factories and other brick-and-mortar locations, perhaps lengthy disclosures of physical properties for many companies are not a material consideration for investors.

We believe that the SEC should carefully evaluate this requirement with the goal of modernizing it to ensure that immaterial information is not disclosed and that there is no unnecessary repetition.

⁹ *Id.* at 36–37.

¹⁰ While the current requirement requires disclosure of “the location and general character of the principal plants, mines and other materially important physical properties” of the company and its subsidiaries, in practice, whether pursuant to SEC staff comment or otherwise, companies have erred on the side of more disclosure than is likely relevant under this item.

The requirement that companies discuss material legal proceedings (Item 103 of Regulation S-K)

A discussion of material legal proceedings is one of the SEC's oldest disclosure requirements, dating back to 1935.¹¹ Item 103 generally requires a description of material litigation outside the ordinary course of business. Since its migration to Regulation S-K in 1978, Item 103 has not been amended substantively.

Investors presumably have an interest in material legal and governmental proceedings about a company. However, although not identical, there is significant overlap between Item 103 and the financial statement disclosures required under Accounting Standards Codification (ASC) Subtopic 450-20—Loss Contingencies, which has been amended more recently than 1978. Over the past several years, these disclosures have received attention from the SEC's Division of Corporation Finance and been the subject of SEC staff comment letters. In July 2012, the Financial Accounting Standards Board (FASB) removed from its standard-setting agenda a long-running project to expand the scope of litigation disclosure. Although the FASB's proposed standard faced criticism from commenters on many fronts, one recurring theme among comment letters was that the revised disclosure would have confused investors by requiring disclosure of information that a reasonable investor would likely find immaterial.¹²

The overlap—if not outright duplication in certain areas—between these two disclosure requirements has contributed to a proliferation of lengthy disclosures containing immaterial information that often clouds investors' understanding of risk. Furthermore, some have expressed concern that Item 103 creates a number of presumptive quantitative materiality thresholds within its instructions that would not meet the test of materiality articulated by the Supreme Court. For example, most companies interpret current Instruction 2 to Item 103 as requiring disclosure of any liability in excess of 10% of current assets, and Instruction 5.C creates a uniform *de minimis* standard for certain regulatory litigation at \$100,000, implying that a governmental action with a potential sanction of \$100,000 or greater is material.

¹¹ S-K Report at 76.

¹² See generally Financial Accounting Standards Board, "Disclosure of Certain Loss Contingencies Comment Letter Summary" (Oct. 2010), available at http://www.fasb.org/cs/ContentServer?site=FASB&c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176157934255.

These types of quantitative thresholds may not in fact be set at levels material for all, or even most, companies. The S-K Report acknowledges that thresholds of this type may need to be updated.¹³

We recommend changes to Item 103 that move away from presumptive materiality thresholds in favor of a principles-based approach premised on traditional materiality standards. Namely, disclosure should be required only if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to invest or vote. This would further the S-K Report's recommendation of reevaluating the SEC's disclosure requirements to ensure that they are flexible enough to adapt over time. To avoid unnecessary redundancy, we also suggest resolving any overlap between Item 103 and relevant accounting standards and financial reporting requirements.

The requirement to disclose which public market a company's shares are traded on and the high and low share prices for the preceding two years (Items 201(a)(1)(i), (ii), (iii), and (iv) of Regulation S-K)

In the past, investors may have looked to a company's Form 10-K or other SEC filing to find where the company's equity was listed or historical information about the company's stock price.

When this requirement was formally added to Regulation S-K in 1980,¹⁴ investors did not have access to the Internet, smartphones, and other technology to retrieve stock information. Today, by contrast, investors can go online and, within a matter of seconds, pull up historical price information on any number of stocks, either through a financial website, smartphone application, or a company's own website.

Given the technological capabilities now widely available, the requirement to disclose where a company's equity is listed and historical stock price information in SEC filings is obsolete and should no longer be included under Regulation S-K.

In making this recommendation, we draw a distinction between new registrants and established companies with respect to disclosing the principal market or markets on which the company's stock is listed. A new registrant's registration statement on Form S-1 or Form S-11 should disclose where the company's common equity will be listed.¹⁵

¹³ S-K Report at 99, n. 327.

¹⁴ *Id.* at 69.

¹⁵ We also note that Form 8-K requires the prompt disclosure of certain information regarding a company's common equity exchange listing, including a transfer of such listing.

The requirement to disclose the frequency and amount of dividends for a company's stock during the preceding two years (Item 201(c) of Regulation S-K)

Companies are required to disclose in their Form 10-K a history of the amount and frequency of dividend payments on their stock, a requirement that stretches as far back as the 1930s.¹⁶ Dividend information is relevant to investors, particularly those seeking to own shares in companies that pay recurring dividends. Nonetheless, investors today are unlikely to search through SEC filings to find this information.

Like historical stock prices, the requirement to disclose details about past dividend payments in an annual filing may have been appropriate in the past, but technology has presented investors with faster and easier ways to access and analyze dividend information. Many companies—including those that are eager to show a record of increasing dividends—post on their websites a full history of the frequency and amount of dividends they have paid over the years.

Again, a number of websites and smartphone applications also make this information easy to obtain, literally at the click of a button. As with historical stock prices, the requirement to disclose historical dividend payments in SEC filings is obsolete and should be removed from Regulation S-K.

The requirement to display a graph showing the company's stock performance over a period of time (Item 201(e) of Regulation S-K)

While performance graphs, charts, and tables can be a valuable tool for investors, many question whether investors, in practice, rely on the dated Item 201(e) performance chart included in SEC filings. Today, a host of websites, smartphone applications, and other technological means allow investors to study the performance of a particular stock over almost any period of time no matter how short or long. In addition, by going online, investors can easily access or create an up-to-date comparison of a company's stock performance against that of other companies or against an index of the investor's choosing.

¹⁶ S-K Report at 69.

Since the SEC contemplated deleting this disclosure requirement in 2006,¹⁷ technology and the tools available to investors have only become more sophisticated and widely available. Accordingly, the Item 201(e) performance graph is no longer needed and should not be required.

The requirement to disclose any changes in and disagreements with accountants (Item 304 of Regulation S-K)

Issuers are currently required to disclose in various documents information surrounding the termination of a relationship with their principal auditor. Originally adopted under Regulation S-X, this requirement became part of Regulation S-K in 1980.¹⁸

This information is useful to investors, but there is no longer a need to mandate its disclosure in annual reports and proxy statements to the extent the same information has been disclosed in a Form 8-K filing. Similar to our observation above regarding the general development disclosure requirement under Item 101(a)(1), we believe that if investors have already been provided with Item 304 information in a Form 8-K filing (e.g., Item 304(a) of Regulation S-K), it is unnecessary to require separate duplicative disclosure in other subsequent SEC filings.

The requirement to disclose certain transactions with related parties (Item 404(a) of Regulation S-K)

This requirement provides that companies must disclose any transactions with “related persons” (such as a director or executive of the company or their immediate family) and creates a presumptive materiality threshold of \$120,000. This amount is scaled for smaller reporting companies but not for other companies.

The Item 404(a) materiality threshold was last updated in 2006 when the SEC increased it from \$60,000, where it had been set since the early 1980s, to \$120,000. While we believe that material related party transactions is useful information for investors making investment and voting decisions, we also believe that the SEC should again revisit the threshold to consider whether \$120,000 is appropriate for all companies and thus whether Item 404 is serving its intended purpose.¹⁹ Specifically, the SEC should consider deleting any quantitative threshold from Item 404(a) and instead require only the disclosure of material related party transactions. Another option would be to implement a scaled approach to

¹⁷ *Id.* at 70, n. 230.

¹⁸ *Id.* at 46–47.

¹⁹ *Id.* at 99, n. 327 (suggesting revisiting quantitative thresholds under Regulation S-K).

disclosure of related party transactions for all companies. Scaling for larger companies could be based on a percentage of total assets, as is currently done for smaller reporting companies, or some other financial metric such as a percentage of total revenue.

These recommendations are effective options for providing investors with timely and material information under Item 404 without distracting them with immaterial information that does not assist their understanding and evaluation of a company.

The requirement to disclose the ratio between earnings and fixed charges (Item 503(d) of Regulation S-K)

First adopted by the SEC in 1954, this requirement was intended to show a company's ability to cover fixed charges to its business.²⁰ Over time, however, as the SEC began to require similar disclosures in other filings and financial modeling became more sophisticated, the usefulness of this disclosure to investors has continued to diminish. As long ago as 1980, the SEC issued a concept release asking whether this requirement should be retained.²¹

Recognizing the sophistication of financial modeling today and investors' ability to analyze detailed financial information through a multitude of online tools using different data sources, the Item 503(d) disclosure requirement is outdated and should be removed. It already is the case that smaller reporting companies do not have to comply with this item.

The requirement to file certain exhibits (Item 601 of Regulation S-K)

The current requirement for an exhibit index similar to the one under Item 601 was added to Regulation S-K in 1980,²² and aside from minor updates, it has not undergone any significant revision in subsequent years.

The S-K Report observed that the exhibit requirements, among other things, "should be reviewed in connection with a reassessment of the presentation of non-financial statement information. . . ."²³ We concur that any comprehensive review of disclosure effectiveness should reconsider whether the existing list of documents and agreements has

²⁰ *Id.* at 44.

²¹ *Id.* at 45.

²² *Id.* at 31–32, n. 85.

²³ *Id.* at 32, n. 86.

kept pace with current investor needs for material information. A more immediate difficulty with the current presentation of the exhibit information is that it requires investors to search through historical filings in Edgar to locate exhibits of interest. The S-K Report notes that this process “can cause frustration to market participants.”²⁴

In the near term, an improvement would be to mandate hyperlinks within an exhibit index to documents incorporated by reference. This change would eliminate the need to parse through historical filings in search of a desired document. Over the longer term, we recommend reevaluation of the entire exhibit filing regime.

The requirement to disclose recent sales of unregistered securities and a description of the use of proceeds from registered sales (Item 701 of Regulation S-K)

Variations of this requirement date back to the very first registration forms adopted by the SEC, and the current Regulation S-K requirement was established in 1982.²⁵ Among other critiques, this requirement is said to have become less useful to investors over time, given that the same disclosure appears elsewhere in a company’s SEC filings. Specifically, if a company completes a material sale of securities to investors, companies typically discuss the transaction as part of MD&A liquidity and capital resources disclosures, if material. In addition, for a company subject to Exchange Act reporting requirements, Form 8-K generally requires prompt disclosure of unregistered sales of equity securities, thus requiring the same basic disclosure as currently is separately required to be included in a company’s Forms 10-Q and 10-K.

Accordingly, we believe that Item 701 should be eliminated as duplicative with these other disclosure requirements.

Longer-Term Improvements

The second category of reforms targets longer-term improvements that we will continue studying in the coming months. Although these topics require more analysis and consideration, we believe it is important to identify them now to stimulate additional dialogue as the SEC considers broader reforms. As for these broader reforms, the discussion

²⁴ *Id.* at 102.

²⁵ *Id.* at 73. The SEC made minor modifications to Item 701 in the mid-1990s. *Id.*

below indicates the direction of some of the more fundamental changes to the public company disclosure regime that we encourage the SEC to pursue.

Compensation Discussion & Analysis (CD&A)

The SEC's disclosure rules on executive compensation were overhauled in 2006 with the adoption of the Compensation Discussion & Analysis (CD&A) requirement in Item 402 of Regulation S-K. These rules, as amended in 2006, greatly expanded tabular disclosure concerning executive compensation of named executive officers and directors. They also required a new narrative discussion and analysis of executive compensation. According to the SEC's adopting release, the 2006 amendments were "intended to provide investors with a clearer and more complete picture of the compensation earned by a company's principal executive officer, principal financial officer and highest paid executive officers and members of its board of directors."²⁶

Since its adoption, CD&A has been the subject of substantial commentary by the SEC and SEC staff,²⁷ and public companies have received countless comment letters on the topic. A search of the SEC's Edgar database revealed more than 8,000 staff comment letters using the term "compensation discussion" issued between January 1, 2007, and June 1, 2014. The complexity of the SEC's rules and interpretations, coupled with the technical nature of the broader subject of executive compensation, means that in-depth expertise is required to understand what CD&A requires a company to disclose. When in doubt about whether something needs to be disclosed, the norm seems to be to disclose it, even if the information is not useful to investors.

Although CD&A was intended to illuminate a company's executive compensation practices and philosophy, the discussion at most companies has instead resulted in a narrative that is dense and laden with technical jargon and immaterial information. CD&A can be impenetrable, even for sophisticated investors. The length of CD&A alone—a 20-page narrative is not uncommon and it has been known to run on for over 40 pages at some companies—can obscure what is material. To the extent investors struggle to comprehend

²⁶ Release No. 33-8732A, *Executive Compensation and Related Person Disclosure*, 71 Fed. Reg. 53158, 53159 (Sept. 8, 2006).

²⁷ In addition to "Staff Observations in the Review of Executive Compensation Disclosure" published in late 2007, the staff in the Division of Corporation Finance has published approximately 70 Compliance and Disclosure Interpretations on Item 402 of Regulation S-K as of the date of this report. Executive compensation is also a common topic of speeches given by the staff and Commissioners at conferences, roundtables, and other settings.

CD&A, it can lead to misunderstandings in the marketplace and impair the ability of investors to make informed decisions. Although companies share some responsibility for this state of affairs, it exists as a natural outgrowth of the rules. In short, CD&A has become the archetypal example of the “avalanche of information” that Justice Marshall predicted and warned against.

We share the S-K Report’s view that executive compensation disclosure should be reassessed fundamentally “to confirm that the required information is useful to investors,”²⁸ particularly when considered from the perspective of a reasonable investor. In short, reforms are needed to ensure that CD&A provides investors with the material information they need to make informed investment and voting decisions but does not inundate them with information that is not useful for understanding and evaluating a company.

Management’s Discussion and Analysis (MD&A)

The SEC has repeatedly described MD&A as a vehicle for explaining a company’s financial condition and results of operations “through the eyes of management.”²⁹ Item 303 of Regulation S-K, which sets forth the MD&A requirement, generally reflects a principles-based approach to disclosure.

We agree with the S-K Report’s view that a disclosure regime based on broad principles, similar to Item 303, could “address the tendency toward implementation of increasing layers of static requirements.”³⁰ Accordingly, we support the SEC in considering how a more principles-based approach to disclosures other than MD&A may enhance disclosure effectiveness. We reiterate, however, that the touchstone of any disclosure requirement must be materiality as seen through the eyes of a reasonable investor.

Beyond Item 303’s principles-based disclosure requirements concerning liquidity, capital resources, and results of operations, more prescriptive and specific disclosure requirements have been added over time to Item 303 that may duplicate disclosures required elsewhere in a company’s disclosure documents. For example, Item 303(a)(4) requires a specific separate discussion of off-balance-sheet arrangements “that have or are reasonably likely to have a current or future effect on the [company]’s financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors.” Item 303(a)(5) requires prescriptive tabular

²⁸ S-K Report at 101.

²⁹ See, e.g., Release No. 33-8350, *Interpretation: Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations* (Dec. 29, 2003), available at <http://www.sec.gov/rules/interp/33-8350.htm>.

³⁰ S-K Report at 98.

disclosures of contractual obligations. In each of these disclosure requirements, the categories of “off-balance-sheet arrangements” and “contractual obligations” are largely defined by the existing accounting standards and, indeed, are separately required disclosures in a company’s financial statements under GAAP.

As with other Regulation S-K items identified in this report, current accounting standards and financial reporting requirements have evolved to overtake these two disclosure requirements, rendering them largely redundant. Moreover, a company already is required to discuss material impacts on its financial condition and results of operations. Therefore, we encourage the SEC to consider whether the one-size-fits-all disclosure requirements of Items 303(a)(4) and (a)(5) are beneficial to investors. It does not seem necessary for these items to mandate the disclosure of information that is substantially similar to what a company would cover when discussing its financial condition and results of operations or that is addressed by the company’s financial statements, including the notes thereto.

The SEC should also consider revising the time periods required to be discussed as part of a company’s MD&A. To focus investors on the most important information to help them “separate the wheat from the chaff,” it would be more appropriate to require discussion of only the most recently completed annual or quarterly period. Narrative discussions concerning prior periods, which typically repeat information disclosed in previous SEC filings, can create more confusion and distraction than elucidation among investors.

As is the case for CD&A, we believe that MD&A is ripe for reexamination with the goal of streamlining the disclosure requirements, eliminating redundancy, and reinforcing the guiding principle of materiality so that MD&A is more useful for investors.

Repetition

Another cause of information overload that undercuts disclosure effectiveness is the repetition of disclosures in multiple places throughout filings that companies make with the SEC. For example, in an annual or quarterly report, the same basic disclosures about a recent financing may appear in the narrative accompanying the description of the business, in MD&A, and in one or more notes to the financial statements. By way of further example, a disclosure about material litigation may be repeated in the discussions regarding legal proceedings and risk factors, in MD&A, and in the financial statement notes. As discussed below, an explanation of risk-related matters may appear in many places throughout the narrative sections of Form 10-K or 10-Q, plus in the financial statement notes.

Future efforts at enhancing disclosure effectiveness should seek to pare back requirements to repeat the same or sufficiently similar information in multiple places within a disclosure document. Greater coordination between the SEC and accounting standard-setters also may be appropriate to prevent new instances of repetition between narrative and financial statement disclosures from being introduced. Similarly, the SEC and accounting

standard-setters should work together to limit instances of divergence between narrative and financial statement disclosures so that, for example, an SEC requirement about pending litigation does not seek to elicit different disclosure than an analogous accounting standard on the topic.³¹

In addition, the SEC should consider reforms to mitigate the repetition of historical information already discussed in earlier disclosure documents. As discussed above concerning MD&A, a Form 10-K, for example, should focus more on what occurred in the most recent year, and a Form 10-Q should focus more on what occurred in the most recent quarter, by mandating less discussion about prior periods unless the comparison is material.

Not all repetition is the result of specific Regulation S-K mandates or accounting standards and financial reporting requirements. Companies often disclose more than is required—or at least than is useful for investors—out of fear of liability, substantiating the Supreme Court’s “avalanche of information” concern.

Companies should take a fresh look at their disclosures and take steps to address any unnecessary repetition. To assist in the effort to eliminate repetition, the SEC should consider providing clear guidance to issuers that repetition is not necessary and that stale information can be deleted from their disclosure documents. As the director of the SEC’s Division of Corporation Finance recently said, “Yes, as unsettling as I am sure this can be for some, it is perfectly all right to remove disclosure when it is immaterial or outdated even if it was included in a prior filing in response to a staff comment.”³² The director also expressly discouraged issuers from repeating themselves. These statements are a good start, but the SEC should consider a more formal pronouncement to these effects.

