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October 27, 2011

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Retrospective Review of Existing Regulations**

Dear Ms. Murphy,

As a student of law and aspiring policy analyst, I am pleased with the opportunity to provide my comments on the Security and Exchange Commission's (SEC) method of retrospective review of its regulations. I hope to provide insightful and objective input from an academic perspective.

In accordance with Executive Order 13579, the SEC has begun the process of periodically reviewing existing, significant regulations. The Order mandates that independent regulatory agencies such as the SEC consider "how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome."<sup>1</sup> The Order requires that each agency should compile and publish a plan to meet this mandate within 120 days. It is essential that this plan be promulgated to reflect the long-standing mission of the SEC as well as the policy priorities dictated by the present economic climate. In evaluating the potential effectiveness of each element of the plan, the following interests should be considered:

1. Protecting investors by ensuring stability and fairness in the securities markets.

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<sup>1</sup> Executive Order 13579

2. Promoting “efficiency, competition, and capital formation.”<sup>2</sup>
3. Enforcing regulations that mitigate unnecessary and disproportionate risk to the general economic welfare.

Since its inception following the Great Depression in the 1930s, the SEC has more-or-less effectively advanced each of these interests. However, with modern technology greatly accelerating the exchange of information in an increasingly globalized economy, regulatory agencies must place more emphasis on avoiding future iterations of the 2008 Global Financial Crisis.

The current process in place for retrospective review of existing regulations is well delineated by the SEC. This process provides for annual review of “each of its rules that has become final within the past ten years” as required by section 610(a) of the Regulatory Flexibility Act.<sup>3</sup> While this process has proven largely effective in some areas, industry critics have voiced serious concerns about its future implementation. I will consider modifications to the existing plan by addressing the form questions provided by the SEC and in light of the above stated interests.<sup>4</sup>

**Question #1: What factors should the Commission consider in selecting and prioritizing rules for review?**

The current economic climate dictates that regulatory agencies such as the SEC must continually assess the degree to which they are protecting vulnerable groups. As an entire generation of ‘baby-boomers’ is reaching retirement age, the security of pension plans and retirement funds is essential to the economy. Regulations dealing with risk assessment and reporting requirements for firms engaged in retirement planning should be more frequently and more meticulously reviewed by the SEC. With population in the United States aging, the first priority of the SEC should be to ensure that its regulations promote confidence in those who are considering retirement. These regulations should be reviewed with enhanced scrutiny.

Some industry participants have advocated for a strictly financial analysis to determine which regulations should be prioritized for examination. David T. Hirschmann, President and CEO of the Center for Capital Markets Competitiveness (CCMC) suggests that the SEC should focus review on those regulations with an

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<sup>2</sup> Securities Act of 1933 §2(b),  
<http://www.sec.gov/about/laws/sa33.pdf>

<sup>3</sup> <http://sec.gov/rules/other/2011/33-9257.pdf>

<sup>4</sup> <http://sec.gov/rules/other/2011/33-9257.pdf>

estimated cost of implementation above \$100 million.<sup>5</sup> While such costly regulations are certainly ripe for periodic review, the Commission should employ a more qualitative analysis rather than dedicate its resources to reviewing regulations simply because they are costly. Many of the most effective regulations imposed upon the securities industry are also the most difficult to comply with. The common interest in maintaining stability in retirement funds and confidence in the firms that provide them cannot be easily economically quantified.

### **Question #2: How often should the Commission review existing rules?**

The question of frequency of review involves weighing many interests on both sides of the regulatory process. The Commission's interest in promoting efficiency should be paramount in determining frequency of review. Firstly, firms are entitled to a clear and consistent declaration of the regulatory procedures they must comply with. Accordingly, SEC resources are finite and should be efficiently apportioned to reflect the Commission's priorities. Just as firms optimize efficiency by directing fewer resources toward compliance, the SEC must consider its policy objectives. Most prominently, implementation of laws like the Frank-Dodd Act, which includes several major provisions for improving securities regulation, should constitute the Commission's top priority.

