



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

TOM QUAADMAN
VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000

September 14, 2015

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

Re: Proposed Rules on Listing Standards for Recovery of Erroneously Awarded Compensation; 17 CFR Parts 229, 240, 249 and 274; Release Nos. 33-9861, 34-75342, IC-31702; File No. S7-12-15; RIN 3235-AK99

Dear Mr. Fields:

The U.S. Chamber of Commerce¹ (“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. The CCMC welcomes the opportunity to comment on the proposed rule issued by the Securities and Exchange Commission (“SEC” or “Commission”) on July 1, 2015, in the release entitled Listing Standards for Recovery of Erroneously Awarded Compensation (the “Proposal”) which seeks to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).

The CCMC believes that properly calibrated stock exchange listing standards are an integral component of good corporate governance at America’s publicly listed companies. Clawbacks are a means to help drive good governance practices if done in a balanced and responsible manner. However, we are concerned that the Proposal, in its current form, is needlessly complex and overly prescriptive harming the ability of exchanges to develop and manage their listing standards and depriving investors and management from using private ordering to develop the governance systems best suited for a business. Our concerns are centered on the following issues:

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.

1. **Final Rule 10D-1 should clarify the concept of “Restatement”;**
2. **The Proposal’s definition of “Executive Officer” requires refinement;**
3. **The Proposal creates a burdensome recovery process;**
4. **The Proposal demonstrates an unfair lack of comity toward foreign law;**
5. **The Proposal takes an unduly prescriptive approach to indemnification and insurance;**
6. **Requiring XBRL tagging of data would be costly and provide little (if any) benefit to investors;**
7. **Rule 10D-1 would be burdensome for smaller reporting companies;**
8. **Rule 10D-1 should not apply retroactively; and**
9. **The SEC should provide the public with an economic analysis if the rule will promote capital formation and competition by creating conditions that will lead to an increase in the number of U.S. public companies.**

The CCMC’s concerns are discussed in greater detail below.

Discussion

1. Final Rule 10D-1 Should Clarify the Concept of “Restatement”.

On October 9, 2013, the CCMC sent a letter to SEC Chair White² with several proposals to modernize financial reporting. These proposals were based upon the SEC’s recommendations of the Advisory Committee on Improvements to Financial Reporting (“CIFiR”). As we wrote at the time:

² The letter is attached as Appendix A and we respectfully request that it be made a part of the record of this comment file.

Mr. Brent J. Fields
September 14, 2015
Page 3

It is important for the SEC to adopt a comprehensive approach to modernizing financial reporting policies that includes, in addition to stepped-up enforcement, increased communication and cooperation among regulators, standard setters and stakeholders. This will reinforce the SEC's efforts to drive bad actors out of the marketplace, by eliminating the complexity and ambiguity on which they thrive. In fact, the CIFIIR report found that financial reporting complexity is a key driver in the disconnection between current financial reporting and the information necessary to make sound investment decisions. Since keeping a clear focus on the SEC's mission to ensure that investors receive relevant decision-useful information and to promote capital formation will maximize the agency's chances of success in stamping out accounting fraud and financial disclosure irregularities, we view this as a win-win for the SEC and its stakeholders.

Among the recommendations suggested by the CCMC was for the SEC to supplement existing guidance to prevent inconsistent definitions of materiality and for the SEC, Public Company Accounting Oversight Board ("PCAOB"), and the Financial Accounting Standards Board ("FASB") to use a consistent definition. As was explained in the 2013 letter, this is of critical importance as a potential trigger for a financial restatement.

Under the Proposal, proposed Rule 10D-1 would provide that issuers adopt and comply with a written policy providing that, in the event the issuer is required to prepare a restatement to correct an error that is material to previously issued financial statements, the obligation to prepare the restatement would trigger application of the recovery policy. To this end, proposed Rule 10D-1 would define an accounting restatement as the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements. The Proposal also lists a number of events (such as retrospective application of a change in accounting principle and retrospective revision for stock splits) that definitively do not constitute restatements. While we appreciate the Commission's efforts to flesh out the limits of a restatement for purposes of the Proposal, we are concerned that because the Proposal's conceptualization of a restatement does not perfectly align with the SEC Staff's own pronouncements on the subject, there remains confusion in the issuer community as to when a restatement for

purposes of the rule will be deemed to have occurred.

For example, as the Proposal itself notes, ASC 250-10-20 uses a different test and defines a restatement as “the process of revising previously issued financial statements to reflect the correction of an error in those financial statements.”³ Staff in the SEC’s Office of the Chief Accountant have also elaborated on restatements in SAB 108, codified as SAB Topic 1.N.⁴ Under the accounting literature and this Staff guidance, when the error is material, the financial statements will be required to be restated, which is sometimes colloquially referred to as a “Big R” restatement. A “Big R” restatement requires an issuer to revise previously issued financial statements via an amendment to Form 10-K or 10-Q, as applicable, to correct the error in those previously issued financial statements. When such a “Big R” restatement is necessary, the previously issued financial statements cannot continue to be relied upon.

On the other hand, when the error is immaterial to the prior year(s), the error can usually be corrected in a future Form 10-K or 10-Q or an amendment thereto, which is sometimes called a “Little r” restatement. In these circumstances, the error is usually corrected by revising the incorrect number in such financial statement the next time the financial statement for such period is filed. Under this approach, prior-period financial statements are not materially misstated.

Based on the tenor of the Proposal’s discussion of the issue, and in particular its emphasis on material errors and correcting previously issued financial statements, we believe that only so-called “Big R” restatements would trigger disgorgement under proposed Rule 10D-1. We respectfully request that the Commission clarify this point in any adopting release concerning final rules.

2. The Proposal’s Definition of “Executive Officer” Requires Refinement.

The Proposal’s mandatory recovery policy would apply to all executive officers of an issuer, regardless of whether the executive officer’s responsibilities include

³ ASC 250 provides only limited disclosure guidance on the topic of restatements.

⁴ See also Mark Mahar, Associate Chief Accountant, Office of the Chief Accountant, *Remarks Before the 2008 AICPA National Conference on Current SEC and PCAOB Developments* (Dec. 8, 2008), available at <https://www.sec.gov/news/speech/2008/spch120808mm.htm>.

preparing the issuer's financial statements. Under the proposed definition of "executive officer" under Section 10D, which is similar to the definition of "officer" in Rule 16a-1(f), an executive officer would be the issuer's president; principal financial officer; principal accounting officer (or if there is no such accounting officer, the controller); any vice president of the issuer in charge of a principal business unit, division or function; any other officer who performs a policy-making function; or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parent or subsidiary would be deemed executive officers of the issuer if they perform such policy-making functions for the issuer.