Risk Disclosure

The SEC’s requirements for the disclosure of risk have expanded in a piecemeal fashion over many decades. Companies are required to discuss risks to the business under various items of Regulation S-K, including, among others, Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 303 (MD&A), Item 305 (Quantitative and Qualitative Disclosures About Market Risk), and Item 503 (Risk Factors).

In addition to requiring overlapping risk disclosures, many items in Regulation S-K concerning risk have not been updated in recent years to reflect developments in financial

³¹ This suggestion echoes our recommendation above regarding Item 103 of Regulation S-K.

³² Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities & Exchange Comm’n, “Disclosure Effectiveness,” Remarks before the American Bar Association Business Law Section Spring Meeting (Apr. 11, 2014), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370541479332#.U8FxRBbs7wI>.

reporting. For example, the SEC adopted Item 305 in 1997 to address a perceived gap that existed at the time concerning disclosures around derivatives and other financial instruments sensitive to market risk.³³ Since then, financial reporting in accordance with evolving accounting standards has greatly expanded. ASC Topic 815—Derivatives and Hedging provides substantial guidance about hedge accounting in financial statements, among other things. But Item 305 has gone unchanged since 1997, although certain disclosures it requires are now redundant with a public company’s financial reporting obligations.

Demonstrating the degree of redundancy between Item 305 and other Regulation S-K items, many public companies do not provide a stand-alone disclosure responding to Item 305 at all, instead cross-referencing to MD&A. Indeed, there is lingering confusion in the marketplace as to what specific disclosures are required under this item, one of the most complicated disclosure requirements to parse in all of Regulation S-K.

Over the longer term, a more fundamental rethinking about how companies disclose material risk and their approach to risk management is in order. One possibility would be to combine the various risk discussions that are otherwise scattered throughout a disclosure document into a single, centralized narrative. It also is worth exploring whether a reformulated risk discussion should highlight the material operational and financial risks that management views as most significant to the business so that the top risks receive particular attention.

Accordingly, we support the S-K Report’s idea to consider consolidating “requirements relating to risk factors, legal proceedings and other quantitative and qualitative information about risk and risk management into a single requirement.”³⁴ Such a consolidated discussion would reduce redundancy and articulate for investors a valuable holistic view of risk through the eyes of management. As with our other recommendations, the revamped risk disclosure should be grounded in the principle of materiality—only risks that are material to a reasonable investor’s investment and voting decisions should have to be disclosed.

A Revised Delivery System

Our discussion has focused primarily on reforming substantive disclosure requirements, guided by the principle of materiality. But we believe any analysis of disclosure effectiveness would be incomplete without discussing the fundamental format of disclosure—namely, how information is presented and delivered to investors.

The SEC’s current disclosure regime for Exchange Act reports, which is premised on self-contained reports delivered (or made available) at regular intervals, is grounded largely in

³³ S-K Report at 77.

³⁴ *Id.* at 99.

a bygone era of communication via physical documents by mail before the proliferation of the Internet, email, and smartphones. The introduction of the Edgar system 20 years ago made these reports and other SEC filings more easily accessible in electronic format. However, the basic layout of Form 10-K, Form 10-Q, Form 8-K, and the proxy statement has gone unchanged for decades, even as the number of substantive disclosures in these and other SEC reports has multiplied and technology has advanced.

We believe it is time to rethink the format of public company reports and the fundamentals of how information is delivered to investors, with the goal of enhancing the usability and value of public company disclosures for investors in the modern technological era. Modern technology allows us to shape a more effective disclosure regime, and we should take advantage of it.

Efforts at modernizing the presentation and delivery of public company reports have been discussed before. For example, the SEC's 21st Century Disclosure Initiative released a report in January 2009 that sought to explore “the possibility of using modern technology to move from a document-based disclosure system that requires the repeated filing of the same information in often lengthy static documents to an interactive data disclosure system that avoids redundancies and makes the information more accessible.”³⁵ The report made a number of recommendations for moving forward, most notably by advocating for the further exploration of what it described as a centralized “company file” to replace the current process for delivering investor information.

Importantly, under this type of system companies would not be required to repeat prior disclosures on a regular basis, but would be required to discuss additional developments that are material. This type of system would make it easier for investors to identify the most current material information about a company without having to wade through historical information to ferret out what is most relevant. A variation of the company file concept would be to allow companies at least to satisfy certain disclosure obligations—perhaps those describing the business, the management team, and the board—by cross-referencing the company's website, assuming this information is adequately disclosed there.

The events of the financial crisis overtook other SEC priorities and little progress has been made on this front since 2009. We note, however, that the S-K Report identified the concept of a company file as one for further study, an initiative we firmly endorse and recommend that the SEC undertake.³⁶

³⁵ Staff Report of 21st Century Disclosure Initiative, “Towards Greater Transparency: Modernizing the Securities and Exchange Commission's Disclosure System” (Jan. 2009), at 4, *available at* <http://www.sec.gov/spotlight/disclosureinitiative/report.pdf>.

³⁶ S-K Report at 98.

The actual modernization of disclosure delivery by the SEC is not without precedent. For example, at about the same time that the 21st Century Disclosure Initiative completed its report, the SEC undertook a substantial simplification of mutual fund disclosure.³⁷ Specifically, the SEC adopted new rules in January 2009 to allow mutual funds to satisfy their prospectus delivery obligations under the Securities Act by providing a summary prospectus to investors, so long as the statutory prospectus and certain other information are made available on the Internet. In making these revisions, the SEC observed that fund prospectuses were “criticized by investor advocates, representatives of the fund industry and others as being too long and complicated.”³⁸ Further, the SEC noted that “[t]oo frequently, the language of prospectuses is complex and legalistic.”³⁹ Animating factors for the SEC’s decision to modify its rules included a desire to employ a “streamlined document with other more detailed information provided elsewhere,” reflecting investor surveys that indicated “that investors prefer to receive information in concise user-friendly formats.”⁴⁰ The mutual fund summary prospectus captures the concept of “layering” disclosures so that investors can more easily focus on what is most important while still being able to easily access the other information that is made available. To that end, the SEC declared:

Technology has the potential to replace the current one-size-fits-all mutual fund prospectus with an approach that allows investors, their financial intermediaries, third-party analysts and others to tailor the wealth of available information to their particular needs and circumstances.⁴¹

Although mutual funds present some different disclosure considerations than those that are relevant to most public companies, the SEC’s basic observations about the faults of long and complicated disclosure documents, the needs of investors, and the power of technology to benefit investors are universal.

Any effort at enhancing disclosure effectiveness should consider not just what is disclosed but also how information is presented and delivered to investors. We acknowledge that such an effort may require substantial modifications of the existing Edgar system. Nonetheless, the benefits of moving toward a company file or something like it seem to be considerable. While it may take time to fully think through and then implement a company file approach to disclosure, using technology to achieve a more layered approach to

³⁷ See Release No. IC-28584, *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, 74 Fed. Reg. 4546 (Jan. 13, 2009).

³⁸ 74 Fed. Reg. at 4547.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 4548.

disclosure may be achievable more readily. Accordingly, we will continue to consider options for layering disclosures and encourage the SEC to do the same.

As these ideas are studied further, potential areas of inquiry may include the following:

- How might investors—both retail and institutional—use disclosures differently if the information were presented and delivered in a more accessible way?
- How can technology be used to provide a better experience to investors as they review public company disclosures?
- Should the SEC move to a company file or other centralized electronic depository for disclosure in lieu of the historic Form 10-K, Form 10-Q, Form 8-K, and proxy statement?
- Is there investor demand for increased use of interactive data?
- Are there other techniques for streamlining disclosures and allowing investors to customize the information available to them without reducing the material information investors can access?

Conclusion

The SEC has the opportunity to enhance the effectiveness of the public company disclosure regime by modernizing the regime for the 21st century. This report lays out the CCMC's philosophy and recommendations for a modern disclosure regime refocused on the core principle of materiality. While it is appropriate for disclosure requirements to evolve, it also is important that they do so in a manner that retains the focus on information that is important to a reasonable investor's ability to understand and evaluate a business.

As for the CCMC's specific recommendations, there is no reason to delay enacting the near-term improvements while the second category of longer-term reforms continues to be studied and analyzed. The near-term improvements would achieve meaningful progress that informs and protects investors and facilitates capital formation, and we encourage the SEC to move these reforms forward at this time.

The CCMC may issue additional recommendations going forward. We recognize, for example, that Regulation S-K items aside from those we address in this report may warrant rethinking and that Regulation S-X also might be able to be improved upon.

We look forward to collaborating with the SEC and other stakeholders and interested parties in the SEC's disclosure effectiveness reform efforts so that we end up with a disclosure regime that is optimal for investors overall—a regime that provides investors with the material information they need to make informed investment and voting decisions and that fosters capital formation and economic growth.



CENTER FOR CAPITAL MARKETS

C O M P E T I T I V E N E S S

U.S. Chamber of Commerce
1615 H Street NW | Washington, DC 20062
www.CenterforCapitalMarkets.com
phone (202) 463-3162



CENTER FOR CAPITAL MARKETS
C O M P E T I T I V E N E S S

TOM QUAADMAN
SENIOR VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

July 20, 2016

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Concept Release on Business and Financial Disclosure Required by Regulation S-K; 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599; File No. S7-06-16; RIN 3235-AL78

Dear Mr. Fields:

The U.S. Chamber of Commerce (the “Chamber”) created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.¹ The CCMC welcomes the opportunity to comment on the concept release issued by the Securities and Exchange Commission (the “SEC” or “Commission”) on April 13, 2016, entitled Business and Financial Disclosure Required by Regulation S-K (the “Concept Release”) which seeks public comment on modernizing certain business and financial disclosure requirements in Regulation S-K.²

The Chamber commends the Commission for undertaking a review of how to modernize the corporate disclosure regime in a manner consistent with the Commission’s statutory mission to protect investors, facilitate orderly and fair markets, and promote capital formation. This review of disclosure effectiveness comes at a time when the United States has less than half of the number of public companies than it did in 1996; the number of public companies has gone down 19 of

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

² Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916 (Concept Release proposed Apr. 22, 2016).

the last 20 years.³ That data should be surprising against the reality that American capital markets are the deepest and most liquid financing source the world has ever known. Regulators, including the Commission, should constantly review the effectiveness of regulation, which means performing *ex ante* and *ex post* analysis on whether the costs of a particular regulation justify its benefits. The disclosure regime should be modernized around and governed by the concept of materiality; this Concept Release is an important first step in that effort.

As discussed in greater detail below, we believe that the Commission's disclosure modernization effort should:

- Focus on materiality to improve Regulation S-K disclosure;
- Not expand special-interest disclosure, which threatens to politicize the disclosure regime to the detriment of the reasonable investor;
- Make greater use of scaled disclosure to encourage capital formation; and
- Consider additional techniques for modernizing the format of disclosure documents.

DISCUSSION

Public companies that are subject to Regulation S-K undertake their duty to disclose material information to the investing public willingly and with great care. After all, disclosure of the type of information a reasonable investor cares about is a fair trade-off for accessing the public markets. Excessive disclosure, however, imposes unnecessary costs on organizations and, ultimately, on shareholders and customers. It also has the tendency to overload investors, especially retail investors, with extraneous information that can confuse or obfuscate material information.

³ Barry Ritholtz, *Where Have All the Public Companies Gone?* BLOOMBERG, June 24, 2015, <https://www.bloomberg.com/view/articles/2015-06-24/where-have-all-the-publicly-traded-companies-gone->.

Mr. Brent J. Fields
July 20, 2016
Page 3

In 2014, the Chamber released a study on disclosure effectiveness.⁴ In that report, we identified 14 regulations that are obsolete and five broad areas that need to be modernized. We made the following observations:

Information overload strikes a blow to the effectiveness of the disclosure regime that the SEC administers. The essential problem is that investors become inundated with information that is not useful, making it difficult to identify important information about a business. In some instances, investors simply ignore long, dense documents altogether as they find much of the information unhelpful or too time-consuming to go through. . . .

To have an effective disclosure regime that promotes transparency and the interests of all investors and American business, we must address the problem of information overload. Even as the SEC makes efforts to address this problem, we recognize that there may be calls for the disclosure of *additional* information in certain areas. It is appropriate for new disclosures to be considered from time to time. That said, when doing so, we must be vigilant in applying the test of materiality to ensure that any expanded disclosure requirements help investors make better-informed investment and voting decisions.⁵

Similarly, many have pointed to the proxy statement and disclosures that have exploded over the past several years as impediments to going or staying public. In 2015, for example, Stanford University released a study of institutional investors, who control over \$17 trillion dollars in assets, finding that the majority found the proxy statement to be too long and that only a third of the information was relevant.⁶

⁴ See generally U.S. CHAMBER OF COMMERCE, CORPORATE DISCLOSURE EFFECTIVENESS: ENSURING A BALANCED SYSTEM THAT INFORMS AND PROTECTS INVESTORS AND FACILITATES CAPITAL FORMATION (2014), available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf.

⁵ *Id.* at 3-4.

⁶ DAVID F. LARCKER ET AL., STANFORD UNIV., 2015 INVESTOR SURVEY: DECONSTRUCTING PROXY STATEMENTS—WHAT MATTERS TO INVESTORS 1 (FEB. 2015), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-surveyey-2015-deconstructing-proxy-statements_0.pdf.

The Chamber supports a disclosure regime based on the concept of materiality. Materiality has long been the dividing line for determining what should be disclosed and what should not have to be disclosed under the federal securities laws. Forty years ago, the U.S. Supreme Court refused to find that a fact is material just because an investor “might” find it important.⁷ Justice Thurgood Marshall, writing for the court in the landmark case of *TSC Industries v. Northway* explained, “[m]anagement’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making.”⁸ Marshall was concerned about information overload harming investors and therefore set a more demanding test of materiality. A fact is material, the Court held, if “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”⁹

The Supreme Court again addressed materiality in 1988 with *Basic Inc. v. Levinson*.¹⁰ There, the Court made clear that the *TSC* materiality construct applies not just to voting decisions as were at issue in *TSC*, but also to decisions to buy, sell, or hold a security. The *TSC-Basic* formulation has guided federal securities regulation ever since.¹¹

Considering materiality through the eyes of a “reasonable investor” is a critical feature of the Supreme Court’s test. Materiality does not turn on the needs of an investor that is not representative of investors more broadly or that is looking to advance some special interest. This approach to materiality mitigates the risk that SEC disclosure documents will become too dense and impenetrable for investors by seeking to be all things to all people. It also helps ensure that the SEC, in fashioning and enforcing the disclosure regime under the federal securities laws, focuses on what

⁷ See *TSC Indus. v. Northway*, 426 U.S. 438 (1976).

⁸ *Id.* at 448-49.

⁹ *Id.* at 449.

¹⁰ See 485 U.S. 224 (1988).

¹¹ The SEC generally interprets its rules in a manner consistent with the Supreme Court’s jurisprudence. For example, SEC Rule 405 under the Securities Act of 1933 and Rule 12b-2 under the Securities Exchange Act of 1934 define materiality as relating to those matters where “there is a substantial likelihood that a reasonable investor would attach importance in determining whether to” buy or sell the subject securities. 17 C.F.R. § 230.405 (2016). Rule 12b-20, which is applicable to all reports under the Securities Exchange Act, provides: “In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.” 17 C.F.R. § 230.12b-20 (2016).

is best for investors overall and adheres to the agency's mission as the country's capital markets regulator.

In recent years, there have been efforts to erode this longstanding approach to materiality. This development has complicated and confused what materiality means and will further overload investors with information that few find to be useful when evaluating a company's financial and operational performance. Some special interest activists are pushing conceptions of materiality that would abandon altogether the traditional notion of materiality rooted in the Supreme Court's jurisprudence. These activists want to expand what businesses are mandated to disclose to advance the groups' own parochial agendas and to further goals that are extraneous and contrary to the SEC's mission. The guiding principle for public company disclosure is, and should remain, materiality as viewed by a reasonable investor.

The courts have told us a great deal about the reasonable investor. According to the Supreme Court, one should not ascribe "child-like simplicity" to the reasonable investor.¹² Instead, as courts have subsequently said, reasonable investors are presumed to be able to complete basic mathematical calculations, to comprehend the basic operation of a securities margin account, to understand the time value of money and basic principles of diversification, to know that free cash and securities may be used to earn interest, to be able to read and understand risk factors and other disclosures plainly presented in a prospectus, and generally to be aware of macroeconomic conditions.¹³ These characteristics further clarify that materiality centers on the financial and operational performance of companies and on investment returns for investors.

The Chamber supports a system of securities regulation in which investors are provided with decision-useful information to deploy capital efficiently and for businesses to raise the financial resources needed to grow and expand. The concept of "materiality" has played the central role in our American capital markets for decades and has contributed to the formation of the deepest, most diverse, most

¹² Basic, 485 U.S. at 234.

¹³ See, e.g., *In re Merck & Co., Inc. Securities Litigation*, 432 F.3d 261 (3d Cir. 2005); *Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 702 (2d Cir. 1997); *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357 (3d Cir. 1993); *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346 (2d Cir. 1993); *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir. 1987); *Zerman v. Ball*, 735 F.2d 15 (2d Cir. 1984).

liquid markets the world has ever known. The ability of businesses of all sizes—from young Main Street entrepreneurs to more mature companies that have employed millions of Americans for generations—to seek appropriate forms of investment from investors of all walks of life within our disclosure-based regulatory system is the hallmark of American free enterprise.

A. The Commission Should Focus on Materiality to Improve Regulation S-K Disclosure

Over the many years since the federal securities laws were first enacted, and especially in more recent years, the disclosure documents that companies file with the SEC have continued to expand, as reflected, for example, by the lengthy annual reports on Form 10-K and proxy statements provided to investors. As many have pointed out, disclosure documents are laden with too much information that is obsolete, unnecessarily repetitive, or otherwise not useful to investors.

Requiring public companies to disclose information that is material to investment decisions promotes capital formation and the efficient allocation of capital. Excessive mandated disclosures have the tendency to obfuscate rather than inform. Improving the effectiveness of the Commission's disclosure regime requires us to rethink what information should be disclosed—as well as how it should be disclosed—with this in mind.

In reimagining the disclosure regime, the guiding principle should be materiality. Against this backdrop, below we provide some recommendations for improving the effectiveness of a number of items from Regulation S-K as identified in the Concept Release.

1. General Development of Business (Item 101(a)(1))

We believe the information included under this requirement is generally material. However, in the case of a company that is already subject to the reporting requirements of the Securities Exchange Act, information regarding material acquisitions, dispositions, or bankruptcies should already be disclosed in a Form 8-K or other filing given its materiality to the company's business. Redundant disclosure in reports subsequent to the Form 8-K should not be required. Likewise, the

requirement for a five-year look-back for seasoned issuers seems unnecessary. The SEC could choose to make a distinction under this S-K item between new registrants (who may be disclosing the general development of their business, including prior mergers or bankruptcies, for the first time in a registration statement) and established registrants (who would have disclosed such information in a previous filing). As a general matter, we do not believe companies should be required to disclose the same or substantially similar information in multiple filings.

