



May 6, 2022

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Cybersecurity Risk Management and Incident Disclosure – File Number S7-09-22

Dear Ms. Countryman:

On March 23, 2022, the Securities and Exchange Commission (SEC) published proposed rules entitled *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rules.

The proposed rules will enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and cybersecurity incident reporting by public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act).² The proposed rule would amend Regulation S-K,³ Regulation S-T,⁴ the Securities Act of 1933,⁵ and the Exchange Act. The proposed amendments would require registrants to provide current and periodic reporting of material cybersecurity incidents and periodic disclosures about a registrant's policies and procedures to identify and manage cybersecurity risks.

Advocacy supports SEC's effort to analyze the impact that the proposed rules would have on small businesses in an Initial Regulatory Flexibility Analysis (IRFA). However, based upon feedback received from small business representatives and on our internal analysis of the proposed rules, Advocacy is concerned that the IRFA lacks essential information required under

¹ 87 Fed. Reg. 16590, March 23, 2022.

² 15 U.S.C. § 78a et seq.

³ 17 CFR §§ 229.10-229.1305.

⁴ 17 CFR §§ 232.10-232.903.

⁵ 15 U.S.C. § 77a et seq.

the Regulatory Flexibility Act (RFA).⁶ Specifically, the IRFA does not adequately describe the costs of the proposed amendments on small entities, nor does it set forth significant alternatives which accomplish the stated SEC objectives and which minimize the significant economic impact of the proposal on small entities. For these reasons, Advocacy recommends that the SEC republish a Supplemental IRFA for public comment before proceeding with this rulemaking.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁷ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁹

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹⁰

B. The Proposed Rules

On March 23, 2022, SEC published a notice of proposed rulemaking on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure in the *Federal Register*.¹¹ SEC is promulgating proposed regulations to require public companies subject to the Exchange Act to do the following:

- 1) Disclose information about cybersecurity incidents within four business days after a registrant determines that it has experienced such an incident.¹²

⁶ 5 U.S.C. § 601 et seq.

⁷ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁸ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 87 FR 16590.

¹² 87 FR 16595.

- 2) Provide updated disclosure relating to previously disclosed cybersecurity incidents.¹³
- 3) Require disclosure when a series of previously undisclosed individually immaterial cybersecurity incidents has become material in the aggregate.¹⁴
- 4) Require disclosure of a registrant's policies and procedures for managing cybersecurity risks, its cybersecurity governance, and management's role and expertise in assessing and managing cybersecurity risks.¹⁵
- 5) Require disclosure about whether any member of a registrant's board of directors has cybersecurity expertise.¹⁶
- 6) Require foreign private issuers to provide cybersecurity disclosures in annual reports consistent with the disclosure required in domestic forms.¹⁷
- 7) Require that the proposed disclosures be provided in Inline eXtensible Business Reporting Language (Inline XBRL).¹⁸

In the IRFA, SEC estimated that there were 669 small entities (660 issuers and 9 business development companies¹⁹) that would be subject to the proposed amendments as of June 2021.²⁰

II. Advocacy's Small Business Concerns

Advocacy has two chief concerns with the IRFA contained in the proposed rules. Under the RFA, an IRFA must contain:

- 1) A description of the reasons why the regulatory action is being taken.
- 2) The objectives and legal basis for the proposed regulation.
- 3) A description and estimated number of regulated small entities.
- 4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
- 5) Identification of duplication, overlap, and conflict with other rules and regulations.
- 6) A description of significant alternatives to the rule.²¹

First, Advocacy is concerned that the IRFA does not adequately describe the regulated small entities and potential impacts on those entities. Second, Advocacy believes the IRFA does not adequately discuss specific alternatives that might reduce the impacts on small entities.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act (15 U.S.C. 80a-2(a)(48) and 80a-53-64). *See* 87 FR 16617 n. 176.

²⁰ 87 FR 16617. The IRFA provides that SEC estimates were based on staff analysis of Form 10-K filings for calendar year 2020, Morningstar data, and data submitted by investment company registrants.

²¹ 5 U.S.C. § 603.

A. The Proposed Rules Do Not Adequately Describe and Estimate Small Entities or Impacts to Those Entities

The IRFA contained in the proposed rules does not adequately describe the small entities to which the amendments would apply. The IRFA estimates that the proposed rules would apply to 669 small entities.²² However, it does not provide additional information, such as the North American Industry Classification System classifications of the affected entities. Additionally, the IRFA does not break down the affected entities into smaller size groups (e.g., based on total assets). Advocacy recommends that the SEC revise its IRFA and provide such information to better identify and describe the distribution of all regulated small entities.

Furthermore, the IRFA does not adequately analyze the relative impact of costs to small entities. SEC expects that the costs associated with the proposed amendments to be similar for large and small entities.²³ Small business representatives from the biotechnology industry have told Advocacy that the proposed rules may be particularly problematic to emerging growth companies. Emerging growth companies may have little or no revenue to afford the additional cost burden of the proposed rules and may not have access to the cybersecurity expertise necessary to comply with the new disclosure requirements. Advocacy recommends that the SEC revise its IRFA using the detailed information described above to analyze the relative impact of costs based on entity size. This would help the SEC to understand the cost burden faced by the smallest regulated entities.

B. The Proposed Rules Do Not Adequately Consider Alternatives

The IRFA does not contain a description of significant alternatives which accomplish the stated SEC objectives and which minimize the significant economic impact of the proposal on small entities. The RFA requires that an IRFA provide significant, feasible alternatives that accomplish an agency's objectives. In this case, the IRFA lists broad categories of potential alternatives to the proposed rules but does not analyze any specific alternative that was considered by the SEC.²⁴ Instead, the IRFA supplies the SEC's reasoning in rejecting each of the categories of potential alternatives.

Most notably, the IRFA states that the SEC's "objectives would not be served by establishing different compliance or reporting requirements for small entities or clarifying, consolidating or simplifying compliance and reporting requirements for small entities."²⁵ This statement appears to reject, among others, all alternatives that would exempt small entities from the requirements of the proposed rules because exemption would conflict with the purpose of the rulemaking. Complete or partial exemption for small entities is therefore never analyzed within the IRFA. Nevertheless, the IRFA later requests comment on whether small entities should be exempted from certain elements of the proposed rules, including Regulation S-K Item 106 disclosure regarding cybersecurity risk management, strategy, and governance; the board expertise

²² 87 FR 16617.

²³ *Id.*

²⁴ 87 FR 16618.

²⁵ *Id.*

disclosure requirement in proposed Item 407(j); and the requirements to present the proposed disclosure in Inline XBRL.²⁶

Advocacy recommends that the SEC revise its IRFA to include alternatives which accomplish its objectives for the rulemaking. Advocacy further encourages the SEC to provide a detailed analysis of each potential alternative and to discuss how that alternative may reduce the economic burden on small entities.

III. Conclusion

Advocacy is concerned that the proposed rulemaking and IRFA lack essential information that is necessary to inform the SEC's decision making and any comments from regulated small entities. Advocacy urges the SEC to further analyze the impact of the proposed rules on small entities and explore regulatory alternatives before proceeding to a final rule. This analysis should be published in a supplemental IRFA to provide small entities an opportunity to comment. We are available to assist the SEC in its outreach to small entities and in its consideration of the impact upon them.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at [REDACTED]

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Meagan Singer
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

²⁶ *Id.*