The CCMC is concerned that this broad conceptualization of "executive officer" unnecessarily captures a large group of officers who as a practical matter have little or no control over, or impact on, the preparation of an issuer's financial statements. Senior personnel in areas such as human resources, marketing, public relations, information technology, legal and compliance, research and development, and other administrative areas outside of financial reporting could all be swept up under the rule. When coupled with the Proposal's strict liability standard for recovery, we believe the Proposal (if implemented) would be grossly unfair to personnel of this type who, because of the nature of their job duties, have no ability to affect financial reporting in the first place. More fundamentally, providing a remedial mechanism against personnel who have no ability to impact accounting decisions will do nothing to improve accounting systems, enhance the quality of a company's financial statements, or mitigate against future restatements. Such a rule would also serve to discourage many qualified employees from seeking senior positions within companies out of fear that they may be required in future years to disgorge compensation because of a series of events totally outside their control. Nothing in Section 954 of the Dodd-Frank Act requires the SEC to define "executive officer" so broadly.

The Proposal's no-fault standard for such a large group of employees also raises other serious issues. On this point, we find the case law that has considered a similar clawback provision involving an issuer's CEO and CFO under Section 304 of the Sarbanes-Oxley Act to be compelling. For example, a leading case under Section 304 justified a no-fault recovery against a CFO on the grounds that:

An issuer's CEO and CFO are required to certify each annual or quarterly report of the issuer. In so doing, the CEO and the CFO also certify that they are responsible for the existence, design, and operation of effective internal controls that provide assurances as to the accuracy of the issuer's financial statements. Section 304 provides an incentive for CEOs and CFOs to be rigorous in their creation and certification of internal controls by requiring that they reimburse additional compensation received during periods of corporate non-compliance regardless of whether or not they were aware of the misconduct giving rise to the misstated financials.⁵

Another federal court interpreting Section 304 similarly opined:

§ 304 ties in closely with the various duties required of CEOs and CFOs in § 302 of Sarbanes-Oxley, and it creates an incentive for them to be diligent in carrying out those duties. The absence of any requirement of personal misconduct is in furtherance of that purpose: it ensures corporate officers cannot simply keep their own hands clean, but must instead be vigilant in ensuring there are adequate controls to prevent misdeeds by underlings.⁶

But these judicially-recognized factors are not present with the many other "executive officers" (as currently proposed) of a company who have little or no visibility into the maintenance of internal controls or the preparation and certification of financial statements, and likewise have no control over accounting and financial professionals within the company who prepare those financial statements. To remedy this fundamental unfairness and mitigate unintended consequences, the CCMC recommends that any final rules (1) limit the scope of "executive officer" to those senior executives with direct responsibility for accounting and preparation of financial statements, and (2) require that any officer for whom disgorgement is sought must have scienter and must otherwise have played a significant role in the events leading to a restatement.⁷ We also request that final rules clarify that recovery only be

⁵ *SEC v. Jenkins*, 718 F. Supp. 2d 1070, 1077 (D. Ariz. 2010) (internal citations omitted).

⁶ *SEC v. Baker*, 2012 WL 5499497 at *6 (W.D. Tex. Nov. 13, 2012) (internal citations omitted).

⁷ As was the case when the SEC decided to begin enforcing Section 304 of the Sarbanes-Oxley Act, we expect many executives for whom a clawback is sought will judicially challenge elements of the statute and the SEC's rules, leading to

required for the period of time in which an employee served as an executive officer, and not to periods (such as those preceding a promotion) in which an employee worked for the same employer in a non-executive role.

3. The Proposal Creates a Burdensome Recovery Process.

The Proposal would require a US issuer to recover erroneously awarded compensation in accordance with its recovery policy except under the limited circumstances that pursuing recovery would be impracticable because it would impose undue costs on the issuer or its shareholders. The issuer would first have to make a reasonable attempt to recover the excess incentive-based compensation before concluding that it would be impracticable to recover based on the costs of enforcing recovery. The Proposal further explains that the only criteria that should be considered in making this determination are whether the direct costs (such as reasonable legal expenses) of enforcing recovery would exceed the recoverable amounts. The issuer would then be required to document its recovery attempts, provide such documentation to the exchange and disclose why it chose not to pursue recovery.

A determination that recovery would be impracticable must be made by the issuer's compensation committee of independent directors or, in the absence of a compensation committee, by a majority of independent directors on the board. Any such determination would be subject to review by the listing exchange. Moreover, the Proposal does not allow issuers to settle for less than the full recovery amount unless full recovery is impracticable, in which case the same conditions would apply as those applicable to a determination to forgo recovery. Issuers may exercise discretion in determining the means of pursuing recovery, provided that recovery should be "reasonably prompt."

Although the CCMC is sensitive to the concern that a few bad actors may seek to evade the proposed mandate of Rule 10D-1, we do not believe it is good policy to draft stock exchange listing standards with the lowest common denominator in mind. In many ways, the Proposal seems premised on the faulty, cynical notion that notwithstanding their well-established fiduciary duties under state law, independent

Mr. Brent J. Fields
September 14, 2015
Page 8

directors are not to be trusted to do the right thing when it comes to matters of executive compensation or legal compliance. More basically, the Proposal is extremely intrusive in seeking to micromanage all stages of third-party litigation, all the way down to what terms of settlement are permissible and providing a mechanism for the stock exchange to second-guess a board's business judgment. The Proposal provides no real escape valve in cases when amounts to be pursued are far outweighed by the cost of collection; the Proposal requires that companies must in all cases make an attempt to collect before determining that collection costs are unjustifiable. Quite simply, this approach is backwards. And there is no benefit to a company's shareholders in expending huge sums of corporate funds to recover what will often be nominal or immaterial amounts.

In sum, the Proposal's elaborate collection mechanism is both novel and unprecedented. We know of no other example in the law where the Government seeks to compel one private citizen to go through such extreme lengths to collect a debt from another. We believe that this requirement will prove unworkable in practice, and provide another opportunity for parties affected by the rules to judicially challenge them.

Instead of the drastic and unprecedented measures the Proposal requires, we believe a more streamlined approach would be to permit boards of directors the broad discretion to assign responsibility for collection to the SEC in the event a current or former executive officer is unwilling to make voluntary disgorgement to the company. The SEC could then pursue this remedy in much the same way it does in cases arising under Section 304 of the Sarbanes-Oxley Act. Doing so reduces costs and burdens on private citizens, and properly places responsibility for enforcement of the law with the regulator. If they avail themselves of this option, listed companies would then disclose the decision to make this assignment to the SEC.