2. Narrative Description of Business (Item 101(c))

Generally, Item 101(c) should be limited to a brief summary of background information on a business. Some of the more substantive information currently required to be disclosed here, such as working capital practices and compliance with environmental laws, would be better addressed in other sections, such as MD&A. Several subsections of Item 101(c) appear to be drafted with the manufacturing firm in mind. While manufacturing is certainly an important sector of the American economy, many SEC registrants do not engage in this activity. Accordingly, presumptively material items that are not broadly applicable to most registrants—such as sources of raw materials, dollar amount of backlog orders believed to be firm and seasonality of the business—should be eliminated in favor of a more principles-based approach.

3. Technology and Intellectual Property Rights (Item 101(c)(1)(iv))

We recommend maintaining the current scope of Item 101(c)(1)(iv) relating to certain intellectual property assets.¹⁴ The role intellectual property plays in a registrant's operations can vary widely depending on the industry, a company's business model, and other factors. Considering the nature and use of these intangible assets, Regulation S-K's current focus on materiality allows registrants to disclose information about technology and intellectual property that is important to their business in a way that is beneficial for their investors. By contrast, the potential expanded disclosure on which the Concept Release seeks comment would more likely obfuscate rather than enhance a reasonable investor's understanding of risk. For example, a catalog or tally of registered intellectual property, such as patents or trademarks, is both of limited importance in many cases and already available in the

¹⁴ See 17 C.F.R. § 229.101(c)(1)(iv).

public record. Unlike other forms of property, the existence of an asset does not convey its value or usefulness.

We further do not support broadening this item to cover copyrights. If Item 101(c)(1)(iv) were revised to require registrants to disclose all their copyrighted works, especially if such requirement were without regard to materiality, companies would be faced with the enormous burden and substantial cost of having to identify and catalogue everything in their operations that might be eligible for copyright protection. Copyright protection extends to software, designs, drawings, technical instructions, documents, and a wide range of other works that are routinely created by companies in their day-to-day operations. Even minor revisions are eligible for protection, thus requiring disclosure of these assets would be both enormously burdensome and of minimal benefit to the reasonable investor. Such specificity could also adversely impact the interests of American companies by requiring them to disclose commercially sensitive information that their foreign competitors would not be required to reveal.

Similarly, we strongly caution against the mandated disclosure of trade secrets in this item. The commercial impact of requiring trade secrets to be detailed would be detrimental to U.S. competitiveness. The entire value of a trade secret stems from its confidential nature. Trade secrets are ubiquitous—they are held by nearly every company in virtually every sector of the economy to protect a wide variety of details, from business strategies to manufacturing techniques and source code. Trade secrets tend to be particularly important in innovation and knowledge-based industries; a company's entire value may be protected by trade secrets. Even if the regulation did not require trade secrets to be divulged in detail, a mere intimation may be enough for a knowledgeable competitor to gain the upper hand. Moreover, since companies may rely on trade secrets to protect incipient technologies that are not yet on the market, it could be extremely difficult to determine whether certain trade secrets are material and/or to quantify their value. Since the value of a trade secret resides in its not being generally known, any SEC-mandated disclosure of trade secrets could result in forfeiture of trade secret protection and cause irreparable competitive harm to companies. Registrants should not be put in the position of risking the value of core corporate assets if they disclose too much information about their trade secrets, while risking significant SEC penalties and other civil liability if they disclose too little information.

4. Government Contracts and Regulation, including Environmental Laws (Items 101(c)(1)(ix) and (c)(1)(xii))

The current disclosure requirements related to government contracts and regulation are sufficient. This item as it currently exists with its focus on materiality has been effective in eliciting useful information from registrants. Changing this item to include additional detailed requirements would likely lead to an abundance of immaterial information, which would run counter to the goal of improving disclosure. In fact, we believe this item, with its emphasis on materiality as the disclosure threshold, should be a model for other Regulation S-K items.

5. Number of Employees (Item 101(c)(1)(xiii))

We do not believe that disclosing the number of a company's employees provides material information to investors, particularly as many companies nowadays rely on a large seasonal or part-time workforce, as well as consultants, independent contractors and others who do not neatly fit into the traditional "employee" definition. This skews year-to-year comparisons and comparisons within industries. To the extent this item remains qualified by "to the extent material to an understanding of the registrant's business taken as a whole," however, we do not object to its continued disclosure. But, in any event, Item 101(c)(1)(xiii) should not be expanded to require additional disclosure related to employees, such as distinguishing between unionized and non-unionized employees or actual employees and independent contractors, unless those distinctions are material to the registrant's business.

6. Description of Property (Item 102)

We believe the Commission should consider eliminating this disclosure except to the extent disclosure of property provides material information for investors or is necessary to make other disclosures not misleading. If this disclosure is retained, however, Item 102 should not be expanded to include additional disclosure, and the SEC should clarify that for registrants who do not have material physical properties, disclosure about their corporate headquarters, office space, and other facilities is optional, not required.

7. Selected Financial Data (Item 301)

Given the availability of data online and in previous filings, the Commission should consider eliminating the requirement to provide prior years' financial data unless providing it would be necessary to make the present financial data not misleading. Alternatively, the Commission should consider simplifying the time periods used in disclosure to require financial data for only the past fiscal year or, at most, the past two fiscal years instead of the past five fiscal years, unless additional years are necessary to not be misleading. Prior years' data is easily obtainable for investors who desire information not disclosed in the present filing. Investors would still receive necessary information, but the change would bring more consistency to the required disclosure.

Moreover, we do not believe that the Commission should require auditor involvement (e.g., audit, review, or specified procedures) for this disclosure. We note that extant Public Company Accounting Oversight Board auditing standards (AS 2710) provide guidance for an auditor to read and consider other information in documents containing audited financial statements for material inconsistencies with information appearing in the financial statements and material misstatement of facts.

Item 301 should not be modified to be more prescriptive. Mandating use of additional metrics would lead to many registrants being forced to make disclosures that are immaterial to their business. This would result in bogging down investors with irrelevant information, which would perpetuate some of the current pitfalls of the existing Regulation S-K disclosure regime. We believe that eliminating or limiting this requirement while still requiring registrants to provide additional information that is material to their business is the best approach.

8. Supplementary Financial Information (Item 302)

Because the disclosure required by Item 302(a) is required in prior quarterly reports, we believe Item 302(a) can safely be eliminated. Thus, the disclosure required under Item 302(a) is yet another example of duplicative information that unnecessarily complicates and lengthens disclosure documents, while increasing burdens for registrants and offering little value to investors. As with Item 301, we do not believe that the SEC should require auditor involvement for this disclosure.

9. MD&A (Item 303)

We support a more principles-based approach to Item 303 that emphasizes materiality as seen through the eyes of a reasonable investor. Currently, Item 303 is often duplicative of other required disclosure and, from a cost-benefit perspective, should be revised to eliminate redundancy. For example, the discussion of “off-balance sheet arrangements” and “contractual obligations” is required in a registrant’s financial statements under GAAP, and thus, should be removed from Item 303. We also believe that the required tabular disclosure of contractual obligations should be removed for similar reasons. We agree that consolidating the various Commission and Staff guidance on MD&A into a single place would be helpful to preparers of MD&A disclosure.

In addition to removing duplicative disclosure, the SEC should also consider revising the time periods required to be discussed as part of a registrant’s MD&A. The disclosure should only include information from the most recently completed quarterly or annual period. Information about prior periods can easily be obtained by investors in previous filings. Repetition of previously disclosed information can distract investors from new data and lead to confusion. We do not believe that the SEC should require auditor involvement for this disclosure.

As suggested in the Concept Release, providing an executive-level overview to MD&A that emphasizes the most important information may be helpful for investors and allow registrants to highlight material information so it does not get buried among a large volume of required disclosure. Registrants should have the option to decide whether an overview would be helpful to investors. However, we would oppose the addition of industry-specific prescriptive disclosure to MD&A, because such a requirement could quickly lead to unwieldy disclosure requirements across industries and potentially impose an additional burden on registrants within a particular industry by adding mandatory metrics that are not required for other registrants. We believe that registrants should be encouraged to provide relevant industry information, provided that it is material, but rigid requirements would add unnecessary disclosure that is of limited use to investors.

Although registrants receive the benefit of a forward looking statement disclaimer for information included in MD&A, this is not necessarily the case for similar information provided in the financial statements, including any footnotes

thereto. We urge the Commission to explore ways in which it can harmonize the treatment of forward looking statements in MD&A and financial statements, perhaps using its rulemaking or exemptive authority.

10. Risk Factors (Item 503(c)) and Consolidating Risk-Related Disclosure

We support the consolidation of disclosure related to risk, legal proceedings, and risk management so that it is discussed in a single item, as opposed to the current practice of piecemeal discussion of risk in various items throughout a filing. This would eliminate duplicate discussions of risk and eliminate the need for cross-referencing entire sections of filings and provide investors with succinct information in one location.

While the Commission appears concerned by the possibility that registrants include some risk factors out of an abundance of caution, we do not believe that the Commission should amend this requirement in a way that makes disclosure of risk factors any more prescriptive. Presently, the Regulation S-K instruction requires the registrant to disclose the “most significant factors that make the offering speculative or risky.” The risk factors must also be “organized logically.” Risks vary from company to company and industry to industry; registrants should be afforded flexibility in the manner in which they communicate material risk factors to investors. Neither do we favor revising the disclosure rules to require registrants to discuss how they intend to address or remediate individual risks, as doing so may not be possible in certain cases and could reveal competition-sensitive information. The way a company manages risk is typically discussed in a more holistic fashion in other disclosures.

11. Disclosure of Approach to Risk Management and Risk Management Process

With regard to risk management, information about a registrant’s risk management process may be useful for investors to know how the identified risk factors are being addressed. However, because the details of a registrant’s risk management process may be confidential, required disclosure of such information runs the risk of placing registrants at a competitive disadvantage. Thus, we support encouraging registrants to voluntarily disclose risk management information that is

material, but only to the extent that it does not require them to disclose competitively sensitive information. Therefore, any regulation in this area should not be prescriptive.

12. Number of Equity Holders (Item 201(b))

Because most investors now hold equity securities in street name through nominees or other intermediaries, providing the number of holders of a class of common equity does not provide meaningful information to investors. Thus, this item can safely be eliminated.

13. Description of Capital Stock (Item 202)

Item 202 disclosure should not be expanded to be included in periodic reports on Form 10-Q or Form 10-K. Investors can easily look to a registrant's organizational documents or registration statement to determine the terms and conditions of particular securities, and the current practice of reporting changes on Form 8-K and Schedule 14A is sufficient to keep investors informed. Repeating this information in other periodic filings is therefore unnecessary.

14. Recent Sales of Unregistered Securities (Items 701(a)-(e))

We believe this disclosure requirement is not useful to investors because substantially the same disclosure appears elsewhere in a company's SEC filings. Specifically, if a company completes a material sale of securities to investors, companies typically discuss the transaction as part of MD&A liquidity and capital resources disclosures, if material. In addition, for a company subject to Securities Exchange Act reporting requirements, Form 8-K generally requires prompt disclosure of unregistered sales of equity securities, thus requiring the same basic disclosure as currently is separately required to be included in a company's Forms 10-Q and 10-K.

The information in Item 701 is already disclosed elsewhere, in MD&A and on Form 8-K. We do not believe there is a compelling reason to require repetition of this disclosure. Therefore, Item 701 should be eliminated as duplicative with these other disclosure requirements. In connection with the elimination of Item 701, the SEC should also increase the one percent threshold (five percent for smaller reporting

companies) in Item 3.02 of Form 8-K, or better still, key it off of what is material to a given company.

15. Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703)

We believe current disclosure requirements under Item 703 are sufficient and should not be modified to be more granular or to require more frequent disclosure. The current quarterly disclosure (which provides a monthly breakdown of repurchase activity) is sufficient to provide material information to investors. Requiring disclosure more frequently, such as on a monthly basis, or requiring disclosure about the incurrence of indebtedness to fund repurchases or the impact repurchases had on performance measures would be impractical and overly burdensome for registrants without providing investors with decision-useful information.

16. Exhibits (Item 601)

Item 601 of Regulation S-K could be improved through the greater use of materiality filters. Along these lines, the Commission should review the item and eliminate all categories of documents that are presumptively material in favor of a materiality test that is dependent on each registrant's unique facts and circumstances under the *TSC-Basic* test.

For example, under Item 601(b)(10)(ii)(c), the Commission should not presume that any contract calling for the acquisition or sale of any property, plant or equipment is material when such contract exceeds 15 percent of consolidated fixed assets. A 15 percent threshold is both overinclusive for some companies and underinclusive for others. Instead, the Commission should only require that such acquisition contracts be filed as exhibits to the extent material to an understanding of a particular registrant's business taken as a whole.

Similarly, with regard to the requirement under Item 601(b)(10)(ii) to file contracts upon which the registrant's business is substantially dependent, we generally oppose any absolute qualitative or quantitative disclosure thresholds for "substantial dependence." Modifications to Regulation S-K and requirements for exhibits should move away from one-size-fits all disclosure and emphasize materiality. Use of standardized qualitative or quantitative thresholds runs counter to the goals of

modernization of Regulation S-K by leading to immaterial disclosure that is unhelpful to investors and burdensome to registrants.

Item 601(b)(12) requires the preparation of a ratio of earnings to fixed charges, a metric that has fallen out of favor with most investors such that few (if any) investors currently make investment decisions on the basis of this ratio. Those that do can simply perform the calculation themselves. Thus, this antiquated exhibit can be eliminated.

Item 601(b)(21), which requires lists of subsidiaries, is another provision that produces little useful information for investors. Whether a particular registrant elects to conduct its business through one or a thousand subsidiaries is largely irrelevant to investors insofar as the registrant reports its results on a consolidated basis. Yet companies expend a great deal of effort each year to update the list as organizational structures change. We believe Item 601(b)(21) should be eliminated.

As a more general proposition, the SEC should explicitly allow registrants to omit personal confidential information in exhibits without applying for confidential treatment of information. Personal confidential information should be defined to include a specific list of items that may be automatically omitted, such as social security numbers and bank account numbers.

Finally, registrants should not be required to file immaterial annexes, appendices and schedules to contracts, nor should registrants be required to file immaterial amendments to material contracts. We also note that we support the use of hyperlinks for ease of finding exhibits incorporated by reference.

17. Critical Accounting Estimates

We believe the existing discussion of accounting policies provided by registrants in MD&A is sufficient. Accordingly, Item 303 should not be revised to require additional disclosure about critical accounting estimates. If the SEC has found that registrants merely repeat the discussion of accounting policies contained in the notes to the financial statements, then it should provide illustrative guidance regarding the type of disclosure it is seeking in MD&A. However, we would oppose the addition of strict definitions of “critical accounting estimates”. We believe that clarification on the part of the SEC, such as through a revised interpretive release,

should be sufficient to provide more meaningful disclosure related to accounting policies.

18. Industry Guides

We do not object in principle to the modernization of the industry guides to the extent doing so focuses on the disclosure of material information. We would oppose any effort to use the industry guides to expand special interest disclosure of one kind or another. We are surprised, however, that the Commission would propose the substantive revision of mining industry guide while it also seeks comment on this broader issue in the Concept Release.¹⁵ We would also urge the Commission to better coordinate its industry-specific disclosures with other regulators and accounting standard-setters who oversee those industries. For example, Guide 3 concerning bank holding companies has begun to diverge from requirements of the Federal Reserve Board, and Guide 6 concerning insurance companies includes tabular disclosure rendered duplicative by recent amendments to US GAAP by the Financial Accounting Standards Board.

19. Frequency of Interim Reporting

We do not believe the Commission should change the current disclosure regime with respect to the frequency of reporting. We strongly urge the Commission not to impose more frequent reporting requirements on issuers because the cost of more frequent reporting would be unduly burdensome and there is no evidence to suggest that there is a corresponding benefit for investors or that the reasonable investor has requested more frequent disclosure in order to make an investment decision. If the Commission were to increase the frequency of interim reporting, it should do so only after undertaking a comprehensive study to understand the costs of making existing disclosures. Further, changing the roll-up process associated with creating quarterly reports would be administratively impractical for public companies. We don't believe that investors would benefit in any way by more frequent interim reports especially since issuers are required to make public disclosure upon the occurrence of certain material events on a more frequent basis. Therefore, we urge the Commission to maintain the current frequency of reporting regime.

¹⁵ See Release No. 33-10098, *Modernization of Property Disclosures for Mining Registrants* (June 16, 2016).

B. The Commission Should Not Expand Special-Interest Disclosure

In recent years, various special interest activists have increasingly pressured public companies to provide more information about topics other than their financial performance, operations, and strategy. For example, activists continue to call for public companies to disclose more concerning climate change, environmental impacts, political spending, social policy, and management of their internal affairs. These topics are often referred to by the acronym “ESG” for environmental, social, and governance issues; sometimes the euphemisms “sustainability” or “socially-oriented investing” are also used.

In a thinly-disguised effort to make their efforts appear more palatable to the general public, special interest activists have implemented an aggressive marketing campaign to brand ESG disclosure as “mainstream,” “good governance,” and with similar superlatives. The truth is quite the contrary. When put to an actual vote of shareholders at large, proposals made under Rule 14a-8 on ESG topics regularly and routinely are voted down by wide margins, demonstrating that investors as a whole do not support the use of the federal securities laws, or the corporate ballot box, to advance these causes.¹⁶

Nevertheless, a multitude of materiality formulations now widely circulate from various ESG special interest activists. Notwithstanding their differences, the various approaches to materiality that ESG advocates support all lead toward a common endpoint: requiring public companies to make additional disclosures concerning sustainability and other ESG topics. Each of these approaches to ESG disclosure expands the scope of materiality under the federal securities laws, such as by considering disclosure from the viewpoint of a wide range of stakeholders other than the reasonable investor, by using disclosure to advance social or political goals outside the SEC’s mission, or by developing specific disclosure metrics that go well beyond what the courts or the SEC has endorsed in assessing materiality. Portions of the target audience may literally own no securities at all. Whatever each ESG proponent’s exact purpose and intentions might be, we believe the effect would be to change what materiality means.

¹⁶ See JAMES R. COPLAND & MARGARET O’KEEFE, MANHATTAN INST., PROXY MONITOR 2016 FINDING 3—POLITICAL SPENDING AND LOBBYING (2016), <http://www.proxymonitor.org/Forms/2016Finding3.aspx>; JAMES R. COPLAND & MARGARET O’KEEFE, MANHATTAN INST., PROXY MONITOR 2016 FINDING 2—ENVIRONMENTAL ISSUES (2016), <http://www.proxymonitor.org/Forms/2016Finding2.aspx>.

