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December 26, 2018

Honorable Commissioners
Securities and Exchange Commission
c/o Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-25-18

Dear Commissioners,

On behalf of more than 500,000 members and supporters of Public Citizen, we offer the following comment on rules under review ostensibly pursuant to Section 610 of the Regulatory Flexibility Act (RFA).

The Securities and Exchange Commission (SEC) invites public comment on "whether the rules should be continued without change, or should be amended or rescinded to minimize any significant economic impact of the rules upon a substantial number of such small entities."[1] Importantly, with this exercise, the SEC states that it is expanding its review to other rules, including those that "do not have a substantial impact" on small business despite the purpose of the RFA to examine the impact of regulations on small business.

Overall, we are concerned that this deliberation, with only a 30-day comment period and addressing 40 separate rules, fails to accord appropriate care. Each of these rules followed the mandatory notice-and-comment pursuant to the Administrative Procedures Act. We believe it is inappropriate to consider terminating these rules without commensurate consideration.

Given the number and breadth of the rules under review, as well as the abbreviated timeline for public input, what follows are comments on only a subset of these rules.

[1] *List of Rules to be Reviewed Pursuant to the Regulatory Flexibility Act*, SECURITIES AND EXCHANGE COMMISSION (Nov. 21, 2018) https://www.sec.gov/rules/other/2018/33-10576.pdf

Executive Compensation and Related Person Disclosure

The SEC's adoption of this rule in 2006 to provide investors with a better and more complete picture of compensation earned by a firm's most senior officers, including the board, along with any interlocking relationships where individuals hold additional positions on a board or within the management of another company.[2] This final rule spanned more than 400 pages. During the rulemaking process, the SEC received more than 20,000 comments, attesting to the widespread interest in and importance of these disclosures. Among other items, this rule affirmed the use of tabular data to show compensation, interlocks and other measurable data, as opposed to previous reliance on solely narrative explanations. The rule also solidified the disclosure of stock option-based compensation.

We do not believe this rule should be rescinded. We do welcome an opportunity to expand on these disclosures, but this should be undertaken in a separate rulemaking.

Proxy Disclosure Enhancements

The SEC adopted the proxy disclosure enhancement rule to improve disclosure of compensation policies and practices that present "material risk" to the company. Clearly, pay structures contributed to the 2008 financial crash, where bonuses led bankers to make disastrous decisions. This 2010 rule, however, fell well short of what's needed to equip shareholders with the ability to link problem pay structures with potential problems. For example, the rule simply asks a firm to declare whether a manager is an "interested" party in one of the firm's investment vehicles. More useful would be a clear arithmetic explanation showing specifically how the manager's compensation increases with the sale or results of certain investment products. We recommend that the SEC undertake a formal rulemaking expanding the quantitative analysis of the role of compensation in risk-taking.

Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations

In 2006, the SEC adopted a rule to implement sections of the Credit Rating Agency Reform Act.[3] That act provided that nationally recognized statistical rating organization such as Moody's and Standard & Poor's, must be registered with the SEC, provide financial reporting, and be subject to SEC oversight. Ten years after the financial crash of 2008, the failure of the SEC to adopt and enforce vigorous oversight of the credit ratings industry provides a chilling lesson in regulatory lassitude. Leasing up to the crash, inflated credit ratings of mortgage-backed securities enabled the expansion of toxic assets throughout the financial sector. Congress approved the 2006 act to broaden competition in the arena, which is dominated by three firms. Poor implementation of the law, however, led to few new entries in the credit rating market. Free of

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[2] *Executive Compensation and Related Person Disclosure,* SECURITIES AND EXCHANGE COMMISSION (August 29, 2006) https://www.sec.gov/rules/final/2006/33-8732a.pdf

[3] *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations,* SECURITIES AND EXCHANGE COMMISSION (June 5, 2007) https://www.sec.gov/rules/final/2007/34-55857.pdf

competition from firms ideally producing accurate ratings, the existing firms apparently used inaccurate scores that left many investors unaware of the problems in the mortgage securities. The SEC should certainly address rating agency reform. The lack of implementation of this rule must be investigated along with instituting formal rulemaking for the as yet unaddressed provisions mandated by the 2010 Wall Street Reform and Consumer Protection Act.[4]

References to Ratings of Nationally Recognized Statistical Rating Organizations

The SEC's rule[5] was intended to improve disclosures by credit rating agencies about their methodologies. It also prohibited rating agencies from communicating with firms issuing securities about ways to improve the ratings, an activity the SEC believed would impair objectivity. Since inflated credit ratings contributed to the 2008 financial crash, as noted above, we support the intent of this rule. Also as noted above, the SEC's work remains incomplete and we urge the Commission to address the problem with more vigor.

Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles

This rule prohibits advisors from making false or misleading statements to investors or prospective investors in hedge funds and other pooled investments that they advise. The rule emphasizes the adviser's duty to refrain from fraud. We believe this rule should be retained and even strengthened. Bank-sponsored hedge funds purchased many of the failed mortgage backed securities because the investment advisors did not inform their clients of problems. Had the SEC been more vigorous in enforcing this arena, at least some of the money that facilitated the disastrous housing finance scam precipitating the crash might have been reduced.[6]

Proposed Rule Changes of Self-Regulatory Organizations

This rule requires self-regulatory organizations such as the stock exchanges to submit proposed rule changes electronically so that they can be viewed by the public. We support this rule and urge that it be retained.

Internet Availability of Proxy Materials

In 2007, the SEC provided that companies could offer proxy materials through the internet, instead of via paper material, at the discretion of the shareholder. We support this option and do not think this rule should be rescinded.

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[4] Christopher Small, *Impact of the Dodd-Frank Act on Credit Rating Agencies*, HARVARD LAW FORUM, (Oct. 9, 2014) https://corpgov.law.harvard.edu/2014/10/09/impact-of-the-dodd-frank-act-on-credit-ratings/

[5] *Amendments to Rules for NSROs*, SECURITIES AND EXCHANGE COMMISSION (Feb. 2, 2010) https://www.sec.gov/rules/final/2009/34-61050.pdf

[6] Jesse Eisinger, *Why the SEC Didn't Hit Goldman Sachs Harder,* NEW YORKER (April 21, 2016) https://www.newyorker.com/business/currency/why-the-s-e-c-didnt-hit-goldman-sachs-harder

Shareholder Proposals Relating to the Election of Directors

This rule solidified the SEC's prohibition on shareholder resolutions relating to the election of directors.[7] Generally, we believe that the SEC should not stifle the ability of shareholders to improve the manner in which directors are elected. The single most profound deficiency in corporate governance is the inability of shareholders to exert true control in the selection of directors. Currently, it is management that effectively identifies the directors. This is a perverse dynamic, since directors are supposed to oversee management. And this oversight is meant for the benefit of shareholders. Ideally, shareholders would vote among competing candidates. In reality, shareholders only vote on one candidate for each board position. Ideally, shareholders could nominate candidates to compete in these elections. In reality, the existing SEC rules prohibits such nominations (unless the shareholder is willing to shoulder the expense of the effort, including mailing ballots to all shareholders). The rule at issue here even bars shareholders from proposing a process for reforming the election of directors. Since the SEC adopted this rule, Congress approved a provision in the 2010 Dodd-Frank Wall Street Reform Act that specifically enables shareholders to propose nominees for director elections. While subject to litigation, the courts left intact the ability of shareholders to file resolutions asking companies to accept shareholder-nominated directors.[8] In short, congressional action has rendered this rule obsolete. We believe this rule should be rescinded. However, as noted throughout this comment, such important changes to investor protections must only be undertaken through a deliberative, formal rulemaking process.

We look forward to the opportunity to comment more fully on the importance and impact of these rules under review.

For questions, please contact Bartlett Naylor a [redacted]

Sincerely,

Public Citizen

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[7] *Shareholder Proposals Relating to the Election of Directors,* Securities and Exchange Commission, FEDERAL REGISTER, (Dec. 11, 2007) https://www.sec.gov/rules/final/2007/34-56914fr.pdf

[8] *Proxy Access by Private Ordering,* COUNCIL OF INSTITUTIONAL INVESTORS, (February 2017) https://www.cii.org/files/publications/misc/02_02_17_proxy_access_private_ordering_final.pdf