We also request that the Commission clarify the interaction of recovery under Section 954 and any recovery required under other laws or regulations. We acknowledge the Proposal provides that when an executive officer reimburses an issuer under Section 304 of the Sarbanes-Oxley Act, such amounts should be credited to the extent that an issuer's Rule 10D-1 recovery policy requires repayment of the same compensation by that executive officer. Conversely, under the Proposal, recovery under Rule 10D-1 would not preclude recovery under Section 304 to the

extent any applicable amounts have not been reimbursed to the issuer. But the Commission does not address the effect of other clawback provisions under other current or future legal regimes, particularly those administered by other regulators. Presumably such payments should likewise be credited against amounts sought under Section 954, but what is the priority of payment if other regulations also require disgorgement? How should companies resolve potential conflicts of laws if other legal regimes do not permit amounts paid to be credited?

4. The Proposal Demonstrates an Unfair Lack of Comity Toward Foreign Law.

The Proposal requires foreign private issuers to jump through the same hoops to recover erroneously awarded compensation in accordance with its recovery policy, with the additional exception where pursuing recovery would be impracticable because it would violate home country law. A foreign private issuer who concludes that recovery is impracticable because it would violate home country law must first obtain an opinion of home country counsel that recovery would result in a violation, which opinion must be acceptable to the exchange. Additionally, the relevant home country law must have been adopted prior to the date that the final version of Rule 10D-1 is published in the Federal Register.

In addition to repeating the same concerns we voiced above with respect to the complexity and unworkability of the recovery mechanism, we have the added concern that the Proposal shows an unnecessary lack of comity toward foreign law, particularly insofar as the Proposal seeks to limit the ability of foreign governments to make changes to home country law after the date of enactment of Rule 10D-1. In effect, the Proposal penalizes foreign firms for changes in law made after that date. Does the Commission intend to require foreign firms to violate home country law if their home country governments do in fact make a change in law after the date Rule 10D-1 is enacted?

This sort of regulatory jingoism not only serves as a further disincentive for foreign firms to seek a US listing (and may accelerate the unfortunate trend of foreign firms delisting from US exchanges), but it also may encourage foreign governments to pass laws that disadvantage or penalize US corporations. There are numerous precedents in the SEC's integrated reporting system that provide accommodations for

foreign private issuers under home country law without the need to seek opinions of counsel or take other extraordinary measures, and there is no tradition in the federal securities laws of seeking to influence future changes to foreign law or purporting to penalize foreign firms from compliance with home country law. Likewise, the stock exchanges have a long history of accommodating foreign governance systems when foreign companies seek US listings. We believe that home countries have a more appropriate interest in determining whether companies doing business there should have recourse against their executives when determining whether compensation or bonuses should be recovered after the fact. In addition, we believe the SEC should consider that the opportunity exists for affected companies to find themselves endeavoring to comply with contradictory laws in multiple jurisdictions, creating conflicts that cannot be addressed with a single solution. This results in a separate burden for each affected firm and the untenable choice of being in compliance with one set of laws, while potentially being in conflict with another.

When the Commission looks to adopt final rules here, we encourage it to abandon this discriminatory approach towards foreign private issuers by eliminating the requirement for opinions of counsel and the limitation that home country law cannot change after the date final rules are enacted. Of course, we do not object to requirements that foreign private issuers make reasonable disclosures to investors as to their policies overseas when they avail themselves of home country law.

Although the Proposal is not clear on the point, we believe home country law should not be limited to the jurisdiction of an issuer's incorporation or head office because other foreign laws may also be applicable. In many cases, the law where the executive officer resides will control. For example, for a hypothetical Dutch foreign private issuer with a head office in Germany seeking to recover compensation from a French employee of a French subsidiary before a French court, we believe the French court would likely be more concerned about French law and public policy than corresponding Dutch or German ones. To the extent the Proposal only envisions a limited notion of home country law, we request that any final rule be broad enough to cover all foreign laws, regulations, and official interpretations that would come into play when an issuer attempts to seek disgorgement from an employee domiciled outside the United States.

Additionally, we believe any exemption for compliance with foreign law should not be limited to foreign private issuers. Many US corporations operate in jurisdictions outside the United States and would face the same hurdles in seeking to enforce any SEC disgorgement rule in a foreign court with respect to foreign employees. Thus, any issuer (regardless of corporate domicile) subject to final rules should have the ability to defer to foreign law in situations in which foreign law is applicable.

5. The Proposal Takes an Unduly Prescriptive Approach to Indemnification and Insurance

The Proposal would prohibit a listed issuer from indemnifying any executive officer or former executive officer against the loss of erroneously awarded compensation. Additionally, the Proposal provides that while an executive officer may be able to purchase a third-party insurance policy to fund potential recovery obligations, the indemnification prohibition would prohibit an issuer from paying or reimbursing the officer for premiums for such an insurance policy. The Proposal then concludes that indemnification and insurance premium payment or reimbursement arrangements would frustrate Section 10D's ultimate purpose.

We acknowledge that for many years the SEC has taken the position that indemnification for violation of the federal securities laws is against public policy and unenforceable. One way the SEC enforces this position is through its acceleration authority and the undertaking required by Item 512(h) under Regulation S-K for indemnification under the Securities Act.⁸ The federal courts have often supported this position in some types of antifraud litigation. But we are unaware of any past instance where the Commission has sought through public company rulemaking to

⁸ Item 512(h)(3) requires issuers to include the following undertaking in certain registration statements:

Inssofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, *unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.* (emphasis added)

outlaw indemnity outright, and do not agree with the Proposal's assertion that Congress must have intended this result when Section 954 is itself silent on the point. We believe a better approach would be for the Commission to take the same approach as it has in Item 512, announcing its view that indemnification is against public policy but leaving the final determination of the issue to the courts so they can balance the equities when compelling circumstances to do so arise.

We also believe the Proposal's attempt to, in effect, outlaw certain kinds of insurance coverage also exceeds the SEC's authority and represents an impermissible incursion by the federal government into the regulation of insurance products, a role traditionally reserved to the states. Congress itself considered providing for greater federal oversight of the insurance markets as part of its deliberations over the Dodd-Frank Act, but abandoned these ideas and instead settled on the formation of a Federal Insurance Office under Title V of Dodd-Frank. In light of this policy choice, we do not see how Congress could have otherwise intended for the SEC to intervene in the purchase and sale of private insurance contracts. We respectfully urge the SEC to move off this unnecessary position.