We note that many public companies presently publish detailed sustainability reports that contain ESG information for a variety of audiences and for a variety of reasons. But, the fact that a company publishes communications to various stakeholders who want to learn more about the company does not mean such communications material under the federal securities laws. The Supreme Court has been careful not to set the threshold for materiality too low, citing concerns that “a minimal standard might bring an overabundance of information within its reach.”¹⁷ Mandating formal disclosure of information that wider circles of stakeholders merely find interesting or relevant would erode the use of the materiality standard for Commission-mandated disclosures.

While public companies should remain free to disclose ESG information on a voluntary basis, some policymakers, non-governmental organizations, and private-sector groups have focused in on public company disclosure documents filed with the SEC as the preferred place to include new mandatory disclosures on a wide range of ESG topics. Whether these proposed new disclosures seek to reveal material information to the reasonable investor for purposes of the federal securities laws and are consistent with the SEC’s mission is very much a matter of debate. No matter the topic or the merit of the proposed disclosure’s objective, the Supreme Court’s traditional materiality standard should be the benchmark as the SEC and other policymakers consider whether to impose new disclosure obligations on reporting companies. The federal securities laws should not be used to require public companies to disclose information that does not pass this test.

We do not believe that SEC-mandated disclosures should be used to further social, cultural or political motivations that the federal securities laws were not designed to advance. The SEC disclosure regime should not be an avenue for special interest activists to impose their agenda on shareholders at large. The difficulties associated with implementation of the “conflict minerals” rule, for example, should be a cautionary tale for all.¹⁸ The objective of many calling for new public company ESG disclosures is primarily to obtain some social impact or achieve a political goal. These goals, if met, would in many cases contribute to an environment that makes it more difficult for businesses to innovate, compete, and grow. The Commission should instead test its disclosure regime against the concept of materiality and its tripartite

¹⁷ Basic, 485 U.S. at 231-32.

¹⁸ See 17 C.F.R. § 240.13p-1 (2016).

Mr. Brent J. Fields
July 20, 2016
Page 19

mission to protect investors, facilitate orderly markets, and promote capital formation. If a piece of information does not fit within that rubric, it should not become a mandated disclosure.

Moreover, special interest disclosures risk politicizing the federal securities laws and the SEC while fostering regulatory uncertainty that is detrimental to investors and businesses alike. To the extent securities regulation becomes an instrument of social or political change, it becomes unmoored from its longstanding purposes as reflected in the SEC's mission. In turn, the bounds within which securities regulation is fashioned become porous, which in turn facilitates political and other types of opportunism. The federal securities laws—and thus the SEC as the agency that crafts, administers, and enforces the regulatory regime—become fair game to be used however those with the most influence would like.

The SEC's expertise centers on the operation, practices, and regulation of securities markets. The agency is not an expert about topics outside its mission, such as how to resolve difficult issues of a social or political nature. The SEC is not well-positioned, for example, to address concerns relating to things like supply chain management, the environment, labor relations, the political process, and foreign affairs. While the agency's eighty-plus years as a capital markets regulator does well-position it to address emerging and persistent issues in that arena, the SEC understandably struggles when asked to craft disclosures that are designed to achieve goals other than protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

Likewise, the SEC's expertise is not implicated simply because disclosure is involved. The SEC's expertise is only implicated when the goals of the disclosure are within the scope of the SEC's mission. The CCMC believes that goals outside the SEC's mission should be left to other governmental bodies, civil society organizations, and the private sector to address by means other than the federal securities laws. Thus, we believe the SEC should tread lightly when it comes to compelling so-called sustainability disclosure.

C. The Commission Should Make Greater Use of Scaled Disclosure to Encourage Capital Formation

Registrants of different sizes and seasoning face disparate burdens in complying with the Commission's many disclosure obligations. A growing body of economic research demonstrates that young, dynamic companies spur a disproportionate amount of job creation in the United States.¹⁹ These companies often need growth capital in the form of equity investments. But an overly burdensome disclosure regime (particularly under Regulations S-K and S-X) can serve to discourage capital formation for these companies in the public markets. Likewise, even mature companies can be hamstrung if the costs and burdens of compliance outweigh the benefits of a public listing.

When investment does not occur because of these regulatory burdens, a wide range of stakeholders are impacted beyond the individual managers and shareholders of a particularly company. Potential employees are affected because new employment opportunities will not be created. Additionally, consumers may not see new products brought to market, and new firms may not enter markets to create competition. And growth will slow, harming not just investors but also the broader economy.

Scaling disclosure commensurate with the size and seasoning of an issuer has proved to be an effective tool for encouraging participation in the public capital markets while at the same time providing investors with material information. It is also wholly consistent with the congressional intent expressed in the JOBS Act and the securities law provisions of the FAST Act. Accordingly, the Commission should continue to consider additional opportunities to expand the use of scaled disclosure beyond the current classification of smaller reporting companies and emerging growth companies. We do not recommend, however, tying eligibility for scaled disclosure to a certain proportion of companies, such as a percentile of market capitalization. Such a measure would not be as easy to determine as established metrics, and could result

¹⁹ *E.g.*, EWING MARION KAUFFMAN FOUND., THE IMPORTANCE OF YOUNG FIRMS FOR ECONOMIC GROWTH 1 (SEPT. 2014; UPDATED SEPT. 2015), http://www.kauffman.org/~media/kauffman_org/resources/2014/entrepreneurship%20policy%20digest/september%202014/entrepreneurship_policy_digest_september2014.pdf (“New and young companies are the primary source of job creation in the American economy. Not only that, but these firms also contribute to economic dynamism by injecting competition into markets and spurring innovation.”).

in difficulty and increased uncertainty regarding a particular registrant's eligibility for scaled disclosure.

Although we intend to comment separately on the Commission's recent proposal to increase the financial thresholds in the "smaller reporting company" definition,²⁰ we believe such efforts are a step in the right direction. We welcome the recent unanimous recommendations of the SEC's Advisory Committee on Small and Emerging Companies as a starting point for these discussions. In its report delivered to the Commission on September 23, 2015,²¹ this committee made a series of very sensible suggestions, including the following:

- revising the definition of "smaller reporting company" to include companies with a public float of up to \$250 million;
- providing smaller reporting companies with the same disclosure accommodations that are available to emerging growth companies, including:
 - exemption from the requirement to conduct "say on pay" and "say when on pay" votes;
 - exemption from pay versus performance disclosure;
 - allow compliance with new accounting standards on the date that private companies are required to comply;
- revising the definition of "accelerated filer" to include companies with a public float of \$250 million or more, but less than \$700 million;²² and
- exempting smaller reporting companies from XBRL tagging and from filing immaterial attachments to material contracts.

²⁰ Release No. 33-10107, *Amendments To Smaller Reporting Company Definition* (June 27, 2016).

²¹ The full report is available at <https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-expanding-simplified-disclosure-for-smaller-issuers.pdf>.

²² As a result of such revision, the requirement to provide an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act would no longer apply to companies with public float between \$75 million and \$250 million.

D. The Commission Should Consider Additional Techniques for Modernizing the Format of Disclosure Documents

Whatever the substantive content of Regulation S-K's disclosure requirements may be, information should be disclosed in a way that makes it easier for investors to access the information and understand it. Accordingly, as the Commission evaluates disclosure effectiveness, we urge it to consider how technology can be used to improve the way information is presented and delivered to investors.

The Commission's basic system of delivering reports on a periodic basis to investors originated decades ago in a pre-Internet era in which receiving company reports via the postal service, print media and the SEC's public reference rooms were the primary ways of obtaining detailed information about public companies. The launch of EDGAR in the early 1990s introduced the public reporting process to the computer age, but EDGAR's virtual file cabinet of documents has also become a relic of an earlier time. Both companies and investors have become far more sophisticated in their use of technology to prepare and review disclosure documents, and we believe it is high time for the Commission to begin a process for likewise modernizing the fundamental format of document delivery.

As you know, the Commission's 21st Century Disclosure Initiative produced a detailed report on the topic of disclosure modernization,²³ and many of those recommendations are still worthy of further pursuit. The "company file" discussed at length in this report is one possible solution, but we believe the Commission should consider other alternatives that incorporate new technology as well. In the meantime, below we provide some comments on a series of stop-gap measures for improving the current document delivery system.

1. Cross-Referencing

Cross-referencing should be encouraged as a method of avoiding repetitious disclosure. For disclosure that contains numerous instances of cross-referencing, the addition of a summary page including a list of cross-references with hyperlinks would be helpful for investors to more easily navigate through filings.

²³ See SEC STAFF, TOWARD GREATER TRANSPARENCY: MODERNIZING THE SECURITIES AND EXCHANGE COMMISSION'S DISCLOSURE SYSTEM (JAN. 2009), <https://www.sec.gov/spotlight/disclosureinitiative/report.pdf>.

Despite its convenience, the use of extensive cross-referencing does highlight a problem inherent in Regulation S-K and the SEC's periodic reports, which is the requirement to disclose substantially similar information in multiple places. We recommend that the SEC work toward consolidating and eliminating duplicative disclosure requirements to decrease the need for frequent use of cross-referencing in the first place.

2. Incorporation by Reference

The SEC should continue to permit and encourage incorporation by reference in order to avoid repetition of information. This technique is also useful because it can signal to investors items that have not changed since the previous filing, which can be helpful in noting updated information. Incorporation by reference can be facilitated through the expanded use of hyperlinks, as discussed below.

3. Hyperlinks

We support the current permitted use of hyperlinks to make disclosure more user-friendly for investors. It is relatively easy for registrants to utilize available technology for including hyperlinks to increase the readability of filings. The Commission should continue to encourage the use of hyperlinks to allow investors to navigate throughout a filing and to easily access other documents referenced within a filing.

We also urge the Commission to permit a greater use of hyperlinks to information outside the EDGAR system. For example, most registrants maintain websites that are very useful sources of information for investors. Indeed, several SEC rules now require registrants to post information to their websites and make the corresponding website addresses available in their SEC reports.²⁴ Recognizing the increasingly important role that registrants' websites play, the SEC should permit hyperlinks to additional information on those company websites. Because of the dynamic nature of websites, including changes in URLs and ongoing removal of historical information, we would not object if, as a condition to hyperlinking to a source outside EDGAR, the SEC were to require registrants to maintain separate

²⁴ For example, Item 407 of Regulation S-K permits or requires registrants to disclose information about corporate governance on their corporate websites.

records of hyperlinked information so that an archive would be available should SEC personnel wish to see it.

4. Company Websites

Consistent with our earlier comments advocating for increased ability to hyperlink to external sources, we also encourage the Commission to give registrants the option of satisfying more of their disclosure obligations through the use of incorporation by reference to company websites. We do not believe that making this accommodation would present any undue burden on investors, since SEC rules already require website disclosure of some company information and many investors have become accustomed to using company websites to obtain other company information, such as bylaws, committee charters, and business descriptions. Permitting this practice should also produce cost savings for registrants by permitting them to avoid duplication of effort.

5. Specific Formatting Requirements

We support granting registrants increased flexibility with regard to the order, numbering and captioning of items so that they can tailor the overall format of their disclosure documents in a way they determine is most useful to their investors. Likewise, we request that the Commission permit the greater use of charts, tables and other graphics to satisfy individual disclosure items. In these ways, we believe registrants could then more effectively communicate information that is material to understanding their particular companies.

6. Layered Disclosure

We support the greater use of layered disclosure, in a method that balances providing clear information to investors with avoiding repetition. The addition of a summary introduction highlighting key events and updates from the most recent fiscal period could provide investors with a helpful overview before reviewing the details contained in lengthy disclosure. Again, we believe registrants best understand their own investor bases and should have the flexibility to provide decision-useful information to them.

However, while registrants should have the option of providing layered disclosure if they elect, we do not support requiring numerous methods of presenting information that is tailored toward different investors of varying levels of sophistication. Requiring the same information to be presented in a myriad of ways would be burdensome for registrants to prepare and would create confusion for investors by making information more difficult to find and increasing the length of filings.

7. Structured Disclosures

While we understand the potential usefulness of standardized markup languages such as XBRL for investors to be able to compare data across registrants, the SEC should be mindful of the significant cost and time burden it presents for registrants. In particular, scaled requirements for emerging growth companies and smaller reporting companies should be maintained and expanded.

It would also be advisable for the SEC to examine empirically how many investors actually use this data. While XBRL tagging may seem beneficial in theory, if the data is not actually being used by a significant number of investors, then these requirements may place an undue burden on registrants. Several recent SEC pronouncements make the basic assumption that investors widely use XBRL data, but our own experience is contrary to this assumption. We do not support the further expansion of XBRL or similar requirements without a thorough study of the actual cost of XBRL tagging to issuers and the scope of investors that use XBRL and find it helpful.

The Chamber has urged the SEC and Congress to undertake a modernization of information delivery to make disclosures and reports more usable for investors and companies. This effort should be broader and wider than a simple discussion of the current state and future of XBRL. The SEC should also look into finding a system that is easier for registrants to use. As noted in the Concept Release, the current system involves much complexity, which involves a need for registrants to outsource the task of tagging data. Accordingly, the SEC should examine the usefulness of the current system and whether there is a better, more user-friendly system available.

Mr. Brent J. Fields
July 20, 2016
Page 26

Conclusion

The CCMC believes that Regulation S-K should be modernized in a way that streamlines disclosure and emphasizes materiality, to ensure that investors are provided with meaningful, non-repetitive information and registrants are not burdened with overwhelming disclosure requirements. In the SEC's effort to modify Regulation S-K, we caution against the use of rigid, one-size-fits-all disclosure methods, which we believe would perpetuate existing problems with lengthy disclosure that is of limited use to investors. Requiring controversial disclosures intended only to satisfy the idiosyncratic needs of special-interest groups should not become a routine feature of SEC rules. Additionally, the SEC should use this opportunity to encourage registrants to eliminate boilerplate, immaterial information that has increasingly crept into filings as a result of fear of liability. Finally, we also believe that it is incumbent for the SEC to perform an analysis on how any proposed modifications will impact capital formation and competition prior to releasing proposed rules.

We thank you for your consideration of these comments and would be happy to discuss these issues further with the Commissioners or Staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long horizontal flourish.

Tom Quadman

cc: The Honorable Mary Jo White
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000

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

**Re: Modernization of Regulation S-K Items 101, 103 and 105
17 CFR Parts 229, 239 and 240;
Release Nos 33-10668, 34-86614; RIN 3235-AL78
File No. S7-11-19**

Dear Secretary Countryman:

The U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness (“CCMC”) appreciates the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the “SEC” or “Commission”) on August 8, 2019, entitled “Modernization of Regulation S-K Items 101, 103 and 105” (the “Proposing Release”).

The Proposing Release is the latest effort in a much broader effort undertaken by the Commission over the past several years to modernize the public company disclosure regime. As we have repeatedly noted, the public company business model has become far less popular than in the past, which is reflected in the declining number of public companies overall—in the past twenty years, the number of US public companies has been cut in half. Fewer public companies means fewer investment opportunities for Main Street investors. The Chamber once again commends the Commission for its ongoing commitment to review existing regulations that affect this serious issue.

As the Commission is well aware, the guiding concept of “materiality,” as laid out by the Supreme Court in seminal cases such as *TSC Industries v. Northway*¹ and *Basic*

¹ 426 U.S. 438 (1976).

Inc. v. Levinson,² has played the central role in our American capital markets for decades and has contributed to the formation of the deepest, most diverse, most liquid markets the world has ever known. Materiality has long been the dividing line for determining what should be disclosed and what should not have to be disclosed under the federal securities laws. Therefore, considering materiality through the eyes of a “reasonable investor” is a critical feature of the Supreme Court’s test. Materiality does not turn on the needs of an investor that is not representative of investors more broadly or that is looking to advance some special interest.³

The CCMC has repeatedly expressed its concern that, in recent years, there has been a concerted effort to erode this longstanding approach to materiality. This new development has complicated and confused what materiality means and would further overload investors with information that few find to be useful when evaluating a company’s financial and operational performance. Some special interests are advancing conceptions of materiality that would abandon altogether the traditional notion of materiality rooted in the Supreme Court’s jurisprudence. These interest groups want to expand what businesses are mandated to disclose in order to advance the groups’ own political and social agendas and to further goals that are extraneous and contrary to the SEC’s mission.⁴

For the most part, the Proposing Release favors a principles-based approach to disclosure over a prescriptive one. We support the Commission’s decision to follow this approach, and concur that prescriptive disclosure requirements can easily become outdated. Principles-based disclosure also assures the delivery of material information

² 485 U.S. 224 (1988).

³ This approach to materiality mitigates the risk that SEC disclosure documents will become too dense and impenetrable for investors by seeking to be all things to all people. It also helps ensure that the SEC, in fashioning and enforcing the disclosure regime under the federal securities laws, focuses on what is best for investors overall and adheres to the agency’s mission as the country’s capital markets regulator.

⁴ We discuss materiality further in our white paper, *ESSENTIAL INFORMATION: MODERNIZING OUR CORPORATE DISCLOSURE SYSTEM* (Winter 2017), *available at* https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL-1.pdf.

Ms. Vanessa A. Countryman
October 22, 2019
Page 3

to investors. This approach is also endorsed in our previous comment letters on matters that are the subject of the Proposing Release.⁵

As a brief summary of our comments:

- We support the proposed amendments to Item 101(a) of Regulation S-K in respect of the General Development of Business.
- We also support the proposed amendments to Item 101(c) regarding the Narrative Description of Business, but urge the Commission to proceed carefully with the proposed Human Capital Resources disclosure.
- We support many of the changes to the Item 103 Legal Proceedings disclosure, but urge the Commission to scrap the presumptive materiality threshold of \$300,000 for certain environmental proceedings, as such a threshold would otherwise require disclosure for many companies that is otherwise quantitatively and qualitatively immaterial.
- Finally, we generally support the proposed revisions regarding Item 105 Risk Factors disclosure, though we request that the Commission retain the “most significant” risks trigger for disclosure.

Discussion

I. General Development of Business (Item 101(a))

We support the proposed amendments to Item 101(a) of Regulation S-K. Notably, these amendments would eliminate a prescribed five- or three-year timeline, update the non-exclusive list of disclosure topics, and allow current period updates with cross-references to disclosures in past filings. These strike us as sensible, principles-based revisions designed to deliver material information to investors.

⁵ Our letter dated July 20, 2016 is available at <https://www.sec.gov/comments/s7-06-16/s70616-173.pdf>, and our letter dated October 27, 2016 is available at <https://www.sec.gov/comments/s7-15-16/s71516-33.pdf>.