Eliminating waste in minor regulatory activity is certainly important. However, it has been estimated that periodic review of existing regulation would account for approximately \$10 billion over the next five years<sup>6</sup>, while substantive financial regulations (such as those contained in the Frank-Dodd Act) have accounted for nearly \$500 Billion according to some estimates released by the Office of Management and Budget.<sup>7 8</sup> It is for these reasons that I recommend that relevant regulations be reviewed no more frequently than every three years.

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<sup>5</sup> <http://sec.gov/comments/s7-36-11/s73611-62.pdf>

<sup>6</sup> *Eliminating JobSapping Federal Rules through Retrospective Reviews – Oversight of the President's Efforts*, 112<sup>th</sup> Cong. (2011) (Statement of Cass Sunstein) available at [http://smbiz.house.gov/UploadedFiles/Sunstein\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Sunstein_Testimony.pdf)

<sup>7</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES available at

[http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/Draft\\_2011\\_CBA\\_Report\\_AllSections.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/Draft_2011_CBA_Report_AllSections.pdf)

<sup>8</sup> Both statistics cited by PublicCitizen in its comment. <http://sec.gov/comments/s7-36-11/s73611-57.pdf>

**Questions #5/#6: What can the Commission do to modify, streamline, or expand its regulatory review processes?/How should the Commission improve public outreach and increase public participation in the rulemaking process?**

Again, in the interests of efficiency and fairness, the SEC must consider perspectives that are both informed and diverse when evaluating the effectiveness of its rules. Many industry participants have lodged complaints about a lack of adequate input received by the SEC in formulating new rules and modifying existing regulations. Many of those interested parties have called for a negotiation-like model for resolving disputes about the effectiveness of a given regulation. While this negotiation-style of rulemaking has the advantages of an informed and interested debate, it also comes with the possibility of inviting hyper-pluralism and suggests that the SEC make determinations about which parties deserve its full attention and which do not.

I recommend proposing a petition-style method of evaluating regulations. Under this system, whenever a sufficient number of firms in a particular industry join together in petitioning the SEC to modify, abolish, and enact a regulation, the SEC would provide a structured format for bilateral negotiations. This system exemplifies the adversarial advantages of the negotiation model while also eschews any concerns about an individual firm lodging grievances as a means by which to capitalize on a competitive advantage over its fellows. The petition model would incentivize only those grievances where a consensus is possible across the relevant industry about how to maximize efficiency for all parties.

This model would also be more responsive to regulations concerning very specific industries. For instance, the conflict minerals rule cited by CCMC as inefficient and burdensome<sup>9</sup>, only affects a very specific class: those firms dealing in importing certain minerals from certain sources. Under the petition model, firms could organize themselves in favor of review and be guaranteed an audience by the SEC in a forum for debate among the most interested and informed parties.

**Question #7: Is there any other information that the Commission should consider in developing and implementing a preliminary plan for retrospective review of regulations?**

Many interested parties have suggested the formation of an independent body to oversee retrospective review. I strongly agree with these recommendations. Through further

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<sup>9</sup> See above, <http://sec.gov/comments/s7-36-11/s73611-62.pdf>

specialization, the functions of the Commission and its constituent offices and divisions will be more able to focus on implementing new regulations rather than focusing on which existing regulations to review.

I recommend proposing a Regulatory Review Task Force comprised of Commission veterans as well as former compliance officers from various affected industries. This task force would determine which regulations to be reviewed and how. The body would also be responsible for soliciting public opinion and for proposing modified rules in conjunction with findings made on existing regulations.

Ultimately, the SEC is charged with serving the public. Perhaps this goal is best achieved by promoting financial literacy through lobbying and political outreach. Whether by improving website accessibility or partnering with universities, developing an educational infrastructure within its mission should be a priority for the SEC.

Thank you very much,

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