6. Requiring XBRL Tagging of Data Would Be Costly and Provide Little (if Any) Benefit to Investors.

While the CCMC shares the Commission's desire to make information more accessible to investors, we believe the benefit for investors of XBRL tagging would be minimal at best. Notwithstanding the high hopes many had for the use of XBRL when it was first incorporated into Commission reporting in 2009, there is little to no indication that investors have found XBRL tagging of data to be particularly useful. In our experience, institutional investors typically utilize their own proprietary data analysis systems to assess companies' performance, and retail investors generally do not use XBRL-tagged data to compare companies at all. Furthermore, we are aware of several providers of XBRL analytical tools for SEC disclosures that have had to scale back operations or cease doing business entirely because there is no demand for their services. Before expanding any XBRL tagging requirement to disclosures required under the Proposal, the Commission should first produce data showing that a significant number of investors are actually using XBRL disclosures to make

investment decisions.⁹

7. Rule 10D-1 Would Be Burdensome for Smaller Reporting Companies.

The requirements of the Proposal would prove to be disproportionately costly for smaller reporting companies. The Proposal provides for no scaled disclosure, phase-in period, or other accommodations for smaller reporting companies. The requirement to use XBRL data tags and commence recovery litigation against executive officers would be especially burdensome to smaller reporting companies. Accordingly, we believe smaller reporting companies should therefore be exempt from Rule 10D-1.

8. Rule 10D-1 Should Not Apply Retroactively

The Proposal provides that any final rules would apply to any awards granted, earned or vested on or after the effective date of Rule 10D-1. Because it includes awards that are earned or vested after the effective date, and such awards may have lengthy vesting periods, the Proposal theoretically picks up awards that were granted prior to the effective date. We do not believe Congress intended for the final rules to have retroactive effect, and the DC Circuit's recent holding on the retroactivity of another Dodd-Frank provision enforced by the SEC also calls into question the permissibility of adopting a retroactive rule here.¹⁰ Thus, the CCMC believes that Rule 10D-1 should only apply to awards that were granted after the effective date of final rules.

The Proposal also raises a similar issue with respect to pre-existing employment contracts and incentive compensation agreements that may not permit the kind of clawback recovery contemplated by Rule 10D-1. To this point, the Proposal makes the remarkable statement that there should be no contradiction between Rule 10D-1 and existing employment contracts "because issuers can amend those contracts to accommodate recovery." As a matter of basic contract law, companies cannot in fact

⁹ The CCMC raised similar concerns about XBRL in its comment letter on the Commission's proposed "Pay for Performance" rules, which is available at <http://www.sec.gov/comments/s7-07-15/s70715-26.pdf>.

¹⁰ See *Koch v. SEC*, 2015 WL 4216988, at *8 (D.C. Cir. July 14, 2015) (the presumption against retroactive legislation is "deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic").

make a unilateral amendment to an employment contract; they must seek consent of the counter-party employee, who may—or may not—be willing to agree to an amendment. For employees outside the United States where employment laws and standards for employment contracts differ significantly from those in the US, unilateral amendments may be even more problematic. More fundamentally, the notion that the Government can arbitrarily interfere with private contracts is deeply troubling to the CCMC. Again, there is a simple solution to this problem: apply a final rule prospectively only, so that future employment agreements can incorporate sufficient language to address these issues.

9. The SEC should provide the public with an economic analysis if the rule will promote capital formation and competition by creating conditions that will lead to an increase in the number of U.S. public companies.

As noted in the attached chart¹¹, since 1996 the number of public companies has steadily declined to the point that the total number is half of what it was 19 years ago. In fact, 2014 was the only year since 1996 that saw an increase in public companies. A similar rate of decline in Initial Public Offerings (“IPOs”) has also occurred during the same time period. It should be noted that this is the same time period within which we have experienced the explosion of the size of the proxy and emergence of disclosure overload issues discussed earlier in the letter.

Accordingly, in advancing its mission for capital formation and competition, we would respectfully request that the SEC provide the public, subject to comment, an analysis on how the rule will promote capital formation and competition by creating conditions that will lead to an increase in the number of U.S. public companies.

Conclusion

The CCMC believes that clawback policies, appropriately calibrated for the circumstances of a company, can be an effective means of instilling good governance practices. However, we believe that the proposal, in its current form, is overly complex and prescriptive and may cancel out any potential benefits that may otherwise derive from the implementation of a balanced system. We also believe that

¹¹ The charts are attached as Appendix B and we respectfully request that they be made a part of the record of this comment file.

Mr. Brent J. Fields
September 14, 2015
Page 15

financial reporting polices should be modernized in order for a clawbacks proposal to work as intended by Congress. Finally, we also believe that it is incumbent for the SEC to perform an analysis on how the rule will impact capital formation and competition.

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 'T. Quaadman', with a long horizontal flourish extending to the right.

Tom Quaadman

Cc: The Honorable Mary Jo White
The Honorable Luis A. Aguilar
The Honorable Daniel M. Gallagher
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar

APPENDIX A



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

TOM QUAADMAN
VICE PRESIDENT

October 9, 2013

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

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair White:

The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest federation of businesses and associations, representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector. These members are both users and preparers of financial information. 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 economy. To achieve these goals, the CCMC has supported the development of robust financial reporting systems and strong internal controls to promote efficient capital markets and capital formation.

We have read with interest recent reports that the Securities and Exchange Commission (“SEC”) will step up its enforcement efforts, particularly focusing on potential accounting fraud and financial disclosure irregularities. The CCMC applauds the efforts of SEC to drive bad actors from the market place and create a level playing field for participants who operate in good faith and abide by the law. As SEC uses accounting fraud and financial reporting irregularities as a means to achieve this goal, we also believe that it is incumbent for SEC to modernize financial reporting policies to facilitate the release of relevant disclosures, reduce complexity, and achieve more efficient capital formation and competition. Accordingly, we would also respectfully request an update on the status of SEC’s implementation of the recommendations of the Advisory Committee on Improvements to Financial Reporting (“CIFiR”).

Modernization of financial reporting policies is well overdue.

In the wake of the Enron and WorldCom scandals and the subsequent passage of the Sarbanes-Oxley Act (“SOX”), financial reporting has undergone significant changes and transitions. Policy makers realized that financial reporting must keep pace with those changes. Consequently, then SEC Chairman Chris Cox formed CIFiR, which released its report and recommendations to improve financial reporting in August 2008. Unfortunately, the demands of the financial crisis diverted the time and attention of the agency from its ongoing agenda of

modernizing financial reporting. We believe that the implementation of these recommendations remains an urgent item on SEC's agenda.