II. Narrative Description of Business (Item 101(c))

We are generally supportive of proposed Item 101(c)'s revised disclosure topics, which seem more tailored for today's service-based economy. In particular, we support the Proposing Release's contemplated expansion of narrative regulatory disclosure under Item 101 to include the material effects of compliance with government regulations. The requirements for this disclosure in the past focused solely on environmental issues, which are immaterial for many businesses, yet did not mandate the disclosure of other material regulatory regimes.

Nevertheless, issues around executive compensation have, unfortunately, become hyper-politicized in recent years, and the CCMC is wary of creating a new disclosure regime on this front. The ill-conceived pay-ratio disclosure—itsself the product of a supercharged political process—has resulted in a mandatory disclosure that is wholly immaterial to investors, and is a testament to the dangers of creating compensation disclosures that serve the interests of those other than Main Street investors. Executive compensation has also become a popular subject for shareholder proposals under Rule 14a-8, and public companies must regularly consider such proposals that seek to micromanage those companies' businesses. Various special interest groups also favor expanded compensation disclosure, not because of the informational benefits it brings to them as investors, but rather to gain leverage against corporate managers and to sow disharmony in the workplace.

With these deep reservations in mind, however, the CCMC concedes that certain matters concerning human capital resources may be material to investors in certain circumstances. Accordingly, we are cautiously supportive of the Commission's proposal to require a principles-based disclosure regime around these matters. In doing so, we believe it is critical that such disclosures remain limited, as described in the Proposing Release, "to the extent material to an understanding of the registrant's business taken as a whole." In keeping this disclosure principles based, we do not see a need for the Commission to provide examples of the types of measures or objectives that management should focus on its disclosure.

Additionally, we do not believe that the Commission should retain the requirement to disclose a particular number of employees for a registrant. With the rise of employee outsourcing and leasing arrangements; greater use of outside consultants, seasonal workers and independent contractors; and the emergence of the

“gig” economy, providing the number of pure employees as of a date certain no longer reflects a meaningful statistic for many companies. In light of those developments, adjusting the disclosure to require a range or bucketing employees into arbitrary groups would not seem to provide material information to investors either, and we do not support such a requirement.

III. Legal Proceedings (Item 103)

The Proposing Release contemplates the amendment of Item 103 to permit explicitly the use of hyperlinks and cross-references to disclosures located elsewhere in a periodic report. Many issuers already make use of these disclosure techniques, and we support the proposed amendments. Still others prepare a unified liability disclosure for purposes of the financial statement footnotes and repeat some version of this disclosure elsewhere in the periodic report to satisfy Item 103. Thus, the proposed amendments may have the added benefit of eliminating this kind of duplicative disclosure.

We question the Commission’s desire to retain a presumptive materiality threshold (proposed to be increased to \$300,000) in the context of environmental proceedings. Such a position seems to run counter to the principles-based disclosure philosophy that predominates all other elements of the Proposing Release, and would continue to lead to the disclosure of immaterial information.

The Proposing Release half-heartedly justifies the disclosure on the grounds that it could promote comparability. But there is no comparability between a manufacturing firm with \$10 billion in revenue that discloses a \$300,000 fine from an environmental regulator for conduct involving no discharge into the environment (a quantitatively and qualitatively immaterial event for such a company) and a logistics firm with \$100 million in revenue that makes the same disclosure relating to an event endangering human health (which would likely be material for this much smaller company). Indeed, the Commission’s original selection of a \$100,000 threshold for disclosure in the 1970s was entirely arbitrary, and we see no benefit to investors in

retaining any disclosure premised on an arbitrary threshold. Accordingly, we would delete proposed Section (c)(3)(iii) of Item 103.⁶

Instead, the Commission should only require disclosure for government regulatory proceedings (environmental or otherwise) when material to an investor's understanding of the business taken as a whole. To this end, as noted above, we support the Proposing Release's contemplated expansion of narrative regulatory disclosure under Item 101 to include the material effects of compliance with government regulations on capital expenditures, earnings and competitive position. Such a step is consistent with market practice at many companies and would provide material disclosure to investors.

IV. Risk Factors (Item 105)

We share the Commission's concern over the proliferation of risk disclosure that has grown generic and verbose. We believe that a number of the Commission's proposals to improve risk factor disclosure are sensible and appropriate. Thus, we support a summary risk factor section for disclosure over 15 pages and the reordering of risk factors under relevant headings.

The CCMC does not support, however, the proposed change in the disclosure threshold for risk factors from "most significant" to "material". In doing so, we concede that this position may at first blush seem inconsistent with our broader theme of ensuring that disclosure in Commission filings remains dedicated to material matters. But, the reality is that issuers are routinely sued over immaterial misstatements and omissions. Therefore, for any number of reasons, companies may tailor their prophylactic risk factors to address a universe of perceived risks that go beyond the ones most material to the business.

We are concerned that a migration from a "most significant" standard could create a presumption of materiality in the risk factor section, i.e., that any risk disclosed is presumptively a material one to the business. To mitigate this outcome,

⁶ The CCMC is aware of the unusual circumstances involving the SEC in the 1970s that first led to the development of the environmental liability disclosure, but the passage of time and overall evolution of the Commission's disclosure regime should provide the Commission with the flexibility to depart from decisions about disclosure it made four decades ago.

Ms. Vanessa A. Countryman
October 22, 2019
Page 7

some companies may choose to disclose fewer risks to investors, which would not be beneficial to investors overall. A change in the status quo could also encourage still more frivolous securities litigation. Accordingly, we urge the Commission to retain the requirement to disclose the “most significant” risks.

Conclusion

We again commend the Commission for its ongoing efforts to modernize the public company disclosure regime. We appreciate your consideration of these comments, and the CCMC is available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long horizontal flourish.

Tom Quaadman

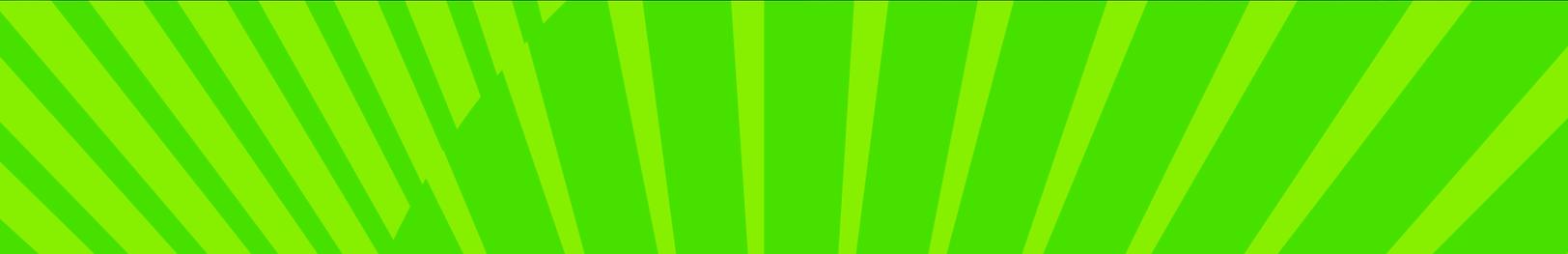
cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee



U.S. Chamber of Commerce
Center for Capital Markets
Competitiveness

Unlocking America's Capital Markets: Fueling Economic Growth and Innovation

June 3, 2025



Executive Summary

Companies that file registration statements with the Securities and Exchange Commission (SEC) and offer securities to the general public are typically referred to in the U.S. as public companies. Public companies have been a critical source of job creation and innovation throughout the U.S. economy for decades. Capital raised in a public offering is used to hire new employees, invest in research & development, and expand operations. Public offerings provide businesses with a steady and reliable source of capital that helps them create well-paying jobs, remain profitable, and stay competitive for the long term.

Investors reap the benefits when companies go public. Millions of Americans directly or indirectly invest in public companies through retirement or education savings plans. The opportunity to invest early in a growth-stage company, before its share price potentially increases significantly, is also an opportunity for investors to create wealth and financial security, which in turn helps generate additional investment in other companies.

Unfortunately, the public markets in the U.S. are not nearly as strong as they were even two generations ago. The number of public companies has fallen by roughly 50% since the late 1990s, and the initial public offering (IPO) market remains a fraction of what it was in the 1980s. Returning the IPO market to its position of historical strength is critical to boost job creation and economic growth in the years to come.

While many factors have contributed to the decline in public companies, there is little doubt that the regulatory framework in the U.S. is damaging this market. Congress has addressed some of the issues that led to the decline in the number of IPOs, but there are additional ways that policymakers of all stripes can help ignite a new era of economic growth through America's public markets.

The U.S. Chamber of Commerce and Nasdaq have a long-standing partnership to inform policymakers about the need to maintain strong public markets in the U.S. In this report, the Chamber and Nasdaq have partnered to deliver recommendations to reinvigorate the IPO market and improve the regulatory environment for public companies.

Summary of Recommendations

Improvements to the Jumpstart Our Business Startups (JOBS) Act and Tailoring Regulations for Small Public Companies

- Extend the emerging growth company (EGC) eligibility time frame from 5 years to 10 years unless the EGC's revenue exceeds \$2 billion (in 2025 dollars and adjusted annually for inflation) for two consecutive years after the initial 5-year period.
- Remove the counterproductive phase-out rule that disqualifies a company from continuing as an EGC if it becomes a large, accelerated filer.
- Modernize the threshold that determines well-known seasoned issuer (WKSI) status to include companies that have \$75 million or less in public float.
- Codify into law the ability of all issuers to submit draft registration statements confidentially to the SEC and test the waters with investors prior to an IPO.
- The SEC should adopt internal policies to shorten the IPO review process.

Reforms to the Proxy Process

- Reestablish meaningful oversight of proxy advisory firms.
- Return the shareholder proposal system under Rule 14a-8 to its original purpose.

Improvements to Public Company Disclosure

- Cease the cross-border application of foreign regulation to U.S. businesses.
- Reinforce the materiality standard as the touchstone for corporate disclosure.
- The SEC should continue scaling disclosure requirements for small public companies.
- The SEC should consider changes to rules governing delivery of disclosures to the public.
- Simplify quarterly reporting requirements and give EGCs the option to issue a press release with earnings results in lieu of a 10-Q.

Increasing Equity Research Coverage of Small Public Companies

- The SEC should examine any regulations that may be contributing to a lack of research in small issuers and develop relevant rulemakings to increase coverage. A full examination and reconsideration of the 2003 Global Research Analyst Settlement is also necessary.
- Policymakers should adopt a permanent solution that allows brokers to receive payments for equity research without having to register as investment advisers to limit the extraterritorial reach of MiFID II and foreign regulators.

Financial Reporting and Public Company Accounting Oversight Board (PCAOB) Recommendations

- The SEC and the PCAOB should jointly examine cost drivers behind ICFR and develop guidance to help address unnecessary costs for small public companies.
- The PCAOB should adopt a more robust set of good governance standards, including cost-benefit analysis.



Introduction

The U.S. public markets have long been the most dynamic in the world because of their unparalleled ability to connect high-growth businesses with capital. The ultimate goal of many entrepreneurs is to start a business from scratch, grow it into a thriving enterprise, then one day complete an initial public offering (IPO) and have the company's shares trade on a U.S. stock exchange. Businesses that go public have been an indispensable source of job creation and innovation, supporting growth throughout the U.S. economy.



Some of the most iconic companies in America had humble beginnings that started in a garage, a dorm room, or a single storefront. Today, many of these companies employ thousands of workers, develop society's crucial innovations, are owned by a vast base of shareholders, and some have market capitalizations worth hundreds of billions of dollars.

These quintessentially American stories do not happen through sheer luck. The path from startup company to IPO is only possible when markets are able to connect capital with ideas, and the vision of entrepreneurs can be transformed into a business that is consistently profitable and competitive over a long period of time. Historically, the steady and reliable capital raised through a public offering has been the preferred method for high-growth businesses to support their long-term business strategy. After a public offering, any investor—whether an institution or an individual—can invest in that company, providing the business with a more permanent base of potential investors. This can ultimately lower the long-term costs of capital for public companies compared to other forms of capital raising.

Investors also benefit when businesses choose to go public. When individuals can invest in young, growth-stage companies—either directly as a shareholder or indirectly through a retirement or pension plan—they are able to participate in the financial success of America's best companies and ideas. This system helps generate wealth and supports the financial and retirement security of millions of Americans.

The sweeping societal benefits that result from companies going public are enormous. It has been estimated that 92% of a company's job growth occurs after its IPO¹, while other research has found that post-IPO companies increase employment by 20% annually compared to companies that withdrew from an IPO.² Encouraging more companies to enter the public markets is a long-held goal of policymakers for good reason.

Concerningly, the competitiveness of the U.S. public markets and the interest of companies in going public have diminished over the last three decades. The number of public companies in the U.S. has declined from a peak of 8,000 in the late 1990s to roughly half that number today. The average number of annual IPOs remains a fraction of what it was in the 1990s.

The implications for the U.S. economy stemming from the drop in the number of public companies have been a source of concern for policymakers since IPO activity began its steady decline in

the 2000s. After the 2008–2009 financial crisis, there was a severe drop in IPOs at the precise moment that the economy was desperate for job creation and new opportunities for investors after the market losses stemming from the crisis. Instead, the immediate post-crisis regulatory response was to layer new regulations on public companies, which hampered the recovery and further damaged the IPO market.

Eventually, Congress and the executive branch came to understand that the regulatory framework for public companies was disincentivizing companies from going public in the first place, and that reforms were necessary to stimulate the IPO market. Congressional hearings were held to examine the issue, and in March 2011 the Treasury Department convened a conference that solicited ideas for how to promote access to capital for growing businesses.

The result of these efforts was the 2012 Jumpstart Our Business Startups (JOBS) Act, a bipartisan achievement that breathed new life into the IPO market. Companies were able to take advantage of provisions of the JOBS Act the day it was signed into law.

The JOBS Act established a new class of issuer (a term used to describe a public company), the emerging growth company, or EGC. EGCs were defined by the JOBS Act as growth-stage businesses with less than \$1 billion in annual revenues.

EGCs may take advantage of an IPO on-ramp that temporarily exempts them from costly regulatory mandates that apply to traditional IPOs. Notably, EGCs are exempt from the auditor attestation requirements under section 404(b) of the 2002 Sarbanes-Oxley Act and are permitted to provide audited financial statements for their two previous fiscal years opposed to the typical three for other companies.

In the years leading up to the JOBS Act, Sarbanes-Oxley Section 404 had been widely cited as a reason why fewer companies were going public, something even the SEC acknowledged in its 2003 rulemaking implementing Section 404 when it said that the rule could “discourage some companies from seeking capital from the public markets” due to the high costs of compliance the rules impose on public companies.³

Additionally, the JOBS Act allowed EGCs to engage in pre-IPO communication about the company’s prospects (test the waters) with potential investors and file draft registration statement confidentially with the SEC.

The JOBS Act had an immediate positive impact upon the trajectory of the IPO market. From 2008 to 2012 there were on average 121 IPOs each year in the U.S. After passage of the JOBS Act, from 2013 to 2021, IPOs averaged 344 annually.⁴ EGCs also made up 93% of all IPOs from 2013 to 2021, demonstrating that tailored regulation for smaller companies can provide an incentive to go public.⁵

Importantly, in the 13 years that the JOBS Act has been in effect, the act has made it easier for companies to enter the public markets while preserving investor protections.

The momentum gained from the JOBS Act led to other initiatives from Congress to improve the regulatory environment for pre-IPO and small public companies. For example, Congress in 2015 passed a law that made further accommodations for EGCs during the IPO on-ramp period and directed the SEC to simplify or eliminate outdated disclosure requirements for all public companies.⁶ Congress has wisely taken steps over the years to improve regulatory conditions to strengthen markets while assiduously avoiding direct market interventions.

The SEC has also taken initiative on its own to modernize rules for the IPO process. In 2017, it permitted all public companies to submit draft registration statements for nonpublic review and further expanded draft registration statement accommodations in early 2025.⁷ This permitted companies to maintain confidentiality about some of the more sensitive aspects of their business strategy or intellectual property. In 2019, the SEC started allowing all issuers, not just EGCs, to test the waters with investors prior to an IPO.⁸ Some of these ideas were also embraced by an influential report on the capital markets issued by the Treasury Department in 2017.⁹

The SEC then took further steps to enhance the public company model, which is the term used for the set of rules and regulations that govern companies once they go public. Because public companies access money from everyday investors, Congress decided in 1933 and through subsequent law that public companies provide annual and quarterly disclosures about their performance and operations to the public. However, in the nine decades since the securities laws were first enacted, the SEC's disclosure regime has become bloated to the point that investors can become overwhelmed with the amount of information that is provided by public companies in their SEC filings.

This system creates substantial costs for issuers—particularly smaller public companies—and can make it difficult for investors to determine the most important information about a company. To address this, the SEC in 2018 allowed more small public companies to take advantage of certain scaled disclosure and financial reporting requirements and eliminated certain outdated, duplicative, or redundant disclosure mandates for all public companies.¹⁰

In addition to annual and quarterly reporting requirements, a public company must also navigate the annual proxy season. Proxy season generally refers to the period leading up to and including a company's annual meeting where shareholder votes are held on various matters. Public companies are required to

provide shareholders with a detailed proxy statement, soliciting their votes on matters to be considered at the annual meeting.

In recent years, the proxy process has become increasingly influenced by activists that exploit the SEC's proxy rules to force companies to consider immaterial matters—often those of a social or political nature—during annual meetings. The proxy process has also come under greater scrutiny because of the influence of proxy advisory firms, which make recommendations to institutional investors for how to vote on director elections, shareholder proposals, or other topics considered at an annual meeting.

Because proxy advisors are turned to by large investors for help with proxy voting, they exert an enormous amount of influence over corporate governance in the U.S., but the industry is riddled with conflicts of interest and prone to committing errors when providing vote recommendations to institutional investors. Proxy advisors often make recommendations that are not rooted in economic analysis, leading to outcomes that are detrimental to shareholders of public companies. In 2020, the SEC adopted rules that provided a baseline level of transparency and accountability for the proxy advisory industry.¹¹

The SEC also adopted changes to the shareholder proposal system under Securities Exchange Act Rule 14a-8—a system that has been abused by special interests that use it as a mechanism each proxy

season to advance social or political agendas that have nothing to do with financial return or investor protection. Rule 14a-8 has permitted activists to submit proposals dealing with immaterial topics year after year, which create real costs and distractions for companies.¹²

Unfortunately, the problems with proxy advisory firms and Rule 14a-8 continue to exist, necessitating the need for the SEC or Congress to enact more permanent changes that protect the interests of investors and facilitate the entry of growing companies into the public markets.

Encouraging More IPOs and Improving the Public Company Model

Encouraging more companies to go and stay public is not just about trying to meet arbitrary benchmarks for annual IPO activity; it is imperative to support sustainable growth in the economy and the long-term competitiveness of the U.S. capital markets. From 1950 to 2010, the U.S. economy averaged 3.4% in real economic growth per year. Since 2010, the annual average has slowed to 2.2%, with some forecasts projecting that growth could dip below 2% per year in the next decade.¹³ Expanding the IPO on-ramp and returning the U.S. IPO market to its position of historical strength must be included as part of any pro-growth agenda for the economy.

Sustained economic growth provides a foundation for broad-based prosperity by expanding opportunities, increasing incomes, fostering innovation, and enhancing the overall quality of life for individuals and families. It is a critical driver in reducing poverty and creating a society where everyone has a chance to thrive. When our economy is growing at 3%, individuals who are born today will see America's economy double in size by the time they are in their early 20s. At 2% growth, it will take until they are in their mid-30s for the economy to double.

To be clear, prioritizing enhancements to the public markets should not be viewed as diminishing the importance of the private capital markets and businesses that choose to stay private for any number of reasons. U.S. policymakers should welcome both strong private capital markets and public markets. However, if businesses that otherwise would go public are electing not to largely because of regulatory costs or the overall burden of being a public company, that is a problem.

The U.S. Chamber of Commerce and Nasdaq have collaborated closely over the years to inform policymakers about the importance of the public markets and put forward ideas to modernize securities regulation in the

U.S. In 2018, we partnered with several other organizations to produce 22 recommendations to policymakers on how to help companies go and stay public.¹⁴ While some of these recommendations have been implemented, there is still more work ahead to modernize public company regulation.

Since the 2018 report was issued, further challenges for public companies and companies considering going public have developed. For example, policies pursued by foreign regulators—namely the European Union’s Corporate Sustainability Due Diligence Directive (CS3D) and Corporate Sustainability Reporting Directive (CSRD) threaten to impose obligations on U.S. firms that would be exceedingly difficult, if not impossible, to implement.

The public capital markets—by way of the federal proxy rules and other sources—have also been drawn into contentious cultural and political debates in the U.S., which typically presents a lose-lose scenario for companies and their shareholders. Organized special interests seek to achieve through corporate pressure campaigns what they cannot achieve

through the normal electoral or legislative processes of the U.S. political system. This puts the hard-earned savings of American investors at risk as companies are pressured to prioritize objectives that are unrelated to long-term performance.

This type of operating environment ends up discouraging companies from entering the public markets with its additional scrutiny and additional requirements, making politicizing the capital markets not conducive to capital formation and risking America’s standing as the preeminent destination for global capital.

Over the last several months, the Chamber and Nasdaq convened a series of meetings and roundtables with public companies, venture capitalists, institutional investors, securities law experts, and investment bankers to determine the best path forward for the U.S. public markets. The insight and expertise gained from these sessions helped inform this report. We are pleased to partner once again with this latest set of recommendations and look forward to working closely with Congress, the SEC, and other policymakers on these important issues.





Recommendations

Building on the Success of the JOBS Act and Tailoring Regulations for Small Public Companies

Title I of the JOBS Act established the IPO on-ramp for EGCs and quickly became the preferred method of going public in the years since the JOBS Act became law. The on-ramp currently provides temporary exemptions from certain regulatory requirements for a period of 5 years or when the company exceeds the revenue threshold for EGCs. (Currently, it's set at \$1.235 billion after inflation adjustments since the JOBS Act was passed.)

Recommendation

Extend the EGC eligibility time frame from 5 years to 10 years and increase the revenue ceiling for EGCs to a minimum of \$2 billion (in 2025 dollars and adjusted annually for inflation) for 2 consecutive years after the initial 5-year period).

Evidence from the JOBS Act shows that EGCs overwhelmingly take advantage of the Title I provisions. Among other provisions, Title I permits EGCs to file registration statements confidentially with the SEC, exempts EGCs from the auditor attestation requirements of the 2002 Sarbanes-Oxley Act and allows EGCs to provide investors with two years of audited financial statements opposed to the typical three for traditional IPOs.

Sarbanes-Oxley's auditor attestation mandate—which requires public companies to hire a third-party to audit their internal controls over financial reporting—had frequently been cited as a reason why more companies were not going public prior to the JOBS Act. The auditor attestation mandate had driven the average annual audit costs for public companies to over \$2 million per year in the immediate years after Sarbanes-Oxley was passed—a substantial sum for a smaller company considering a public offering.¹⁵ This coincided with a general rise in audit costs that led companies to reconsider the costs and benefits of an IPO.

The confidential treatment of draft registration statements has also been attractive to EGCs as it allows them to keep sensitive information confidential for competitive purposes.

In the second year of the JOBS Act being law, 90% of EGCs submitted at least one registration statement confidentially, 65% provided two years of audited financial statements, and 98% used the extended phase-in period for the auditor attestation requirements of Sarbanes-Oxley.¹⁶ A vast majority of EGCs also used the JOBS Act to provide scaled executive compensation disclosures. Companies can be provided needed certainty about the costs of being public by guaranteeing that they will get these benefits for a minimum of 5 years after they go public. In addition, extending the on-ramp from 5 years to 10 years would allow many of these companies to grow before they are subject to regulatory requirements that are appropriate for more mature companies.

Similarly, while the EGC revenue threshold is adjusted for inflation annually, the current level does not properly reflect growth of the economy and the capital markets since the JOBS Act was passed. Allowing companies to qualify as EGCs if they have revenue up to \$1.5 billion for two consecutive years and adjusting that ceiling for inflation would give more companies the opportunity to take advantage of the JOBS Act.

Recommendation

Remove the counterproductive phase-out rule that disqualifies a company from continuing as an EGC if it becomes a large accelerated filer.

Companies can face uncertainty about their status as an EGC once they go public due to factors beyond their control. By the second year after the JOBS Act was passed, for example, 30% of EGCs that went public in 2012 complied with the requirement of Sarbanes-Oxley section 404(b) because they became large accelerated filers. Large accelerated filers are defined under SEC regulation as having a public float of \$700 million or more and are subject to the auditor attestation requirements under the Sarbanes-Oxley Act.¹⁷ EGCs should be permitted to retain their status even if they happen to cross a threshold that would otherwise reclassify them as large accelerated filers.

Recommendation

Modernize the threshold that determines well-known seasoned issuer (WKSII) status to include companies that have \$75 million or less in public float.

WKSIs are a class of issuer under SEC regulation that are eligible to file shelf registration statements, which become automatically effective once filed. Allowing shelf registration and other regulatory accommodations would minimize reporting costs for companies that are already established in the marketplace. As one expert testified to Congress in 2023, “allowing additional seasoned issuers to qualify as WKSIs would greatly facilitate the ability of many companies to access the public markets.”¹⁸

Recommendation

Codify into law the ability of all issuers to submit draft registration statements confidentially to the SEC and test the waters with investors prior to an IPO.

Confidential filings and testing the waters quickly became two of the more widely used provisions of the JOBS Act soon after it was signed into law. The SEC has expanded eligibility for both of these JOBS Act reforms, most recently in early 2025 with additional changes to the processes for submitting draft registration statements. Still, Congress should codify the policy into law so that it cannot be weakened or rescinded in the future by the SEC.

Recommendation

The SEC should adopt internal policies to improve the IPO review process.

While EGCs have overwhelmingly submitted draft registration statements confidentially, the SEC staff review process for registration statements is still cumbersome and time-consuming. Once a company submits a draft registration, the SEC takes time to provide comments back to the company—a process that can take multiple rounds and last for months, creating uncertainty in the timeline for SEC approval. This delay raises the risk that the company may not be able to complete its IPO due to market conditions or other reasons. One recent analysis estimated that 40% of companies that filed a registration statement did not ultimately complete an IPO.¹⁹ The SEC should at a minimum seek to shorten the amount of time the review process takes and ensure that any comments requiring a company's attention provided by SEC staff are only of critical importance.

Reforms to the Proxy Process

Public companies have increasingly become the target of activists who exploit the securities laws to advance political or social objectives through the annual proxy process. These campaigns typically have little or nothing to do with corporate performance, can impose millions of dollars' worth of costs on shareholders, and represent significant opportunity costs. In recent years, activists across the political spectrum have targeted public companies over a wide range of controversial issues. Corporate leaders often find themselves in the difficult position of having to respond and take positions on topics that divide their shareholder or customer base. This politicization of the securities laws is harmful to the reputation of the U.S. capital markets and provides another reason for companies to stay private.

The SEC's shareholder proposal system under Rule 14a-8 has become the preferred vehicle for special interests to advance their idiosyncratic agendas. In the 2024 proxy season alone, companies were called on by activists to address any number of societal issues, including conducting racial equity audits, providing information about gestational crates in the pork industry or the use of cage-free eggs, or reporting on diversity, equity, and inclusion (DEI) targets or metrics within a company.²⁰ The SEC's position on whether companies must include controversial proposals with their proxy materials has varied depending on which political party occupies the executive branch. These policy swings are not entirely predictable and make it difficult and costly for companies to navigate proxy season. An overhaul of the entire Rule 14a-8 system framework is needed to address the unnecessary costs that the current system imposes on public company shareholders.

Exacerbating many of the underlying problems with the proxy process is the influence of the proxy advisory industry. Proxy advisors can play an important role in corporate governance by advising institutional investors how to vote on matters that are important to a company's long-term performance. However, the two foreign-owned firms that

continue to dominate this industry—Institutional Shareholder Services (ISS) and Glass Lewis—operate with significant conflicts of interest and often make errors when providing vote recommendations. Smaller public companies have also historically had a more difficult time communicating with and providing feedback to proxy advisory firms. The reforms outlined below would correct many of these deficiencies and ensure that proxy advice is always accurate, useful, and given with the best interest of investors in mind.

Recommendation

Reestablish meaningful oversight of proxy advisory firms.

In 2020, the SEC adopted reforms to increase accountability and transparency for proxy advisory firms. This rulemaking was the culmination of a years-long effort by Congress and the SEC to examine the flaws within the industry and develop solutions that are in the best interest of public company shareholders.

The SEC's 2020 rule provided a mechanism for public companies to comment on draft vote recommendations in order to correct any errors, required proxy advisors to disclose information regarding their conflicts of interest, and held proxy advisors accountable by extending the SEC's antifraud authority under Rule 14a-9 to the dissemination of proxy advice. These were sensible, calibrated changes that incorporated the views of public companies, investors, and proxy advisors themselves throughout the rulemaking process.

However, after the administration change in 2021, the SEC announced a “non-enforcement” policy for the 2020 rule and ultimately rescinded many of the reforms before they even took effect.²¹ The SEC's rescission and non-enforcement policy currently remain the subject of litigation. Regardless of the outcome in court, the SEC and, if necessary, Congress have the opportunity to establish effective oversight of proxy advisory firms based upon the SEC's 2020 rule.

Nearly every participant in the proxy process—issuers, brokers, transfer agents, and institutional investors—are subject to robust requirements under the federal proxy rules. Proxy advisors must similarly be required to adhere to the basic transparency and accountability requirements that were central to the SEC's 2020 reforms.

Oversight of Environmental, Social, and Governance (ESG) Ratings Firms

Over the last 15 years, many institutional investors—including asset management firms and pension plans—adopted policies to integrate ESG factors into their investment process. These policies can be influenced by ratings provided by a handful of ESG ratings firms that “score” companies based upon certain ESG criteria.

However, there is very little oversight or regulation of ESG ratings firms, an industry that exhibits many of the same deficiencies as proxy advisory firms. The ratings provided by these firms are typically developed through a highly subjective and nontransparent process that does not take business or industry-specific facts into account. Companies are effectively determined to be ESG-friendly or not ESG-friendly, which influences decisions from institutional investors that use ESG ratings as part of their investment screening process. Since topics that fall under the ESG umbrella can often be of a nonfinancial nature, the influence these firms exert can distort markets and lead to inefficient capital flows.

Accordingly, the SEC should expand its regulation of proxy advisory firms to include ESG

and sustainability ratings firms, whose clout in the marketplace continues to grow unchecked.

Recommendation

Return the shareholder proposal system under Rule 14a-8 to its original purpose.

Securities Exchange Act Rule 14a-8 was originally established as a mechanism to facilitate constructive dialogue between shareholders and the boards of public companies. Proposals that dealt with immaterial topics or personal grievances were not considered relevant to the interests of a company’s shareholder base.

Over time, however, the SEC weakened the guardrails that protected shareholders from bearing the costs of dealing with frivolous or immaterial proposals year after year. Predictably, Rule 14a-8 became a favorite vehicle of special interests to pursue their agendas during the annual proxy season. Instead of focusing exclusively on the needs of all shareholders, some companies have had to spend time and resources dealing with, for example, a proposal dealing with low-flow

showerheads in hotels²², a proposal calling on a company to run for office and place itself on an electoral ballot²³, or a proposal demanding that a company produce a report to detail how it deals with fake news.²⁴ These types of efforts may satiate the most extreme of activists, but they do absolutely nothing to create value for shareholders.

Recent actions by the SEC have only worsened the problem. SEC Staff Legal Bulletin 14L (SLB 14L) issued in 2021 led to a sharp increase in the number of social and politically motivated proposals at public companies. SEC Commissioner Mark Uyeda noted that after SLB 14L was issued, the number of proposals dealing with environmental or social issues jumped by over 50% and the frequency of votes on such proposals increased by 125%.²⁵ As a result, annual general meetings could be turned into a kind of debating society where management and activists spend time discussing matters that are irrelevant to the company's strategic goals. In other words, these proposals become a distraction for companies that are trying to focus on their long-term objectives and performance.

This system is not without cost. Millions of dollars worth of shareholder money every year is sunk into legal and other costs to deal with frivolous activism. Private companies take note of this flawed system when they are going through the process or deciding whether or not to go public.

In 2025, the SEC has begun to reverse course and bring a touch of sobriety back to Rule 14a-8. A recent staff bulletin withdrew SLB 14L and made it clear that any proposal submitted must involve a topic that is economically relevant to the underlying company.²⁶ These are all positive developments for future proxy seasons.

However, a fundamental rethinking of the entire Rule 14a-8 system is needed. It does not benefit public companies and their shareholders when policies surrounding Rule 14a-8 swing wildly from one presidential administration to the next via SEC staff guidance. The SEC should solicit public feedback and initiate a rulemaking process to enact wholesale changes to the shareholder proposal system that can be relied on by companies for long-term planning.

The SEC should consider, for instance, a safe harbor that permits boards to properly exercise their fiduciary duty by excluding certain proposals. It should codify many of the policies contained in the 2025 staff bulletin to eliminate the prevalence of immaterial and harmful activist campaigns.

Furthermore, the SEC should seek to close a loophole in the Universal Proxy rule that special interests can now use as an end run around Rule 14a-8 and forcing companies to include immaterial proposals with their proxy materials. The SEC adopted the Universal Proxy rule in 2021 to make it easier for dissidents to nominate their board candidates during proxy season. Throughout that rulemaking process, the SEC never fully examined or sought comment on how activists might use the Universal Proxy rule to place shareholder proposals on a company's ballot and in the process skirt the requirements of Rule 14a-8. However, at least one activist exploited the Universal Proxy rule during the 2024 proxy season to force a company to include that activist's proposals with its own proxy materials.²⁷ The SEC should consider an outright repeal of the Universal Proxy rule since the rule was unnecessary in the first place.²⁸ Absent a repeal, the SEC should amend the rule to prohibit its use for shareholder proposals.

Improvements to Public Company Disclosure

A 2022 report from the American Council for Capital Formation found that at the end of 2019 there were at least 800 fewer public companies in the U.S. because of the high cost of mandatory reporting under our securities laws. The report further estimated that a 10% increase in reporting costs would have led to 80 fewer public companies, which would have had a combined 51,000 employees and \$60 billion in revenue.²⁹ Unfortunately, the SEC has often neglected to consider the cumulative costs of regulatory requirements on shareholders and job creation when adopting new disclosure mandates.

The corporate disclosure regime should also never be used to achieve social or policy objectives. An unfortunate—and tragic—example of this is the Dodd-Frank Act’s conflict minerals rule, which was adopted with the explicit intent of addressing violence in the Democratic Republic of Congo (DRC). However, in practice the supply chain reporting

required by the rule worsened the situation in the DRC while failing to provide investors with any type of decision-useful information.³⁰ The rule also imposes enormous costs on public company shareholders. The SEC estimated initial compliance costs for companies to be between \$3 billion and \$4 billion, with annual costs of over \$600 million.

Public companies are also now at risk of becoming subject to extraterritorial regulation, including the European Union’s Corporate Sustainability Due Diligence Directive (CS3D) and Corporate Sustainability Reporting Directive (CSRD), which as currently drafted would import ideologically driven, EU-style regulation into the U.S. CS3D, in particular, would also open U.S. businesses up to potentially frivolous litigation and redefine the role of board of directors.

Recommendation

Reinforce the materiality standard as the touchstone for corporate disclosure.

Since the securities were first enacted in the 1930s, materiality has been the standard that decides how companies communicate with their investors, primarily through their SEC filings. In *TSC Industries vs. Northway*, the Supreme Court clarified that a fact is material if “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”³¹ The Court subsequently affirmed that the same standard applies to both voting and investment decisions. The Chamber previously issued a report outlining the historical importance of the materiality standard and why it should continue to guide corporate disclosure in the U.S.³²

In recent years, however, the materiality standard has been bent to meet particular policy goals, and public companies are subject to several disclosure mandates that do not meet the test of materiality. These include mandates stemming from the Dodd-Frank Act as well as more recently adopted SEC rules on nonfinancial disclosure.

A prime example of this is the SEC’s 2024 climate disclosure rule, which mandates that companies produce extensive amounts of information that is not material and therefore obscures what is most important to make informed voting and investment decisions. This would include forward-looking, speculative disclosures about the risks of climate change along with highly prescriptive climate-related targets and goals and, for many companies, disclosures regarding greenhouse gas emissions.

By the SEC’s own estimate, the climate disclosure rule would cost public companies

\$2.3 billion every year. SEC Commissioner Hester Peirce pointed out that the climate disclosure rule alone could constitute 15% of an average company’s annual SEC reporting cost.³³

To prevent future harm to investors through ill-advised rulemakings, the SEC should also adopt a clear policy that any future disclosure requirements will be grounded in the Supreme Court articulated principle of materiality.

Recommendation

Cease the cross-border application of foreign regulation to U.S. businesses.

The extraterritorial reach of CSRD and CS3D threatens U.S. sovereignty over its domestic capital markets. The animating purpose of these projects is to change corporate practices in a way that aligns with the priorities of European regulators. In other words, the objectives of CSRD and CS3D are not centered on providing investors with material information as would be consistent with U.S. law. The supply chain reporting requirements under CS3D go well beyond anything that currently exists under U.S. law or would be required under the materiality standard. Boards of directors would assume direct responsibility for a company’s supply chain due diligence and would be required to consider sustainability when making decisions to carry out their fiduciary duty. Again, this type of requirement presents a conflict with existing state and federal law in the U.S.