Adding to the urgency of these recommendations is the pace of change in financial reporting that has taken place since the financial crisis. Among the many new legislative, regulatory, and standard-setting requirements that have influenced financial reporting in the last few years is the Jumpstart Our Business Startups Act ("JOBS Act"). This law exempts emerging growth companies ("EGCs") from new rules of the Public Company Accounting Oversight Board ("PCAOB"), unless SEC determines that those rules are necessary and in the public interest¹, and allows EGCs to comply with any new or revised Financial Accounting Standards Board ("FASB") standards in the same timeframe as companies that are not issuers. Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") has profoundly impacted and exacerbated many of the issues identified in the CIFIr report.

For these reasons, it is important for SEC to adopt a comprehensive approach to modernizing financial reporting policies that includes, in addition to stepped-up enforcement, increased communication and cooperation among regulators, standard setters and stakeholders. This will reinforce SEC's efforts to drive bad actors out of the marketplace, by eliminating the complexity and ambiguity on which they thrive. In fact, the CIFIr report found that financial reporting complexity is a key driver in the disconnection between current financial reporting and the information necessary to make sound investment decisions. Since keeping a clear focus on SEC's mission to ensure that investors receive relevant decision-useful information and to promote capital formation will maximize the agency's chances of success in stamping out accounting fraud and financial disclosure irregularities, we view this as a win-win for SEC and its stakeholders.

Listed below are some of the issues and suggested solutions to improve financial reporting.

Issues and Proposed Solutions

Issue 1: Provide Investors with Information Needed for Sound Decision Making

Problem: Inconsistent definitions of materiality.

Solution: The SEC should supplement existing guidance and coordinate in such a way to ensure that SEC, FASB and PCAOB use a common definition of materiality.

¹ See letter from the Chamber to the SEC (October 5, 2012) that Section 104 of the JOBS Act requires an analysis and finding that new PCAOB standards and revisions must promote efficiency, competition and capital formation in order to apply to EGCs.

Background: FASB has defined materiality for U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) differently than the securities laws, while the PCAOB is using the definition from the federal securities laws.

PCAOB Auditing Standard No. 11 states in part:

In interpreting the federal securities laws, the Supreme Court of the United States has held that a fact is material if there is ‘a substantial likelihood that the ... fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.’ As the Supreme Court has noted, determinations of materiality require ‘delicate assessments’ of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him ...

FASB Concept Statement No. 8 uses the following definition: “Information is material if omitting it or misstating it *could* influence decisions that users make on the basis of the financial information of a specific reporting entity.”²

Additionally, FASB’s Invitation to Comment on Disclosure Framework (File Reference 2012-220), states that reporting entities would assess the relevance of each disclosure using the basic criterion that “information should be disclosed if it has the potential to make a difference in users’ decisions about providing resources to the reporting entity.”^{3 4}

CIFiR recommended that the FASB or SEC, as appropriate, should supplement existing guidance to reinforce that:

*Those who evaluate the materiality of an error should make the decision based upon the perspective of a reasonable investor; and, materiality should be judged based on how an error affects the total mix of information available to a reasonable investor, including through a consideration of qualitative and quantitative factors.*⁵

² Par. QC11, Chapter 3

³ FASB Invitation to Comment on Disclosure Framework, paragraph 4.5 (page 45).

⁴ For additional insights on the issues, see “What is Materiality? SEC & PCAOB v. FASB & ASB” by Samuel P. Gunther in *Bloomberg BNA* (May 7, 2012).

⁵ Recommendation 3.1, page 80, Final Report of the SEC Advisory Committee on Improvements to Financial Reporting, August 1, 2008.

It should also be noted that the International Integrated Reporting Council (“IIRC”) and the Sustainability Accounting Standards Board (“SASB”) are creating their own concepts of materiality in attempting to develop voluntary standards of non-financial reporting and disclosure – with the SASB’s disclosures intended to be included within Management Discussion and Analysis (“MD&A”) in Form 10-K and 10-Q filings with SEC. The Chamber has written to both organizations expressing concerns that the development of these standards needs to be done with SEC and that any work in this area must conform to the definitions, usage, and enforcement of materiality as defined in the Securities Acts and their progeny.⁶ Similarly, in testimony before the U.S. Senate Subcommittee on Securities, Insurance, and Investment the Chamber stated:

The SEC, FASB, and PCAOB should develop standards of materiality for investors, as well as the scope of outreach to the investor community. This will provide perspective on various accounting and auditing issues such as the need for restatements on the one end, while framing the picture for input on the front end of standard setting.⁷

Problem: Information overload from multiple overlapping and sometimes contradictory reporting and disclosure requirements and standards.

Solution: Develop a Disclosure Framework.

Background: CIFIIR recommended that SEC and FASB work together to develop a disclosure framework to, among other things:

Integrate existing SEC and FASB disclosure requirements into a cohesive whole to ensure meaningful communication and logical presentation of disclosures, based on consistent objectives and principles. This would eliminate redundancies and provide a single source of disclosure guidance across all financial reporting standards.⁸

A disclosure framework would also address issues of placement of information within audited U.S. GAAP financial statements versus MD&A which is unaudited, has safe harbors and provides forward looking information.⁹

⁶ See letters from the Chamber to IIRC (July 15, 2013) and SASB (July 26, 2013).

⁷ See testimony of the U.S. Chamber of Commerce on The Role of the Accounting and Auditing Profession in Preventing Another Financial Crisis at the hearings of the U.S. Senate Subcommittee on Securities, Insurance and Investment (April 6, 2011).

⁸ Recommendation 1.2, page 8, Final Report of the SEC Advisory Committee on Improvements to Financial Reporting, August 1, 2008.

⁹ FASB currently has a disclosure framework project in progress and the SEC Chief Accountant announced in February, 2013 that a SEC Staff Paper on disclosure is expected to be released with roundtables planned to follow.

Problem: The accounting standards setters continue down the path of including the recognition, measurement, and disclosure of more fair values and accounting estimates that require judgment and, therefore, investors and others cannot expect there to be a single “right answer” in accounting and auditing matters.

Solution: Issue a policy statement articulating how SEC evaluates the reasonableness of accounting judgments.

Background: CIFIIR recommended that:

The SEC issue a statement of policy articulating how it evaluates the reasonableness of accounting judgments and include factors that it considers when making this evaluation. The statement of policy applicable to accounting-related judgments should address the choice and application of accounting principles, as well as estimates and evidence related to the application of an accounting principle. ... We believe that it would be useful if the SEC also set forth in the statement of policy factors that it looks to when evaluating the reasonableness of preparers' accounting judgments.¹⁰

Solution: The PCAOB should issue a policy statement on how it evaluates the reasonableness of audit judgments.¹¹

Background: CIFIIR recommended that:

[T]he PCAOB develop and articulate guidance related to how the PCAOB, including its inspections and enforcement divisions, would evaluate the reasonableness of judgments made based on PCAOB auditing standards. The PCAOB's statement of policy should acknowledge that the PCAOB would look to SEC's statement of policy to the extent that the PCAOB would be evaluating the appropriateness of accounting judgments as part of an auditor's compliance with PCAOB auditing standards.¹²

¹⁰ Recommendation 3.5, pages 13-14, Final Report of the SEC Advisory Committee on Improvements to Financial Reporting, August 1, 2008.

¹¹ See various CCMC comment letters including to the PCAOB on Request for Public Comment on Concept Release on Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements and Related Amendments to PCAOB Standards and Notice of Roundtable (PCAOB Release No. 2011-003, June 21, 2011, Rulemaking Docket Matter No. 34).

¹² Recommendation 3.5, page 14, Final Report of the SEC Advisory Committee on Improvements to Financial Reporting, August 1, 2008.

Solution: The SEC work with the FASB and PCAOB to consider the auditability of GAAP when developing accounting standards and disclosure requirements.

Background: Again in testimony before the U.S. Senate Subcommittee on Securities, Insurance, and Investment the Chamber stated:

A formal, ongoing, and transparent dialogue should be created to consider the auditability of accounting standards. This would allow for the auditing of accounting standards to work in conjunction with standard development. It would also provide for the identification and resolution of issues that arise in practice. A similar process should be created to ensure that regulators have an understanding of standards and that different entities are not working at cross purposes. The era of “not my problem” needs to end.¹³

Solution: Conduct formal pre and post-implementation reviews.

Background: CIFIIR recommended that the Financial Accounting Foundation (“FAF”), FASB, and other participants in the financial reporting system:

Enhance the consistency and transparency of key aspects of FASB’s field work, including cost-benefit analyses, field visits, and field tests.

Formalize post-adoption reviews of each significant new standard to address interpretive questions and reduce the diversity of practice in applying the standard, if needed.

Formalize periodic assessments of existing accounting and related disclosure standards to keep them current.¹⁴

The Chamber reinforced this notion by stating that standards should be field tested and put through a rigorous process to identify unintended consequences before implementation and after implementation.¹⁵

¹³ See testimony of the U.S. Chamber of Commerce on The Role of the Accounting and Auditing Profession in Preventing Another Financial Crisis at the hearings of the U.S. Senate Subcommittee on Securities, Insurance and Investment (April 6, 2011).

¹⁴ Included in recommendation 2.3, page 11, Final Report of the SEC Advisory Committee on Improvements to Financial Reporting, August 1, 2008.

¹⁵ See testimony of the U.S. Chamber of Commerce on The Role of the Accounting and Auditing Profession in Preventing Another Financial Crisis at the hearings of the U.S. Senate Subcommittee on Securities, Insurance, and Investment (April 6, 2011).

The Chamber appreciates that the FAF and FASB are moving in the direction of this recommendation and we suggest that the PCAOB should do likewise and that SEC should ensure that the FASB and PCAOB are coordinated in these efforts.

Issue 2: Increase Communication and Coordination amongst Regulator and Standard Setters

Problem: Lack of transparent communication and coordination among regulators, standard setters and market participants.

Solution: Establish a Financial Reporting Forum (“FRF”).

Background: CIFI¹⁶ recommended the creation of a FRF, made up of the SEC, FASB, PCAOB, financial regulators, investors (broadly defined), and businesses, with a mission to identify and propose solutions to problems before they reach the crisis stage. A FRF will also provide a mechanism to allow for appropriate coordination amongst regulators and input from investors and businesses.¹⁶ It should also be noted that in the 111th Congress, the House of Representatives passed a version of H.R. 4173, the precursor bill of the Dodd-Frank Act, which contained an amendment by Rep. Gary Miller to create an FRF.

Problem: Potential expectation gap created by the PCAOB’s recent definition of an audit failure.

Solution: Through the exercise of SEC’s oversight authority over the PCAOB reestablish the long-standing definition of an audit failure.

Background: Several years ago and without explanation, the PCAOB began describing Part I deficiencies as audit failures in inspection reports for annually inspected firms (although the PCAOB does not use these terms in inspection reports for tri-annually inspected firms). This change in definition contradicted the long-standing and widely used definition of an audit failure as used by the Government Accountability Office (“GAO”). GAO defined audit failures as:

[A]udits for which audited financial statements filed with the SEC contained material misstatements whether due to errors or fraud, and reasonable third parties with knowledge of the relevant facts and circumstances would have concluded that the audit was not conducted in accordance with generally accepted auditing standards, and, therefore, the auditor failed to appropriately detect and/or deal with known material misstatements by (1) ensuring that

¹⁶ See testimony of the U.S. Chamber of Commerce on The Role of the Accounting and Auditing Profession in Preventing Another Financial Crisis at the hearings of the U.S. Senate Subcommittee on Securities, Insurance, and Investment (April 6, 2011).

*appropriate adjustments, related disclosures, and other changes were made to the financial statements to prevent them from being materially misstated, (2) modifying the auditor's opinion on the financial statements if appropriate adjustments and other changes were not made, or (3) if warranted, resigning as the public company's auditor of record and reporting the reason for the resignation to the SEC.*¹⁷

In other words, for example, differences of opinion in the exercise of judgment on audit procedures or other audit deficiencies – which do not occur in conjunction with any material misstatement of the financial statements – could not be considered an audit failure.

You will also find with this letter, as an attachment, a letter sent by the Chamber to PCAOB Chairman James Doty that contains a more robust discussion of our concerns on the failure to properly define audit failure, the communication, and portrayal of inspections findings and how it may undermine public confidence in financial reporting.

Issue 3: Reduce Fraudulent Financial Reporting

Problem: Lack of a comprehensive and holistic approach to understanding fraudulent financial reporting, diagnosing its root causes and detecting fraud through the application of useful and appropriate methodologies and technologies.

Solution: Establish a Fraud Center.

Background: The Advisory Committee on the Audit Profession (“ACAP”) recommended:

*SEC and Congress, as appropriate, provide for the creation by the PCAOB of a national center to facilitate auditing firms' and other market participants' sharing of fraud prevention and detection methodologies and technologies, and commission research and other fact-finding regarding fraud prevention and detection, and further, the development of best practices regarding fraud prevention and detection.*¹⁸

Financial reporting frauds undermine investor confidence in the capital markets. In October 2010, the Center for Audit Quality (CAQ) formally joined forces to form an Anti-Fraud Collaboration with Financial Executives International, The Institute of Internal Auditors, and the

¹⁷ See GAO 04-217 Public Accounting Firms Required Study on the Potential Effects of Mandatory Audit Firm Rotation (2003) page 6.

¹⁸ ACAP Final Report (October 6, 2008), page VII:1

National Association of Corporate Directors to develop thought leadership, awareness programs, educational opportunities, and other related resources specifically targeted to the unique roles and responsibilities of the primary participants in the financial reporting supply chain. The projects and activities under this Anti-Fraud Collaboration are designed to enhance awareness and understanding of factors that contribute to financial reporting fraud, as well as strengthen the abilities of all applicable parties' efforts to deter and/or detect financial reporting fraud. These types of private sector initiatives can lead to long term progress in combating threats to investor confidence in the U.S. capital markets.

Since fraud can never be completely prevented, efforts to combat fraud must be continuous. All key participants in the financial reporting supply chain – preparers, audit committee members, auditors, *and regulators* – have important roles to play with regard to deterring and detecting financial reporting fraud. We believe the PCAOB can and should do more with the information it has accumulated through its various programs to identify trends, best practices, and specific actions that could be shared with auditors and preparers to assist in the deterrence or detection of financial statement fraud.

Issue 4: Increase Transparency and Accountability of FASB and PCAOB

Problem: Neither the FASB nor the PCAOB are formally subject to the traditional regulatory provisions for accountability and transparency.

Solution: Both the FASB and PCAOB and their attendant advisory groups should abide by the same rules of procedures as required of regulatory agencies by the Administrative Procedures Act and Federal Advisory Committee Act, including any advisory groups should be balanced in presentation and open in process.¹⁹

Solution: The PCAOB should form a Business Advisory Group to understand the role of companies as investors, their use of investments, and the potential impact of standard setting on businesses. The PCAOB should also establish an Audit Advisory Group to more substantively bring the expertise of practicing auditors to inform the PCAOB's activities and initiatives.²⁰

Background: For example, a Business Advisory Group would provide the PCAOB another means of input and broader understanding of issues that need to be addressed in the development of standards and other means of resolving important issues related to audited

¹⁹ See testimony of the U.S. Chamber of Commerce on The Role of the Accounting and Auditing Profession in Preventing Another Financial Crisis at the hearings of the U.S. Senate Subcommittee on Securities, Insurance and Investment (April 6, 2011).

²⁰ Ibid.

financial statements. This dialogue could help the PCAOB better appreciate business operations and the unintended consequences that may impact businesses through the development and implementation of accounting and auditing standards. The avoidance of adverse outcomes for businesses is critical to protect the investors who invest in them.²¹

Issue 5: Addressing the needs of Private Company financial statement users

Problem: Private company financial statement users have differing needs and find public company U.S. GAAP to be too complex and burdensome.

Solution: Preserve U.S. GAAP as the accounting language, while empowering the Private Company Council to address the needs of private company users.

Background: Any modernization of financial reporting policies requires that the differing needs of users of the financial statements be considered and addressed. In particular, privately held users do not require the same information as users those entities that are owned by the public. It is imperative that any changes made to standards do not have the unintended consequence of requiring privately held entities to follow standards which may provide information critically important to users of publically held entity financial statements but which is not relevant to their users. While CIFIr did not address these issues, following extensive study and research, the Blue Ribbon Panel on Standard Setting for Private Companies (“Blue Ribbon Panel”) made several recommendations which eventually led to the creation of the Private Company Council under the auspices of the FAF. Additionally, Congress, in passing the JOBS Act, made the public policy decision that users of financial reports are not monolithic and different business structures (ie. public company, emerging growth companies) will dictate the needs of financial statement users. Accordingly, we believe the SEC, FRF, and FAF should closely monitor the activities of the PCC to ensure the needs of private company users are met and that the Congressional intent of the JOBS Act is fulfilled.

This is not an exhaustive list of reforms or issues that should be addressed. Rather, we view this as a starting point of discussion and would respectfully request to meet with you to discuss these ideas and proposals in greater depth and detail. While we know and appreciate the workload of SEC, it is our belief that the many changes in financial reporting over the past decade require a response to prevent disharmony in financial reporting that can adversely impact the capital markets, businesses and the investors who provide them with the resources to grow and operate on a daily basis.

²¹ See CCMC letter to Martin F. Baumann (May 10, 2013).

The Honorable Mary Jo White
October 9, 2013
Page 11

Thank you for your consideration of these views, and we look forward to further discussion with you and SEC staff as well as an update on the implementation of the CIFiR recommendations.

Sincerely,

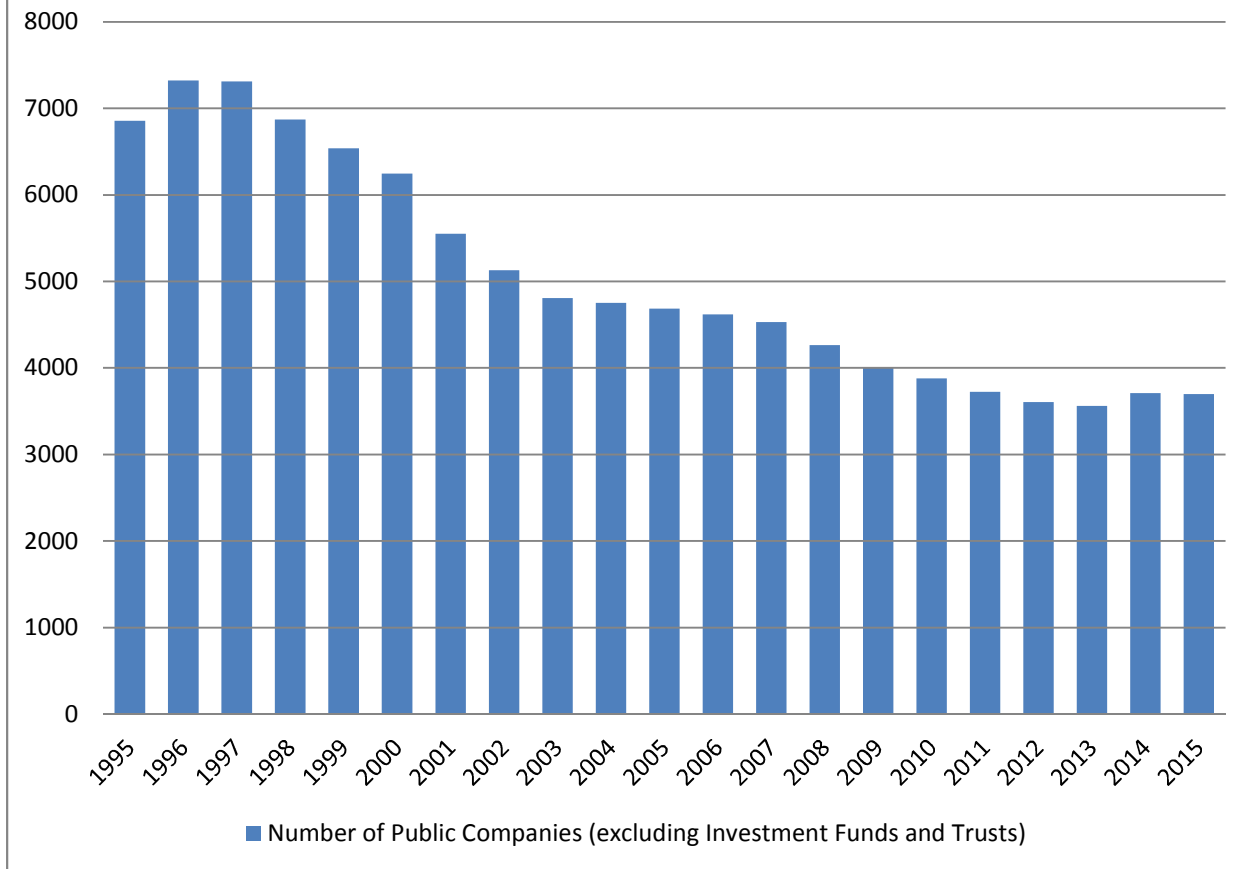
A handwritten signature in black ink, appearing to be 'TK' followed by a long horizontal flourish.

Tom Quaadman

cc: The Honorable Luis A. Aguilar, U.S. Securities and Exchange Commission
The Honorable Daniel Gallagher, U.S. Securities and Exchange Commission
The Honorable Kara Stein, U.S. Securities and Exchange Commission
The Honorable Michael Piwowar, U.S. Securities and Exchange Commission
Mr. Paul Beswick, U.S. Securities and Exchange Commission
Mr. Russell Golden, Financial Accounting Standards Board
Mr. James Doty, Public Company Accounting Oversight Board
The Honorable Tim Johnson, U.S. Senate
The Honorable Michael Crapo, U.S. Senate
The Honorable Jeb Hensarling, U.S. House of Representatives
The Honorable Maxine Waters, U.S. House of Representatives
The Honorable Scott Garrett, U.S. House of Representatives
The Honorable Carolyn Maloney, U.S. House of Representatives

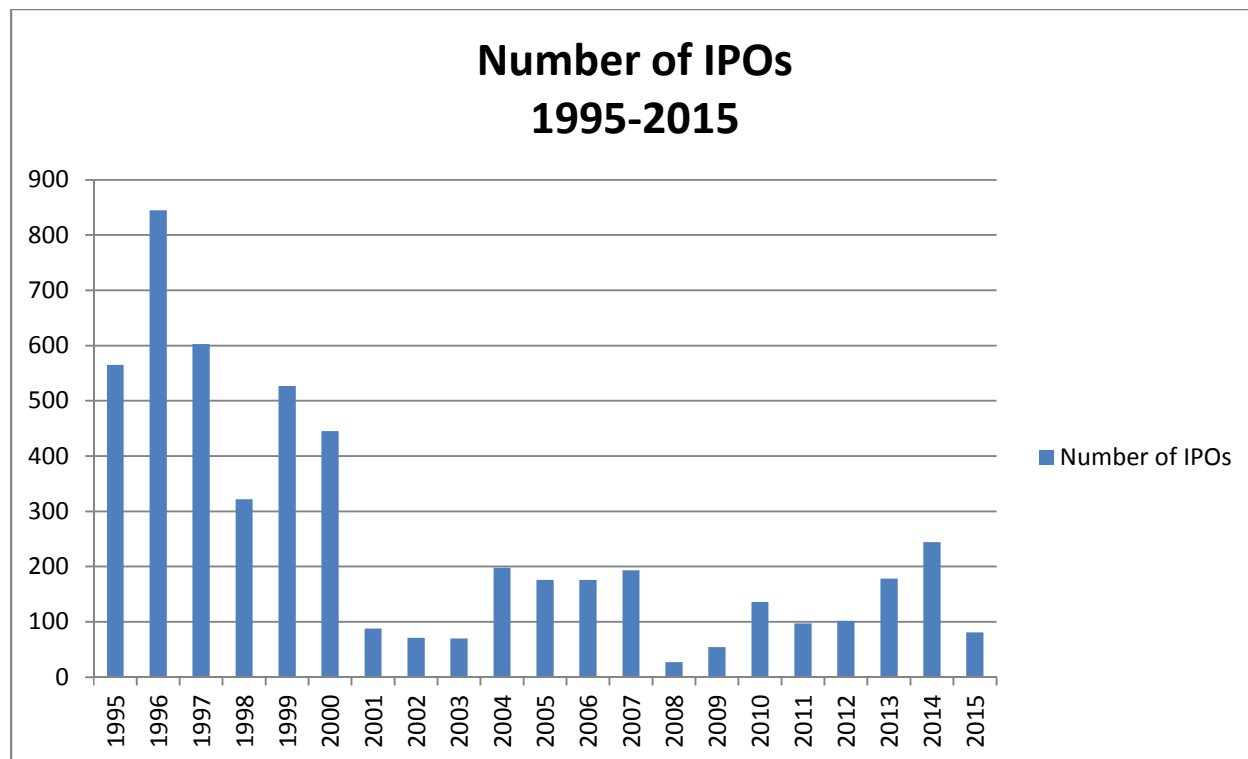
APPENDIX B

Number of Public Companies 1995 - 2015



1

¹ Ritholtz, Barry. "Where Have all the Public Companies Gone?," BloombergView. 24, June 2015.
<http://www.bloombergview.com/articles/2015-06-24/where-have-all-the-publicly-traded-companies-gone->



2

² "2015 IPO Report," WilmerHale. 2015.

https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-WilmerHale-IPO-Report.pdf.