As currently drafted, CS3D would be extremely difficult—if not impossible—for many U.S. companies to implement without conflicting with existing law in the U.S. Although the EU has indicated it may scale back some of the

more problematic provisions of CSRD and CS3D, they still represent a major threat to the competitiveness of U.S. businesses.

We encourage the administration and Congress to continue dialogue and negotiation with their European counterparts to prevent the imposition of EU law on U.S. businesses and protect the American economy from the harmful effects of CS3D and CSRD.

Recommendation

The SEC should continue scaling disclosure requirements for small public companies.

In 2018, the SEC adopted changes to the smaller reporting company (SRC) definition to permit more companies to take advantage of scaled disclosure requirements. As the SEC stated at the time, the changes “will promote capital formation through a modest reduction in compliance costs for newly eligible SRCs while maintaining appropriate investor protections.”^{34, 35} Similarly, Congress exempted EGCs from certain Dodd-Frank Act mandates such as the pay ratio rule and pay versus performance rule, along with extensive executive compensation disclosures that other public companies must provide.

These exemptions are a recognition of how the costs of such mandates can harm EGCs or small public companies and divert resources away from hiring, research & development, or other productive functions. The SEC should further examine its disclosure regime and determine whether further exemptions from costly disclosure rules are warranted for small public companies and/or EGCs.

Recommendation

The SEC should consider changes to rules governing delivery of disclosures to the public.

Additionally, a fundamental rethink of delivery systems for SEC disclosure is overdue. The current requirements involve self-contained reports provided on either an annual or quarterly basis and do not take into account new technologies or how investors today typically receive and disseminate information. The SEC has previously considered the adoption of a “company file” system that would collect “core information about a company... in a centrally and logically organized interactive data file.” Companies could then provide continuous updates to that file, which would be easily accessible for investors. Since the SEC first considered this idea in 2009, investor use of new technologies has only advanced, and the 1930s paper-based system is becoming even more obsolete. The SEC should convene public forums and solicit public comment on how disclosure delivery systems could be modernized in a way that benefits investors and minimizes costs on public companies.

Recommendation

Simplify quarterly reporting requirements and give EGCs the option to issue a press release with earnings results in lieu of a 10-Q.

According to the report of the IPO Task Force—a committee convened through a Department of Treasury conference in 2011 and whose recommendations formed the basis of the JOBS Act—92% of public companies said that the “administrative burden of public reporting” was a significant challenge to completing an IPO and becoming a public company. The 1930s-style disclosure system that continues to exist has grown upon itself over the decades, and the SEC has

rarely considered wholesale simplification of disclosure requirements. The growing density of SEC filings makes it difficult for investors to determine the most salient information about a business. Allowing EGCs to issue a press release that includes earnings results every quarter—opposed to a full quarterly report—will still provide investors with the material information they need to make informed decisions but reduce some of the unnecessary burden associated with the current system.

Increasing Equity Research Coverage of Small Public Companies

The 2024 annual report of the SEC's Office of Small Business Capital Formation found that 44% of small and mid-capitalization stocks have no research coverage at all, while 73% of large capitalization stocks are covered by more than 10 analysts.³⁶ As one contributor to the report noted, limited research coverage can exacerbate volatility and decrease liquidity in a particular stock.³⁷ Companies that do not have any research coverage can appear opaque or unworthy of investment. Institutional investors, in particular, may be cautious about investing client capital in companies that have no available research. The 2003 Global Research Analyst Settlement, past SEC guidance, and rules overseen by the Financial Industry Regulatory Authority (FINRA) have all contributed to the dearth of research coverage in small public companies.

Recommendation

The SEC should examine any regulations that may be contributing to a lack of research in small issuers and develop relevant rulemakings to increase coverage. A full examination and reconsideration of the 2003 Global Research Analyst Settlement is also necessary.

The 2017 Treasury Report found that research coverage of small public companies has become limited “due in part to the increase in regulation and compliance costs caused by the [Global Research Analyst Settlement].” That settlement was implemented to address the problem of research analysts being

influenced by investment bankers that worked within the same firm. While well-intended, small public companies cite the settlement as having far-reaching consequences and being a contributor to the dearth of coverage for many companies. The 2017 Treasury Report recommended a holistic review of the Global Research Analyst Settlement and research analyst rules to determine what rules may need to be rescinded or amended to encourage greater research coverage.

In 2022, SEC staff issued a report examining current research rules pursuant to a congressional directive.³⁸ While the

report offered little in the way of concrete recommendations for how to improve analyst coverage, it serves as a basis for the SEC to continue its work on the issue. We encourage a fundamental rethinking of the Global Research Analyst Settlement and the SEC to prioritize rulemakings that improve analyst coverage.

Recommendation

Policymakers should adopt a permanent solution that allows brokers to receive payments for equity research without having to register as investment advisers to limit the extraterritorial reach of MiFID II and foreign regulators.

The European Union's Markets in Financial Instruments Directive (MiFID II) contained a provision that prohibits broker-dealers from receiving soft dollar payments for equity research (i.e., payments that are bundled with compensation for other services provided by broker-dealers.) MiFID II ended up having significant extraterritorial reach, and U.S. broker-dealers had to begin accepting payments for research with hard dollars. Under U.S. laws, however, brokers are typically required to register as investment advisers if they accept such payments for research. The effect of MiFID II was to exacerbate the research coverage issue as brokers began to scale back their coverage of public companies.

The SEC had issued a series of no-action letters until it suddenly declined to extend this position in the summer 2023. We encourage Congress or the SEC to adopt a permanent solution that, at a minimum, allows brokers to receive hard dollars without having to register as investment advisers and which protects U.S. broker-dealers from the extraterritorial reach of foreign regulators.

Financial Reporting and PCAOB Recommendations

The accuracy and reliability of audited financial statements are essential for investor confidence. Strong internal controls within public companies are a critical component of the U.S. regulatory framework. Companies take seriously their internal controls obligation and invest significant resources to establish and oversee them. However, we continue to be concerned about the steady increase in costs surrounding internal controls over financial reporting (ICFR), the mechanism inside public companies that governs reporting, since the Sarbanes-Oxley Act was signed into law over 20 years ago.

The Public Company Accounting Oversight Board (PCAOB) has in recent years strayed far from its core mission and has failed to address some of the underlying cost drivers of ICFR. The change in leadership at the SEC presents a fresh opportunity for the SEC and the PCAOB to jointly reexamine ICFR, particularly its effect on small public companies.

Recommendation

The SEC should examine cost drivers behind ICFR and develop updated guidance to help address unnecessary costs for small public companies.

In 2007, the SEC attempted to address ICFR costs when it issued Commission Guidance Regarding Management's Report on Internal Controls over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (Management Guidance). This principles-based document was meant

to empower companies to focus on material issues that pose the greatest risk of material financial misstatements. However, the ongoing PCAOB inspection process and standards for attestation have undermined the intent of the Management Guidance.

The SEC and the PCAOB should solicit public comment and conduct public roundtables to further explore this issue and identify changes that can be made to the PCAOB inspection process that will minimize costs for small issuers without compromising audit quality.

Recommendation

The PCAOB should adopt a more robust set of good governance standards, including cost-benefit analysis.

Over the past few years, the PCAOB has spent much of its resources developing extraneous proposals that are not tied to the PCAOB's core mission of improving audit quality in the U.S.

In 2023, for example, the PCAOB proposed a new standard that would have fundamentally transformed the role and responsibilities of public company auditors. The proposal—Auditing Standards Related to a Company's Noncompliance with Laws and Regulations (NOCLAR)—would have turned auditors into part-time lawyers and part-time detectives responsible for ferreting out any possible noncompliant or illegal activity occurring at the company that is the subject of an audit.

Such a sweeping and far-reaching transformation of the auditor's responsibilities, without any legislative mandate, necessitates compelling evidence of a significant, pervasive market failure. The proposal provided no such evidence. Instead, the PCAOB's justification for the proposal appears to be based on a general statement that auditors have a fundamental obligation to protect investors, and NOCLAR can result in legal and regulatory penalties as well as reputational loss. While the PCAOB eventually dropped that specific proposal, the initiative heightened concerns that the PCAOB's priorities were stepping further out of line with its core mission.³⁹

The SEC also failed to conduct a proper economic analysis when it proposed to adopt an expansive new disclosure regime for audit firm engagement metrics in 2024. As the Chamber noted in our comment letter on the proposal, the proposal would have implemented a one-size-fits-all approach to audit firm disclosure and would not have provided investors with useful information regarding public company audits.⁴⁰

From the outset of these and other proposals, the PCAOB failed to conduct a robust cost-benefit analysis or adequately explain how the proposals would improve audit quality. The PCAOB should never seek to implement a new standard unless it has fully analyzed the costs and benefits of the standard and can articulate how the standard would increase confidence in financial reporting.





Conclusion

Congress and the SEC now have a unique opportunity to begin an era of major reform to the public capital markets. Increasing the IPO pipeline in the years to come will boost job creation and economic growth and expand wealth creation opportunities for millions of American households. The U.S. Chamber of Commerce and Nasdaq look forward to working with all members of Congress, the SEC, and the private sector on this critical initiative for the U.S. economy.

Endnotes

- ¹ Report of the IPO Task Force, Rebuilding the IPO On-Ramp (October 20, 2011).
- ² Babina, T; Ouimet, P.; Zarutskie, R.: IPOs, Human Capital, and Labor Reallocation (July 3, 2024).
- ³ Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Report. SEC Final Rule (June 5, 2003).
- ⁴ House Committee on Financial Services Staff Report—Ten Years of the Jumpstart our Business Startups (JOBS) Act of 2012 (April 5, 2022).
- ⁵ Id.
- ⁶ Fixing America’s Surface Transportation (FAST) Act, P.L. 114-94.
- ⁷ Draft Registration Statement Processing Procedures Expanded, Division of Corporation Finance (June 28, 2017).
- ⁸ Solicitations of Interest Prior to a Registered Public Offering, SEC Final Rule (September 26, 2019).
- ⁹ U.S. Treasury Department—A Financial System That Crates Economic Opportunities (October 2017).
- ¹⁰ Disclosure Update and Simplification, SEC Final Rule (August 17, 2018).
- ¹¹ Exemptions from the Proxy Rules for Proxy Voting Advice, SEC Final Rule (July 22, 2020).
- ¹² Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8. SEC Final Rule (September 23, 2020).
- ¹³ U.S. Chamber of Commerce—A Policy Agenda for 3% Annual Economic Growth.
<https://www.uschamber.com/economy/u-s-chamber-launches-growth-and-opportunity-imperative-policy-agenda-3-annual-economic-growth>
- ¹⁴ Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public (Spring 2018).
- ¹⁵ Small Companies Still Wonder if Sarbanes-Oxley Is Worth It, The Wall Street Journal (July 26, 2012).
- ¹⁶ HFSC Report
- ¹⁷ Latham & Watkins—The JOBS Act, Two Years Later: An Updated Look at the IPO Landscape (April 5, 2014).
- ¹⁸ Testimony of Anna T. Pinedo before the Subcommittee on Capital Markets (March 9, 2023).
- ¹⁹ Alexander Platt—Columbia Law School Blue Sky Blog, Make IPOs Great Again (January 13, 2025).
- ²⁰ See, e.g., Gibson Dunn—Shareholder Proposal Developments During the 2024 Proxy Season (July 29, 2024).
- ²¹ Statement on the application of the proxy rules to proxy voting advice, Chair Gary Gensler (June 1, 2021).
- ²² <https://www.sec.gov/Archives/edgar/data/1046311/000119312513125951/d478587ddef14a.htm>
- ²³ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/johnharrington021913-14a8.pdf>
- ²⁴ https://www.sec.gov/Archives/edgar/data/1652044/000130817917000170/lgoog2017_def14a.htm#lgooga069
- ²⁵ Remarks at the Society for Corporate Governance 2023 National Conference, SEC Commissioner Mark Uyeda (June 21, 2023).
- ²⁶ Staff Legal Bulletin 14M (February 12, 2025).
- ²⁷ See, e.g., Corporatecounsel.net, Proponent Artfully Dodges 14a-8’s One Proposal Limit
<https://www.thecorporatecounsel.net/blog/2024/03/shareholder-proposals-proponent-artfully-dodges-rule-14a-8s-one-proposal-limit.html>

²⁸ See, e.g., Chamber letter to SEC on proposed Universal Proxy rulemaking (June 7, 2021).
<https://www.sec.gov/comments/s7-24-16/s72416-8888029-240839.pdf>

²⁹ American Council for Capital Formation—“The Declining Number of Public Companies and Mandatory Reporting Requirements” (Prepared by Ernst & Young) (June 24, 2022).

³⁰ See, e.g., Chamber letter to SEC re: reconsideration of conflict minerals rule (March 17, 2017).
<https://www.sec.gov/comments/statement-013117/cil2-1648731-148501.pdf>

³¹ TSC Industries, Inc. vs. Northway (1976).

³² U.S. Chamber of Commerce— Essential information: Modernizing Our Corporate Disclosure System (January 2017).

³³ Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors, Commissioner Hester Peirce (March 6, 2024).

³⁴ Supra note xi.

³⁵ SEC 21st Century Disclosure Initiative.

³⁶ <https://www.sec.gov/files/2024-oasb-annual-report.pdf>

³⁷ Comments of Davina Kaile at the SEC annual Small Business Forum (April 18, 2024)

³⁸ Staff Report on the Issues Affecting the Provision of and Reliance Upon Investment Research Into Small Issuers (February 18, 2022).

³⁹ See Chamber-commissioned report on economic consequences of NOCLAR proposal (March 2024).
<https://www.uschamber.com/assets/documents/CBA-NOCLAR-Cost-Benefit-Critique.pdf>

⁴⁰ https://www.uschamber.com/assets/documents/241220_Comment_Engagement-Metrics_SEC.pdf



U.S. Chamber of Commerce
Center for Capital Markets
Competitiveness



June 25, 2025

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

Re: June 26th Roundtable on Executive Compensation Disclosure

Dear Ms. Countryman:

The U.S. Chamber of Commerce (“Chamber”) submits these comments for the Securities and Exchange Commission’s (“SEC”) roundtable regarding public company executive compensation disclosure. The Chamber commends the SEC for holding this roundtable on a timely issue and frequent topic of discussion within the SEC’s corporate disclosure framework. We appreciate the Chairman’s initiative to review disclosures with respect to the public company model to evaluate whether certain disclosures serve as impediments to companies accessing and remaining in the public markets.

As the SEC discusses this subject and considers potential reforms in this area, the Chamber provides the following recommendations, which are discussed in further detail below:

1. The SEC should fundamentally reassess current requirements under Item 402 of Regulation S-K (including Compensation Discussion & Analysis, or “CD&A”) and adopt any changes or simplification necessary to ensure investors receive clear and decision-useful information regarding executive compensation;
2. The SEC should review current perquisite (“perk”) disclosure requirements and exempt from perk disclosure certain expenses, including expenses for personal security;
3. The role and influence of proxy advisory firms should be assessed as part of any discussion about corporate decisions and disclosures regarding executive pay;
4. While the Chamber continues to support Congressional repeal of Section 953(b) of the 2010 Dodd-Frank Act (the “pay ratio” rule), the SEC should use

its existing authority to address compliance challenges that businesses continue to face under the final pay ratio rule adopted by the SEC in 2015;

5. The SEC should make changes to its 2022 rule implementing Section 953(a) of the Dodd-Frank Act (the “pay versus performance” rule) to adopt a more principles-based approach to the requirement;
6. The SEC, along with the federal banking regulators, National Credit Union Administration, and the Federal Housing Finance Authority, should abandon an overly prescriptive 2016 proposal to implement Section 956 of the Dodd-Frank Act (“incentive compensation” rule) and reassess Section 956 implementation;
7. The SEC’s rule implementing Section 954 of the Dodd-Frank Act (“clawback” rule) should be revisited so that the rule reflects clawback policies that companies have enacted since 2010; and,
8. The SEC should seek further tailoring of executive compensation disclosure requirements for small issuers, including smaller reporting companies (SRCs) and emerging growth companies (EGCs).

Background

In his statement accompanying the announcement of the roundtable, Chairman Atkins noted that executive compensation disclosures “have become increasingly complex and lengthy” and questioned whether the “increased complexity and length have provided investors with additional information that is material to their investment and voting decisions.”¹

The complexity of executive compensation disclosures today is largely the result of multiple SEC rulemakings on the topic stretching back decades, SEC staff interpretations, and Congressional mandates for specific disclosures regarding executive compensation. Executive compensation disclosure mandates have been layered on top of each other over the years, and with each new rulemaking the SEC has done little aggregate analysis to determine whether the full scope of executive compensation disclosures provide investors with material information and a clear picture of executive pay at a particular company.

¹ Statement on the Upcoming Executive Compensation Roundtable. Chairman Paul Akins – May 16, 2025. (Atkins Statement)

In 2006, the SEC adopted rules on executive compensation, including new requirements for compensation discussion & analysis (CD&A) under Item 402 of Regulation S-K.² These rules were “intended to provide investors with a clearer and more complete picture of the compensation earned by a company’s principal executive officer, principal financial officer, and highest paid executive officers and members of its boards of directors.”³ While principles-based in nature, continuously evolving staff views and interpretations of CD&A has contributed to a marked increase in the volume of information provided by companies regarding executive compensation.

Dodd-Frank Executive Compensation Rules

The complexity of existing SEC requirements was compounded by the 2010 Dodd-Frank Act, which contained a panoply of new executive compensation rules. As the Chamber has pointed out in previous comment letters to the SEC, the requirements under many of these mandates, when disclosed alongside CD&A and extensive tabular disclosure in proxy materials, can confuse - rather than clarify - executive compensation policies at public companies.

The most significant of these include:

- Section 951, requiring that every public company include a “say on pay” resolution with its proxy materials and disclosures regarding golden parachutes;
- Section 953(a), the pay versus performance rule;
- Section 953(b), the pay ratio rule;
- Section 954, the clawback rule; and,
- Section 956, a requirement that the federal financial regulators jointly prescribe rules governing incentive compensation agreements at financial institutions.

Some of these rules (e.g. pay versus performance and the clawback rule) were only recently finalized by the SEC – more than ten years after the Dodd-Frank Act was signed into law and nearly fifteen years after the 2008 financial crisis which precipitated the Dodd-Frank Act. Moreover, many of the rules recently finalized were done without adequate comment periods and cost-benefit analysis. Others (e.g. Section 956) have yet to be finalized.

Materiality Standard

As with any other area of corporate disclosure, the traditionally employed definition of materiality must remain the guidepost to determine what information regarding

² Executive Compensation and Related Person Disclosure – Sep. 8th, 2006. (SEC 2006 Rule)

³ SEC 2006 Rule at 1

executive compensation must be disclosed by public companies.⁴ Since the securities laws were first enacted, materiality has been the standard to determine what information public companies must disclose to investors. In the 1976 *TSC Industries Inc. vs. Northway* decision, the Supreme Court established a meaningful standard of materiality that was designed to provide investors with the significant information they need to make informed voting and investment decisions. Importantly, the Court provided further guidance but noted that the “disclosure policy” under the federal securities laws “is not without limit” because investors should be safeguarded from being overwhelmed with information that runs counter to the goal of rational investor decision-making.

The Court operationalized this principle in its decision – subsequently affirmed by the Court in *Basic, Inc. v. Levinson* – by explicitly rejecting the notion that information is material if it “might” be important to an investor in favor of the following test: information is material for purposes of federal securities regulation if “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote” or invest.

The Court has noted its concern that absent a defined materiality standard, investors could be buried “in an avalanche of trivial information – a result that is hardly conducive to informed decision making.” The materiality standard has served investors well for decades and has been a bedrock of corporate disclosure in the United States.

We welcome Chairman Atkins’ recognition of the importance of materiality and his statement that the SEC should engage in retrospective review of rules to ensure that investors do not receive “an overload of immaterial information.”⁵ The prioritization of the materiality standard is especially critical when it comes to executive compensation disclosure given the often technical nature of executive compensation arrangements at public companies.

Recommendations

1. The SEC should fundamentally reassess current requirements under Item 402 of Regulation S-K (including Compensation Discussion & Analysis, or “CD&A”) and adopt any changes or simplification necessary to ensure investors receive clear and decision-useful information regarding executive compensation.

⁴ See: U.S. Chamber of Commerce. “Essential Information: Materiality.” Winter 2017. Available at: https://www.uschamber.com/ccmc-migration/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL.pdf?x48633

⁵ Atkins Statement

A 2013 SEC staff report noted that requirements for executive compensation disclosure have been amended by the SEC more often than any other disclosure topic⁶ and that executive compensation requirements often result in “lengthy, technical disclosure.” The report recommended that the SEC evaluate current requirements to ensure they remain useful to investors.⁷

A previous report from the Chamber summarized that CD&A provided by most companies is laden with technical jargon and information that is immaterial to investors.⁸ Recent estimates place the average CD&A in a company’s proxy statement at roughly 10,000 words, or 15 pages with a 10-point font.⁹ For many companies, CD&A may be significantly longer, covering dozens of pages alongside every other piece of information that companies are required to include every year with their proxy materials.

Despite all of the information provided by companies that stems from CD&A and other rules, even sophisticated *institutional* investors have difficulty understanding executive compensation disclosures. A 2015 Stanford Business School survey found that only 38% of institutional investors found executive compensation disclosure “clear and easy to understand.”¹⁰ Notably, this survey was conducted before several of the executive compensation rules contained in the Dodd-Frank Act were implemented.

Specific Item 402 Recommendations

- The number of named executive officers (NEOs) for which executive compensation disclosures are required should be reduced to include the chief executive officer (CEO), chief financial officer (CFO), and the one highest paid employee. Disclosure severance compensation of former NEOs should also be included in the CD&A rather than compensation tables.
- CD&A currently requires complex and voluminous disclosure about how the compensation committee utilized peer groups, benchmarking and market studies to arrive at pay decisions. The focus of CD&A should be on the actual pay decisions and not on the process that the compensation committee utilized to arrive at those decisions. In addition, CD&A also requires significant and

⁶ Report on Review of Disclosure Requirements in Regulation S-K. SEC Staff Report – December 2013. (Staff S-K Report)

⁷ Staff S-K Report at 101

⁸ Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation – U.S. Chamber Report (Spring 2014)

⁹ Preparing for Proxy Season 2022 – Equilar Report (November 2021)

¹⁰ 2015 Investor Survey: Deconstructing Proxy Statements – What Matters to Investors. D. Larcker, R. Schneider, B. Rayan, A. Boyd - Rock Center for Corporate Governance, Stanford University. (February 2015)

voluminous disclosures about payments that may be made under a variety of employment termination circumstances, most of which may never occur. Focusing on disclosing events that have actually occurred is much more likely to be useful to investors.

- The SEC should address the timing mismatch that currently exists between bonus and equity disclosure that is reported in the summary compensation table (SCT). Current rules stipulate that non-equity incentive payments must be reported for the relative performance year, but equity incentive payments are reported for the year in grant. This is at odds with the way that compensation committees typically consider compensation for a given performance year.
 - The SEC should also determine whether certain details required to be included in compensation tables under Item 402 are necessary or of use to investors. One example that stands out is the “grants of plan-based awards” table. Much of the information currently included in these tables can be found either in Section 16 filings or elsewhere in the proxy statement.
 - Because change in pension value included in the SCT is based upon changes in interest rates (not realized compensation), the SEC should consider eliminating this component from the SCT.
2. **The SEC should review current perquisite (“perk”) disclosure requirements and exempt from perk disclosure certain expenses, including expenses for personal security.**

Item 402 of Regulation S-K generally requires that companies disclose personal benefits (“perks”) given to an NEO if the total value of all perks exceeds \$10,000. Item 402 contains a two-step test for companies to determine whether certain benefits should be disclosed as a perk. This test stipulates that 1) an item is not a perk or personal benefit if it is integrally and directly related to the performance of the executive’s duties; and 2) an item is a perk or personal benefit if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees.

The SEC has issued previous guidance regarding this requirement to assist companies in determining what benefits may constitute a perk. However, the two-step test remains difficult in practice for even the most experienced of companies as it requires a level of nuanced judgment that is overly burdensome. This reality is the opposite of the SEC’s goal of promoting clear and consistent disclosure. The \$10,000

threshold is also outdated and extremely low, which can result in disclosures that may not be material to investors.

While the Chamber agrees that the types and amount of perks an executive receives can be important information to investors, the SEC should review whether certain expenses should be considered as personal “benefits” to executives.

For example, in light of recent events and the threats that many top executives at public companies receive, expenses related to personal security of NEOs are not, in the Chamber’s view, a “perk” as defined under Item 402. There are various costs related to security that the SEC should make clear are not perks for purposes of Item 402. While travel-related costs are fairly common amongst companies, depending on the executive some companies also provide home security systems, protection from cyberthreats, bodyguards, or access to apartments when traveling. Disclosure of this specific information is not only likely to be immaterial to investors, but it can also give potential threat actors access to highly sensitive information.

3. The role and influence of proxy advisory firms should be assessed as part of any discussion about corporate decisions and disclosure regarding executive pay.

While the SEC’s June 26th roundtable is focused specifically on executive compensation disclosures, the Chamber believes that any discussion regarding public company executive pay and pay disclosure must examine the influence of proxy advisory firms in executive compensation structures.

Proxy advisors hold tremendous influence over the outcome of shareholder votes at public companies, and the industry is controlled by two firms – Institutional Shareholder Services (ISS) and Glass Lewis. ISS and Glass Lewis are riddled with conflicts of interest and both have a track record of making significant errors with respect to company information or employing flawed analysis during annual proxy seasons. Both proxy advice firms have also tended towards adopting “one size fits all” policies regarding executive compensation and corporate governance that do not take into account the specific profiles of each public company. Concerningly, most companies do not have an opportunity to review proxy advisor recommendations in order to address any errors or flaws in analysis committed by a proxy advisor before the information is used to formulate a voting recommendation.

Within the context of executive compensation, a glaring example of both proxy advisor influence and conflicts of interest are the positions taken by ISS and Glass Lewis regarding Section 951 of the Dodd-Frank Act (“say on pay” votes). Congress made it abundantly clear in Section 951 that every public company is required to hold a regular

nonbinding shareholder vote on approval of executive compensation, but that such vote could occur every year, every two years, or every three years, per a company's discretion.

Soon after the Dodd-Frank Act passed, ISS and Glass Lewis both adopted policies that every public company should hold their say on pay vote annually. The proxy advisors did this without any evidence regarding whether a particular frequency of voting cycle would provide better information to shareholders than a different cycle, or whether differences among companies and their circumstances might warrant a frequency cycle longer than one year. The firms also did not consider the shareholder cost that would result from companies having to go through the say on pay process every year when holding a vote every two or three years might be in the best interest of shareholders and companies. Perhaps more to the point, under this policy institutional investor clients would have to retain ISS and Glass Lewis' services every year to help them decide how to vote on say on pay resolutions.

The actual voting outcomes regarding say on pay and other resolutions also highlights the large influence that ISS and Glass Lewis continue to wield. One recent study showed that support for say on pay resolutions at S&P 500 companies was 28% less when ISS issued an "against" recommendation.¹¹ There is little question that public companies must take into consideration how ISS or Glass Lewis will recommend on a vote regarding executive compensation when they go about designing pay and incentive plans, and also when deciding how to disclose these programs. As a result, public companies often write their disclosures with ISS and Glass Lewis – not their direct investors – as the primary audience.

Furthermore, proxy advisors will sometimes demand action on a compensation-related matter, which may entail a significant investment of resources by the company, even if the resolution passes but is perceived as not garnering sufficiently high support (usually approximately 70% of the vote). This means that companies can win the vote but still effectively rhetorically lose, further magnifying the proxy advisors' sway in this space. The SEC should consider whether the outsized influence of conflicted third parties is ultimately good for shareholders.

The Chamber continues to strongly support changes to the rules governing proxy advice that incorporate many of the reforms included in a 2020 SEC rulemaking.¹² These reforms included a mechanism that allows public companies to provide feedback and point out any errors in analysis within a proxy advisor recommendation

¹¹ Say On Pay and Proxy Vote Results. Semler Brossy (January 2025) at 2.

¹² Exemptions from the Proxy Rule for Voting Advice (July 2020) <https://www.sec.gov/files/rules/final/2020/34-89372.pdf>

before a vote takes place, and accountability under the SEC's antifraud rules when a proxy advisor makes false or misleading statements.

- 4. While the Chamber continues to support Congressional repeal of Section 953(b) of the 2010 Dodd-Frank Act (the "pay ratio" rule), the SEC should use its existing authority to address compliance challenges that businesses continue to face under the final pay ratio rule adopted by the SEC in 2015.**

The SEC's finalized pay ratio rule is a fundamentally flawed regulation that seemingly provides little benefit for investors, adversely impacts the ability of American companies to compete in a global economy, makes it more difficult for businesses to engage in efficient capital formation, and damages the public company model by making public companies subject to activist attacks and criticisms that are based upon misleading data. The intent behind the pay ratio rule has always been overtly political, as the rule attempts to address a problem that should be addressed through the political system and Americans' elected representatives; the rule has never been about providing investors with material, decision-useful information. Pay ratio disclosures under the current rules do not accurately reflect internal pay or labor practices and are too simplistic to provide meaningful insights into how pay ratios compare across companies.

Full statutory repeal of the pay ratio rule is the only way to adequately protect investors from this harmful and costly regulation. Unfortunately, when the SEC finalized the pay ratio rule in 2015, it missed an opportunity to implement Section 953(b) without placing unnecessary burdens upon public companies and their shareholders. Even without congressional repeal, the SEC has adequate authority under Section 953(b) to implement a differently-contoured rule to meet Congress' directive.

In 2017, then-Acting Chairman Mike Piwowar solicited comments on potential changes to the pay ratio rule. Because the 2015 rule remains intact, the Chamber reiterates several of our recommendations provided in response to Chairman Piwowar's request, including:

- The SEC should exclude all non-U.S. employees as well as seasonal and part time employees from the median employee calculation or, at a minimum, allow the foreign data privacy exemption and the de minimis exemption to operate independently of each other;
- The SEC should create a safe harbor to allow issuers the option of using industry median compensation data compiled by the Bureau of Labor Statistics;

- The SEC should rely on and adopt prevailing standards regarding the definition of independent contractors; and,
 - The SEC should exclude employees who are on a leave of absence or have been furloughed from the median employee calculation.¹³
5. The SEC should make changes to its 2022 rule implementing Section 953(a) of the Dodd-Frank Act (the “pay versus performance” rule) to adopt a more principles-based requirement.

When Congress adopted Section 953(a) in 2010, there was an underlying argument that the only way for investors to begin receiving disclosure about the relationship of executive pay to company performance was through a new regulatory mandate. By the time the SEC ultimately adopted a rule to implement Section 953(a) twelve years later in 2022, that argument was obsolete given the volume and detail of disclosure being provided by public companies at their own initiative on matters related to executive compensation, including the relationship between pay and performance.

Moreover, the SEC’s 2022 final rule contains provisions that compound the problems that arise from imposing a new requirement on top of existing mandates. For example, the rule permits – and, some may argue, encourages – companies to include nonfinancial performance metrics as part of their pay versus performance calculation. Not only is this at odds with the text of Section 953(a) – which makes clear that companies should use *financial* performance metrics for comparison – it also creates new threats to shareholders as companies are encouraged to align executive pay with objectives that are unrelated to shareholder return.

Additionally, the requirement to disclose “compensation actually paid” (CAP) alongside existing calculations of compensation paid to executives necessitates further explanatory disclosure from companies to address any confusion that multiple and potentially conflicting amounts create for investors. In fact, the description of depicted amounts as CAP is inherently misleading because a large portion of the amounts shown include hypothetical valuations of equity awards that in many cases have not yet been earned or paid.

Companies also experience challenges in the calculation of CAP, including mark-to-market expense calculations for valuing equity awards which typically necessitates the engagement of an outside accounting firm. Using SCT compensation or W2

¹³ <https://www.sec.gov/comments/pay-ratio-statement/cll3-1664896-148926.pdf>

compensation as an alternative to CAP would alleviate these burdens and provide investors with more accurate information.

Instead of the prescriptive and unnecessary components of the 2022 pay versus performance, investors would be better served if the SEC instead adopted a simpler rule to carry out the intent of Section 953(a), including by amending or eliminating the current CAP disclosure requirement. Doing so would allow companies to explain pay versus performance in their own way and based upon their unique circumstances. It would also recognize that many companies were already disclosing information about pay versus performance before the 2022 rule went into effect based upon their own materiality analysis and communication with their investors.

- 6. The SEC, along with the federal banking regulators, National Credit Union Administration, and the Federal Housing Finance Authority, should abandon an overly prescriptive 2016 proposal to implement Section 956 of the Dodd-Frank Act (“incentive compensation” rule) and reassess Section 956 implementation.**

Section 956 of the Dodd-Frank Act requires that six agencies – the SEC, Office of the Comptroller of the Currency (OCC), Federal Reserve, Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Federal Housing Finance Authority (FHFA) – jointly prescribe regulations or guidance regarding incentive compensation agreements at financial services firms. These agencies together proposed rules twice – in 2011 and 2016 – but have yet to enact a regulation implementing Section 956.

The Chamber submitted previous comments outlining serious concerns with both proposed rulemakings. The Chamber has been concerned that the approach outlined in those rules is overly prescriptive and entirely at odds with the purpose of Section 956. We have cautioned the agencies from enacting anything similar to what has been proposed.

Instead, as the Chamber wrote in 2024,¹⁴ interagency guidance adopted in 2010 provides a more appropriate framework for Section 956 implementation. Section 956 provides clear authority to the six agencies to issue guidance instead of a prescriptive rulemaking. The 2010 guidance was carefully developed by the federal banking regulators and has enabled these agencies to achieve their regulatory goals in their supervision of the banking industry without significantly impeding competition for talent. These agencies should consider if guidance is the more appropriate path and

¹⁴ See: U.S. Chamber of Commerce Letter on Section 956. June 3, 2024. Available at: <https://www.uschamber.com/finance/u-s-chamber-of-commerce-letter-on-section-956>

potential principles-based modifications to the 2010 guidance rather than a highly prescriptive regulation.

7. The SEC’s rule implementing Section 954 of the Dodd-Frank Act (“clawback” rule) should be revisited so that the rule reflects clawback policies that companies have enacted since 2010.

Properly calibrated stock exchange listing standards are an integral component of good corporate governance for America’s publicly listed companies, and executive compensation clawbacks are a means to help drive good governance practices if done in a balanced and responsible manner. However, the Chamber remains concerned that the SEC’s final clawback rule from 2022 is unnecessarily prescriptive and fails to take into account proactive clawback policies that have been implemented by companies over the last 15 years.

The SEC’s 2022 final rule inappropriately encompasses reporting errors that were not material to previous reporting periods (“little r”) restatements – something that is at odds with Congressional intent under Section 954. The SEC’s 2022 rule also provides for clawback of compensation on a pre-tax basis, an approach that is not required by the Dodd-Frank Act and is unnecessarily burdensome on individuals who may not have committed any type of fraud or misconduct to trigger the clawback. The SEC should amend the clawback rule so that it does not encompass reporting errors that were immaterial to previous reporting periods (“little r”) restatements and so that recovery of compensation is done on a post-tax rather than pre-tax basis.

8. The SEC should seek further tailoring of executive compensation disclosure requirements for small issuers, including smaller reporting companies (SRCs) and emerging growth companies (EGCs).

Congress and the SEC have typically recognized that certain reporting requirements can create an overly costly burden for smaller public companies and have either exempted such companies from certain requirements altogether or permitted them to provide scaled disclosure.

For example, smaller reporting companies (SRCs) – generally defined by the SEC as a company with a public float less than \$250 million or a company with less than \$100 million in annual revenue and a public float less than \$700 million – are subject to tailored disclosures under the structure of certain rules. Under the pay versus performance rule, SRCs can disclose pay over a 3-year period (as opposed to 5 years for larger companies), and are not required to include comparisons to total shareholder return (TSR) of a peer group. SRCs can also provide executive

compensation disclosures for a total of 3 NEOs, compared to 5 NEOs for larger companies.

Additionally, emerging growth companies (EGCs) – defined as growth stage companies with less than \$1.235 billion in annual revenue – are exempt from the Dodd-Frank Act’s say on pay, pay ratio, and pay versus performance rules. EGCs can also provide similar scaled disclosure as SRCs regarding other requirements.

These regulatory accommodations allow EGCs and SRCs to focus their resources on growth and become more mature companies before they are subject to enhanced regulatory mandates. The SEC should seek further tailoring for small public companies, including any current requirements under Item 402 that may be inappropriate or unnecessary for smaller companies.

Conclusion

We commend the SEC for holding this important discussion and re-focusing the agency on an area of SEC regulation in great need of examination and reform. Attached as an addendum are comment letters and reports from the Chamber in recent years regarding several topics related to executive compensation. The Chamber and our members stand ready to provide subsequent information, insights, and feedback based upon the discussion at the June 26th roundtable. We look forward to working closely with SEC commissioners and staff as this initiative moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Evan Williams". The signature is fluid and cursive, with a large initial "E" and "W".

Evan Williams
Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce