June 1, 2020

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (Release Nos. 33–10763; 34–88321; File No. S7–05–20)

Dear Secretary Countryman:

Better Markets[1] appreciates the opportunity to comment[2] on the above-captioned proposal ("Release," "Rules," "Proposal") published for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). In the Release,[3] the Commission proposes radical expansion to the already complex web of exemptions under the current securities laws and regulations that are available to companies that want to raise capital through the issuance of securities without providing minimal information about their financial condition or growth prospects. These proposals are a leap from the Concept Release the Commission released for public comment last year.[4] We submitted a comment letter in response to that Release and we also submitted a comment letter in response to the separate rule proposal to amend the definition of Accredited Investor. [5]

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Given the importance of the topics, the relatively short comment period afforded, and the national emergency due to the COVID-19, we reserve the right to supplement this comment letter with additions to either offer further commentary on separate aspects of the Proposal or to rebut and respond to other commenters.

[3] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (Release Nos. 33–10763; 34–88321; File No. S7–05–20) 85 Fed. Reg. 17956 (March 31, 2020) *available* at https://www.federalregister.gov/documents/2020/03/31/2020-04799/facilitating-capital-formation-and-expanding-investment-opportunities-by-improving-access-to-capital.

[4] *See* Concept Release on Harmonization of Securities Offering Exemptions (Release Nos. 33–10649; 34–86129; IA–5256; IC–33512; File No. S7–08–19) 84 Fed. Reg. 30460 (June 26, 2019) *available* at https://www.federalregister.gov/documents/2019/06/26/2019-13255/concept-release-on-harmonization-of-securities-offering-exemptions.

[5] *See* Better Markets Concept Release on Harmonization of Securities Offering Exemptions (Release Nos. 33–10649; 34–86129; IA– 5256; IC–33512; File No. S7–08–19), *available* at https://bettermarkets.com/sites/default/files/CL%20SEC%20Exempted%20Offering%209-19-19%282%29.pdf, and

Taken together, these Proposals—sold in the name of capital formation—would expose retail, financially unsophisticated investors (who often lack the wherewithal to understand risks associated with investing in dark private markets and/or lack the deep pockets to withstand higher-than-normal probability of investment loss) to the risks of investing in companies that have funding challenges and prefer to not disclose information about their financial condition or growth prospects. These Proposals—marketed in the name of increasing investment opportunities for retail investors—would, more often than not, enable intermediaries to reap huge commissions by peddling unsuitable investment products to unsuspecting investors and allow companies and their executives to plunder through the hard-earned savings of ordinary Americans—just as when these nest-eggs have gotten smaller—with no real benefit of sensible and sustainable economic growth. We are left to conclude that the Commission has naively bought the hype peddled by intermediaries who stand to benefit from the rents in their role as middle-men or so-called entrepreneurs who often engage in job destruction and wasting of assets. We fear the Commission's decisions risk dismantling the regulatory pillars upon which the Commission has stood for nearly 70 years. We urge the Commission to reverse course.[6]

SUMMARY

Companies with promising prospects—that offer needed products or services for their customers, that reward their employees well, and that seek their profits without imposing negative externalities upon others—indeed do deserve access to reliable and affordable financing. Similarly, investors indeed need diversified investment opportunities offered by companies that disclose robust financial data and other material information that would give confidence to investors. Public companies—with their robust financial controls, disclosure requirements, corporate governance structures and regulated public trading venues—provide investment opportunities for investors and all those who want to put aside a portion of their wages to be able to pay for their kids' education or retire in dignity. It is indeed a public policy failure that today investors have—compared to 1997, for example—almost half as few public companies to consider investing in.[7] The Release would exacerbate these challenges, harm investor protection and consequently harm capital formation, and therefore should not be approved.

The solutions proposed in this Release—that of making it easier for private companies to remain private or public companies to go dark—will harm capital formation, and indeed capitalism. Said differently, if the Commission enacts some of the ideas it is proposing in this Release, the US investors will have fewer public companies to invest in, the securities markets will have more companies with illiquid securities, price discovery of all securities will suffer, job

see Better Markets Comment Letter on Amending the "Accredited Investor" Definition (Release Nos. 33–10734; 34-87784; File No. S7–25–19), *available* at https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-amending-accredited-investor-definition. We request both these letters to be incorporated herein by reference and made a part hereof as if set out in full herein.

[6] As an appendix to this letter, we enclose a letter—which we file to be incorporated herein and be made a part hereof as if set out in full herein—co-signed by the author of this letter sent to Chairman Jay Clayton on May 26, 2020 that discusses decisions, including this very Release, the Commission has made in recent years.

[7] 8,000 listed companies versus around 4,000. *See* "Where Have All the Public Companies Gone?" Bloomberg, April 9, 2018, *available* at https://www.bloomberg.com/opinion/articles/2018-04-09/where-have-all-the-u-s-public-companies-gone

destruction and asset-wasting will become even more pronounced, and investor harm will increase. The result of these deregulations would be that more retail investors who cannot fend for themselves will be harmed and lose confidence in the markets and regulators, and withdraw further from such markets, which in turn would harm capital formation and economic vibrancy. And thus, SEC's efforts to facilitate capital formation for a few companies that are failing to attract funding will in fact harm capital formation for the rest of the economy.

The Release suffers from a series of serious shortcomings. Among those are:

- The Commission's own prior actions, rulemakings and exemptive orders have created many of the problems that have led to the shrinking number of public companies and capital formation.

- The Commission offers insufficient evidence showing an actual need for financing. To the contrary, there is evidence that, in fact, there is glut of funding, and that too much money is chasing too few investment-worthy companies. The Commission assumes, without providing data, that deregulation will in fact spur capital formation, and ease viable and growing companies' access to financing.

- The Commission offers no evidence that retail investors who are not accredited investors actually demand or desire to invest in exempt offerings. The Commission also offers no evidence how investors (be they institutional or accredited) currently fare when investing in exempt offerings. Similarly, the Commission—despite its clear mandate of investor protection—fails to show how retail investors would fare if they invest in high-risk and illiquid exempt offerings. Similarly, the Commission fails to show whether any investor, who owns a properly diversified portfolio, would fare better when investing in exempt offerings versus public market-wide low-cost indexes.

- Instead of blindly deregulating further, the Commission should review its own discretionary rules and actions, including many discussed in the Release, that has caused exempt offerings to balloon to the determent of retail investors and public markets.

- The various regulatory constructs that the Commission proposes to change in this Release have served the Commission well for its founding mission of investor protection. Constructs such as:

    - prohibition on general solicitation;
    - temporal limitations on unregistered issuances (the so-called integration doctrine);
    - limits on investments in highly risky products (individual investment limits and income/asset threshold tests in crowdfunding, for example);
    - provision of audited financial statements for issuances of $20 million or more;
    - limiting of testing-the-waters communications and other communications by issuers (or their paid affiliates such as brokers or investment advisers);
    - verification of the investor to ensure accredited status;

have been vital for the SEC to distinguish between those investors who could fend for themselves and do not depend on the government for protection and those investors who lack financial means or sophistications and look to the government for essential protection.

The Proposal would weaken—and in some cases eviscerate—these clear demarcations that have helped the Commission to protect retail investors from being solicited unsuitable and harmful securities. These constructs have helped the Commission to better protect those who need such protection, and has allowed market participants, including broker-dealers, underwriters and companies to more effectively target their solicitations and offerings. The SEC should not tamper with this time-tested and time-proven construct.

If anything, inflation has already caused hundreds of thousands of more investors to qualify as "accredited" investor since the definition was set in law in 1982. This should give concern to the SEC as there may indeed now be tens of thousands of investors who have become qualified as accredited investor solely on the virtue of inflation of their asset prices but who otherwise lack necessary financial sophistication to carefully weigh the risks associated in investing in exempt offerings. These newly-minted accredited investors are often seniors with diminishing mental abilities and other vulnerabilities. The Commission should devote its regulatory attention to the protection of these investors, and not attempt ways to dangerously expose them—or worse, retail investors who do not qualify as accredited—to "investment opportunities" and its misguided effort to spur capital formation.

BRIEF DESCRIPTION OF THE PROPOSAL

The Commission proposes multiple deregulatory measures that could—in unsubstantiated theory—assist companies with supposedly real prospects of growth to access needed funding and increase investment choices for retail investors. While the Release contains other proposals, our letter will focus on the following (discussed and commented on in more detail later in this letter):

1. Recasting the integration doctrine that would replace the current 5-part test with a general principle that would leave it to the discretion of the issuer whether any two or more of its issuances should be integrated. The Proposal would also add four explicit safe harbors that issuers could use in their determination that any two or more issuances should not be integrated. One of these safe harbors would amend the current 6-months waiting period into a 30-day waiting period.

2. Designating "demo days" as *not* engaging in general solicitation which would permit an issuer or an intermediary on behalf of the issuer to solicit interest in its securities from retail investors at a public event or meeting organized by a college, university, or other institution of higher education, a local government, a nonprofit organization (including churches) or an angel investor group, incubator, or accelerator.

3. Drastically increasing the statutorily-set limits of crowdfunding, Regulation A, and Rule 504 under Regulation D. Crowdfunding capital raising limits will increase 5-fold (from current $1.07 million to $5 million); Regulation A Tier 2 will go from $50 million to $75

million, and; Rule 504 under Regulation D will increase from the current $5 million to $10 million. All three of these exempt offerings are currently open—and is proposed to remain open—to retail investors. The Commission is further proposing to remove safeguards placed on individual investors that aim to limit their individual exposure to these exempt offerings.

4. Permitting issuers or their intermediaries to sell unregistered securities to investors who may no longer be accredited investors but have self-certified to the intermediaries or the issuer that they are accredited investors. The Proposal would permit issuers or their intermediaries instead of validating the status of the investor to rely upon the investor's check-the-box assertion.

5. Permitting all issuers to engage in "testing the waters" communications with all investors, including retail investors, prior to the issuance of a registered offering. The Proposal would require that any written testing the waters communications be filed with the Commission, if and when the issuer determines to register the offering.

6. Permitting companies, including foreign companies such as those domesticated in the People's Republic of China, to raise from U.S. investors up to $20 million per issuance without providing audited financial statements. If this proposal and the integration proposal are approved as proposed, this would potentially allow foreign companies to raise hundreds of millions of dollars from U.S. retail investors without providing audited financial statements.

GENERAL COMMENTS APPLICABLE TO THE RELEASE

At the outset, we note that the Commission has failed to discuss much less analyze its own past and ongoing actions that have induced and enabled expansion of private markets, to the detriment of the public markets, public investors, and capital formation. While the SEC bemoans the size and vitality of the public markets, it continues to authorize if not incentivize the expansion of dark private markets, bleeding public investors of opportunities, transparency and accountability, and our economy of needed capital. Any such analysis would almost certainly demonstrate that the dearth of public companies is actually caused by the SEC's own actions. Given that, before taking any action on any of these matters, the SEC must undertake a comprehensive review of its own actions in creating the problems it now suggests solving through this Proposal.

It also noteworthy how much of the Release is based on conjecture and assumptions. The lack of robust data and actual concrete information is glaring and shocking. The Commission simply must undertake a serious data gathering process and answer some fundamental questions:

1. Are high-growth and/or promising companies having difficulties accessing funding?

2. Are retail investors asking for or need access to exempt offerings?

3. Do high-growth and/or promising companies prefer funding from *retail* investors rather than institutional investors, venture funds, and others that are already amply available?

4. If there are indeed some promising companies that cannot access to needed capital to grow, what are the reasons the smart money is shunning them?

5. Why are these promising companies having challenges raising funds from friends and family, angel investors, local and national banks, credit unions, from facilities Small Business Administration sponsors or other federally-backed facilities or state and local government programs?

6. If these high-growth and promising companies and intermediaries that cater to them particularly prefer funding from retail investors, what are the reasons?

7. How do those who invest in exempt offerings fare? Will *retail* investors do better or worse compared to sophisticated investors investing in the same exempt offerings? Will retail investors fare better investing in exempt offerings versus public offerings?

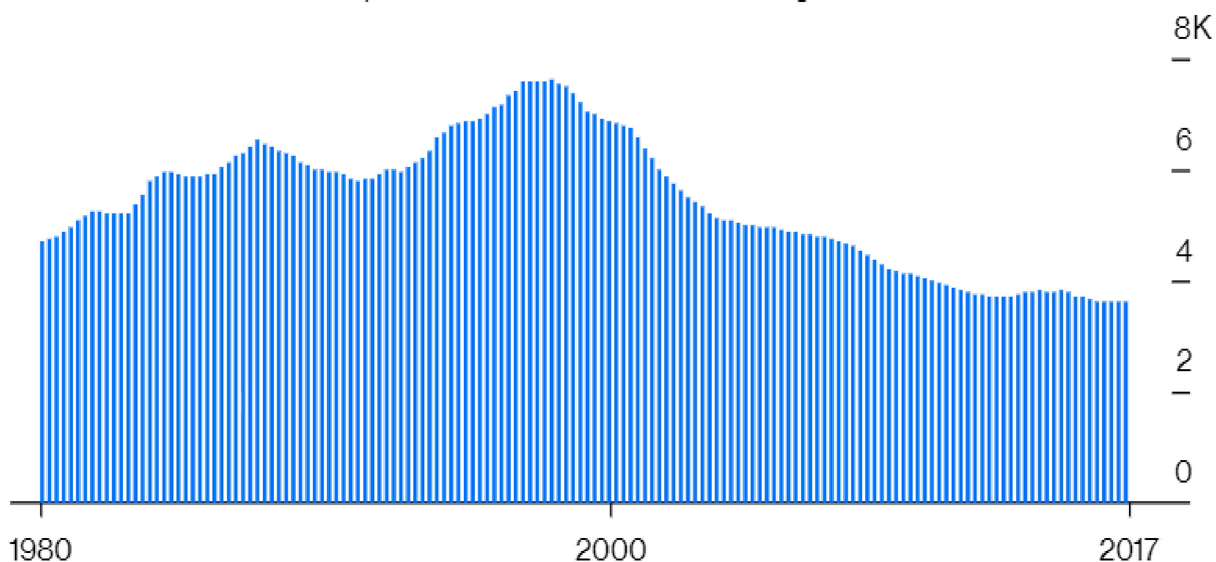
8. What are the causes that contribute to companies' decision to remain private?

9. How could the SEC encourage more companies to become public issuers?

10. Are there appropriate ways to improve the definition of "accredited investor" without unduly exposing investors who cannot adequately protect themselves from harm?

<u>The Shrinking Number Of Public Companies Is A Public Policy Challenge Created By Misguided Congressional And SEC Action.</u>

Companies that stay private or public companies that go dark deprive investors of investment opportunities in liquid and transparent markets. Since the late 1990s, the number of US companies listed on public exchanges has decreased by more than 50%.



Source: Bloomberg.

Public companies have either de-listed or ceased offering registered securities (*i.e.,* "gone dark"), have merged or been acquired into another public of private company, or have gone out of business. An increasing share of new companies, rather than listing through an IPO, have decided to remain private. Experts agree that statutory and regulatory reforms have contributed to the shrinking of the public securities markets, and "have enabled the current trend toward prolonged delays in corporate IPOs."[8] This decline of public capital-raising is "due in large part to the dramatic deregulation of private capital under the securities laws over the last several decades" and therefore, "further deregulating the securities registration regime would only exacerbate the problem."[9]

Not only have the number of public companies shrunk in the past two decades, but the aggregate amount raised through exempt offerings is now double that of registered offerings, showing that those companies that go dark or remain private seem to have no difficulty in raising necessary funding. In 2019, companies raised about $1.2 trillion through registered, public offerings, whereas unregistered, exempt offerings were twice as much, amounting to $2.7.[10] This discrepancy is not new, but it is getting worse.

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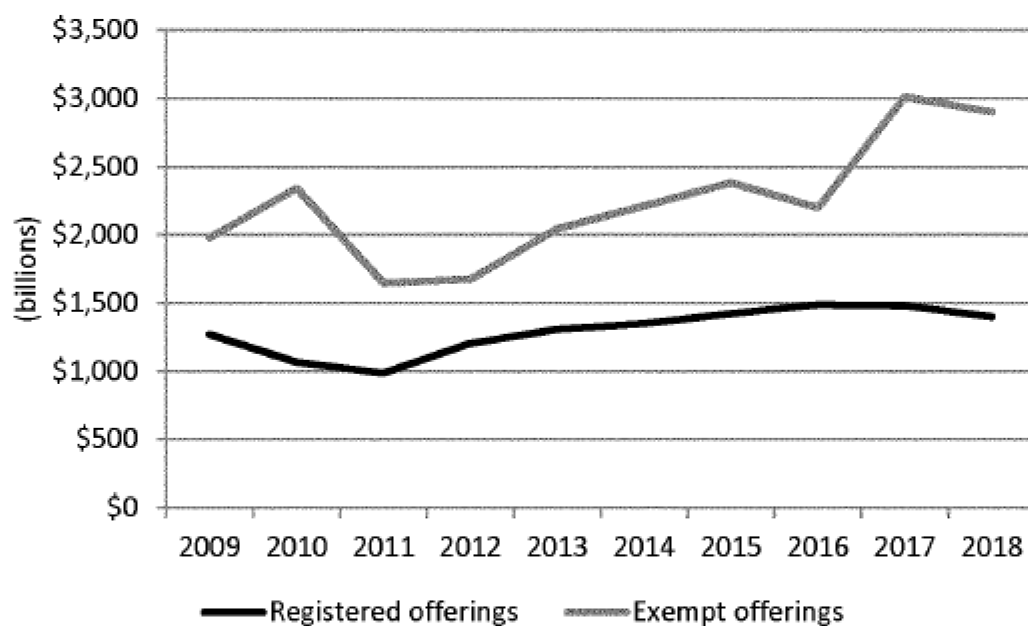
[8] *See* Professor Renee Jones testimony ("Jones Testimony") before House Financial Services Committee, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, "Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment," p.5, September 11, 2019.

[9] *See* Elizabeth de Fontenay testimony ("de Fontenay Testimony") before House Financial Services Committee, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, "Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment," p.2, September 11, 2019.

[10] *See* Release at 17957.



Source[11]

The rapid growth of private funding as shown above can be traced back to misguided Congressional action in the so-called JOBS Act of 2012. Until 2012, growing companies that needed a reliable source of funding had one viable path: that of going public through and IPO. A growing company with $10 million in assets would maintain its growth by increasing the number of shareholders. As this company's number of investors increased, Section 12(g) of the Securities Exchange Act of 1934 would be triggered, which would compel the company to disclose certain material information to its investors if their numbers reached 500 individuals. This disclosure would in turn cause the company to initiate and IPO. This is the path that Google, Microsoft and others took.

As companies prepared for an IPO, they "took steps to ensure they were well-positioned to face the public scrutiny a public offering entailed" and they hired "executives with experience working at publicly traded firms, recruit outside directors with strong reputations, and take steps to clean up conflicts of interest or other unorthodox transactions."[12] But in 2012, Congress raised the 500-individual threshold to 2,000, which, at the stroke of a pen, relieved over 87% of existing companies from the disclosure requirements and permitting them to remain private or go dark.[13]

As such, the "new Section 12(g) has essentially eliminated the prospect of mandatory registration."[14] The result has meant that today's startups and growing companies—especially those that raise their funds through venture capital or exempt offerings—could essentially remain

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[11] *See* Concept Release on Harmonization of Securities Offering Exemptions at 30465, Figure 1.
[12] *See* Jones Testimony, p.2.
[13] *See* Jones Testimony, pp.7-8.
[14] *See* Jones Testimony, p.8.

private forever because investors from venture firms or those who are "accredited investors" do not count towards the 2,000-individual threshold.

Commission Assumes, Without Providing Data, that Deregulation Will in Fact Spur Further Capital Formation, and Ease Viable and Growing Companies' Access to Financing. Instead, Permitting Exempt Offerings to be Sold to Retail Investors May Expose Investors to the Worst of the Worst Companies.

Despite data showing that companies which are viable and investment-worthy have no significant challenge finding and raising necessary funding, the Commission, throughout the Release, seems to suggest that access to capital is still curtailed. The fatal flaw in such a suggestion is that the Commission fails to distinguish between investment-worthy companies and those that have little to no prospect of ever returning a profit for their shareholders or making a product or offering a service that their clients want. It is not unreasonable to assume that "in our current glut of capital, firms that still cannot attract capital from institutional or high-net-worth investors are likely the smallest firms with the very worst prospects, which are wholly unsuitable investments for retail investors."[15]

As discussed above, given the glut of funding[16] available to viable companies (including, historically low levels of interest rates which cause lenders and investors to compete to find viable borrowers/issuers, and the recent COVID-19 related federally-sponsored funding facilities aimed supporting small and medium size companies), companies that have challenges finding investors, and therefore need to resort to soliciting retail investors, would need to have been denied by sophisticated investors and those who know the business or company's executives well.

This means the company would need to be passed by their friends and family, local angel investor groups, local community banks or credit union, national banks, Regulation A+ (which permits companies to raise $50 million a year), venture capital funds, private equity funds, Business Development Companies, strategic acquirers, and other institutional investors. Put another way, all the "smart money" would need to decline such a company for it to make economic sense to undergo the expense of soliciting small-dollar retail investors.

But this also is the strongest signal sophisticated investors send to other market participants, that this company is unacceptably high-risk and investors should stay away.[17] This also means that, unlike in the public markets, where retail investors[18] and institutional investors operate on a relatively level playing field in making investment decisions,[19] in private markets, given the disparate share class structures, retail investors may be "driven into investment structures

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15 *See* de Fontenay Testimony, p.4.

16 *See* also Rick Fleming, Investor Advocate of the SEC, Comment Letter (Investor Advocate Letter), July 11, 2019, *available* at https://www.sec.gov/comments/s7-08-19/s70819-5800855-187067.pdf, p.5.

17 *See* Investor Advocate Letter, p.5.

18 Retail investors are also often aided by third-party analysts and information providers.

19 For example, by assessing a company's value using the market-clearing prices of its security, or having access to the same disclosure documents at the same time.

in which they bear the downside risk of losing their entire principal while their potential for profits is severely restricted."[20]

<u>The Commission Fails to Show Whether Retail Investors Could Afford or Want to Invest in Exempt Offerings or Would Fare Better When Investing in Exempt Offerings Versus Public Markets.</u>

The Commission offers *no evidence* that retail investors who are not accredited investors could afford to invest in exempt offerings. As detailed in the SEC Investor Advocate's letter, "companies may not be able to raise a lot of money from retail investors who do not already meet the definition of accredited investor" since "the top 10% of U.S. households by net worth—a segment of the population that would include most accredited investors—hold 77.1 percent of the wealth in this country."[21] The Investor Advocate further documents that "when one looks beyond that top decile of households, the likelihood of stock ownership falls off dramatically. Even more remote is the likelihood that a household would have a portfolio of securities that is large enough for a financial professional to reasonably recommend the purchase of securities that are exempt from registration."[22]

Finally, given Federal Reserve's data that the bottom 50% of American households hold less than $10,000 in financial assets[23] and that median brokerage account balance of all U.S. investors is only $6,200,[24] it is reasonable to assume that retail investors—who are not ill-served by their investment professionals or defrauded to by struggling companies—would not prefer to invest their precious savings into illiquid and high-risk exempt offerings. They simply cannot afford to do it, and any broker who recommends such unsuitable investments would likely violate even the very weak new Regulation Best Interest rules.

There is also *little evidence* showing that retail investors actually want to invest in exempt offerings. The experience with Regulations A+ and Crowdfunding is the strongest signal that retail investors are sending that, in fact, they do not care for exempt offerings. As detailed in the Investor Advocate's letter, "both of these [Reg A and Reg Crowdfunding] exemptions were explicitly designed to allow companies to offer their securities to non-accredited investors…[O]f the completed offerings under Regulation Crowdfunding, the average amount raised was $208,300, well below the $577,385 maximum that was sought in the average offering."[25] Given that early-stage companies have much higher rates of failure, and the fact that retail investors (given the dearth of their investable funds) cannot adequately diversify among high-risk firms—like venture capital and private equity investors are able to do—it is only reasonable to expect that rational retail investors would not flock to exempt offerings.

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[20] *See* Investor Advocate Letter, p.5; *see* also, de Fontenay Testimony, p.15, "expect retail investors to fall to the bottom of the heap in the private markets, behind the enormous amount of 'smart money.'"

[21] *See* Investor Advocate Letter, p.2.

[22] *See* Investor Advocate Letter, p.2.

[23] *See* Board of Governors of the Federal Reserve System, 2016 SCF Chartbook, https://www.federalreserve.gov/econres/files/BulletinCharts.pdf, at 145.

[24] *See* Brokerage Accounts in the United States, Advanced Analytical Consulting Group and Deloitte, November 30, 2015, available at https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/retirement/brokerage-accountsin-the-us.pdf.

[25] *See* Investor Advocate Letter, p.5.

The Commission also offers *no evidence* how investors (be they institutional, accredited or non-accredited) currently fare when investing in exempt offerings. In fact, given by their very nature of unregistered offerings, the Commission admits that it lacks evidence about their performance.[26] In the Concept Release preceding this Proposal, the Commission makes the following startling admission regarding its total lack of evidence of investor benefits:

> It is difficult to perform a comprehensive market-wide analysis of investor gains and losses in exempt offerings given the significant limitations on the availability of data about the performance of these investments. Where partial data is available for some types of investments in exempt offerings, it does not lend itself to a comprehensive estimate of investment performance and risks across the entire market of exempt offerings. A typical startup issuer may require a long period of time to experience a liquidity event or close its business, and we lack comprehensive data on such events and associated investor gains and losses. The lack of a secondary trading market for many securities issued in exempt offerings further limits our ability to examine investor gains and losses.[27]

Nothing else in this current Release attempts to answer the fundamental question we posed at the outset of this letter: Given the SEC's mandate of investor protection, how will investors fare when they invest in exempt offerings? These offerings have scant information about the issuer and the securities themselves—to the extent they can even be traded—are very illiquid. Finally, retail investors would be at a disadvantage compared to deep-pocketed and sophisticated investors who have ability and leverage to gain more information. This informational asymmetry would mean that when a company issuing the exempt offering is in trouble, the sophisticated investors would be able to detect it (or know) sooner and liquidate sooner, leaving the retail investors further disadvantaged.

Throughout the Release, the Commission seems to be suggesting that supposedly retail investors are missing out on high-growth companies that only offer exempt securities. But as Professor de Fontenay has shown, these claims are based "more on faith than evidence," and that "available research suggest that retail investors would do materially worse on average in the private markets than in the public markets."[28] At a bare minimum, the SEC must—before promulgating any rule that would expose retail, unaccredited investors to exempt offerings—definitively know that retail investors, given their financial and other limitations, would in fact do better when investing in exempt offerings versus what they could achieve, for example, by investing in the public markets or low-cost market index funds.

<u>Commission Should Repeal Exemptions And Cease Further Deregulation Which Has Harmed The Vibrancy Of Public Markets And Reduced Number Of Public Companies.</u>

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[26] *See* Release at 18004, fn.372.
[27] *See* Concept Release on Harmonization of Securities Offering Exemptions at 30468, fn. 53.
[28] *See* de Fontenay Testimony, p.4.

Instead of deregulating further or contemplating policy revisions that would further expose retail investors with limited wherewithal to withstand financial loss to financial risk, the SEC should seek ways to encourage, and if necessary, compel companies with significant assets and growth-potential to go public. Increasing the number of listed companies is the only way to offer retail investors genuine investment opportunities in a manner that provides them with the minimal protections that an investor protection agency should demand. To do this, the SEC must reduce the number of exemptions available to companies, and not contemplate making it even easier for companies to remain private.

COMMENTS ON SPECIFIC PROPOSALS

Commission's Use Of Section 28 Exemptive Authority To Raise The Monetary Limits In Crowdfunding, Regulation A, And Rule 504 Under Regulation D Is Inappropriate, Contrary To Congress's Express Legislation And Intent, And Would Harm Investors. The Commission's Interpretation Of Its Exemptive Authority Would Allow It To Assume The Role Of A Legislator And Re-Write Any Law Through Rulemaking.

The Commission, solely citing its Section 28 exemptive authority[29]—is proposing to raise the investing and offering limits in Crowdfunding, Regulation A, and Rule 504 under Regulation D. Crowdfunding capital raising limits will increase 5-fold (from current $1.07 million to $5 million); Regulation A Tier 2 will go from $50 million to $75 million, and; Rule 504 under Regulation D will increase from the current $5 million to $10 million. All three of these exempt offerings are currently open—and is proposed to remain open—to retail investors. The Commission is further proposing to remove safeguards placed on individual investors that aim to limit their individual exposure to these exempt offerings. The SEC refers to multiple comments that they received from the Concept Release requesting that the Commission amend the thresholds. The Commission argues that higher monetary limits increase private companies access to capital at a lower marginal cost. By increasing different investment and offering limits, the SEC believes that this increased capital will increase the vitality of the market. The Commission believes that increased monetary limits will benefit both investor and issuer by giving them more capital to invest/issue.[30]

We oppose all of these changes for the same reason detailed below.

As a threshold matter, the Commission lacks the requisite authority to finalize this Proposal, and the Release makes little effort to demonstrate the existence of any such authority. Take crowdfunding offering and investing levels, for example. In 2012, Congress created a clearly defined the crowdfunding exemptions by setting a fund-raising limit of $1 million, and setting certain income and asset thresholds, which in turn determine the maximum allowable investment levels for each investor. Congress also created a mechanism for the Commission to periodically raise some of these thresholds to account for inflation. Congress did not grant any further authority anywhere in the JOBS Act. Now the Commission, citing its Section 28 general exemptive authority, is proposing to permanently expand these thresholds, by rule, to levels that utterly change the character of the exemptions.

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[29] *See* Release at 17994.

[30] *See* Release at 17994-5 and *also* 18021-3.

The Release offers no analysis of the legal authority that would justify this extraordinary exercise of regulatory power. Certainly, the JOBS Act itself provides none. There, Congress created a limited exemption from the normal regulatory construct governing registration and the offer and sale of crowdfunding securities, for the benefit of a defined class of issuers and investors. The legislative history shows that Congress considered, debated different thresholds, and eventually settled on the ones included in the enacted JOBS Act. As to anticipate some modifications to the thresholds, Congress also create a specific mechanism for the Commission to use to raise the thresholds to account for inflationary pressures. Congress granted no further authority to the Commission.

The Commission offers a single, one-line paragraph titled "B. Legal Basis," which simply lists the sections of the Securities Act and the Investment Company Act pursuant to which the Commission is proposing the amendments. However, they are not persuasive grounds on which to base such a sweeping regulatory exemption. For example, Section 19(a) titled "Special Powers of the Commission" confers upon the Commission the authority to make rules necessary to carry out the provisions of the subchapter, "including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms in this subchapter." Clearly, however, this section does not confer an exemptive authority, and is in fact aimed at authorizing rules necessary to carry out—not rewrite—the statute.

Section 28 of the Securities Act, also cited in the "Legal Basis" portion of the Release, is certainly a general grant of exemptive authority, but even it has its limits. It allows for the exemption of "persons" or "classes of persons" from the provisions of the subchapter, but in this case, the Commission is proposing to exempt all issuers from the statutorily set crowdfunding limits and exempts all investors—not just a subset—to invest according to these newly created thresholds.

Under no reasonable interpretation of the JOBS Act or the Commission's Section 28 general exemptive authority would anyone agree that the Commission has the authority to re-write a standing provision of a law. The law clearly states that crowdfunding limits are to be $1 million for a 12-month period—a monetary threshold that could only be adjusted to account for inflation. If the Commission usurps the authority to re-write the law in this instance, then it can do so for all other instances. That would put the Commission in the seat of a legislator. The Commission's duty is to interpret, enact, and enforce the law passed by Congress and signed by the President, not re-write it to its liking.

<u>The So-Called "Demo Days" Would Significantly Weaken Appropriate Prohibitions Against General Solicitation And Increase The Risk Of Affinity Fraud, Both Would Harm Investors.</u>

The SEC is proposing Rule 148, which would state that particular "Demo Day" communications to and solicitations from retail investors do not fall under general solicitation. In the Proposal, an issuer would not have partaken in general solicitation if the communications occur during a "seminar or meeting by a college, university, or other institution of higher education, a

local government, a nonprofit organization, or an angel investor group, incubator, or accelerator sponsoring the seminar or meeting."[31] The SEC argues that this will benefit companies who have had difficulty getting access to the capital that they need because it allows them to reach a larger audience. The Commission believes that these "Demo Days" provides both investors and issuers the ability to increase investments and offerings.

We oppose these changes.

Permitting essentially any social group or institution to organize "demo days" and allow issuers or their affiliates to advertise the existence of that "demo day" in advance of the meeting, and permit the issuer or an affiliated intermediary to solicit interest from unlimited number of retail investors about both unregistered and potentially-to-be-registered securities offering is an end-around of the prohibition on general solicitation. If there are essentially no restrictions on advertising the existence of the presentations, and no restrictions on who could conduct the presentations, and no restrictions on who could participate in the presentations, then this is—in our view—constitutes a general solicitation.

We further believe permitting issuers to engage in solicitations at meetings organized by various social or religious groups would increase the risk of affinity fraud. It is at these kinds of settings where the organizers take advantage of their ties to investors and facilitate fraudulent or unsuitable investment decisions.

Finally, we believe permitting issuers or their trade associations, such as local Chambers of Commerce, to cause the organizing of demo days by local governments would increase the risk of pay-to-play corruption, where the issuer, its affiliated intermediary, or the trade association would promise (explicitly or not) to contribute political campaign contribution in return for demo days.

Discontinuing The Provision Of Audited Financial Statements For Certain Reg D Offering Would Allow Companies That Already Have Questionable Accounting Practices To Raise Hundreds Of Millions From Us Retail Investors Without Providing Audited Financial Statements.

The SEC is proposing amendments to the financial statement requirements that are in Regulation D offerings. The proposals would permit companies, including foreign companies such as those domesticated in the People's Republic of China, to raise from U.S. investors up to $20 million per issuance without providing audited financial statements. If this proposal and the integration proposal are approved as proposed, this would potentially allow foreign companies to raise hundreds of millions of dollars from U.S. retail investors without providing audited financial statements. Current rules on these Regulation D offerings require issuers to provide certain financial, including audited financial statements, and non-financial statements to non-accredited investors. Issuers must provide this information in a timely manner, allowing time for investors to ask questions. The Commission believes that these differences can be confusing and cumbersome for issuers. The requirements force issuers in Regulation D to provide different types of statements that are more costly and time consuming to produce. The SEC believes that by

[31] *See* Release 17974

aligning Regulation D with Reg A, issuers will be more open to non-accredited investors, increase the investment opportunities for retail investors.

We oppose these changes.

The Proposal would allow foreign companies—including companies domesticated in the People's Republic of China—to raise potentially hundreds of millions a year from U.S. retail investors without providing audited financial statements. The Commission and U.S. investors are already facing seemingly unsurmountable difficulties in accessing reliable financial information from foreign companies, particularly those based in China. This Proposal would further exacerbate that challenge and be harmful to U.S. investors.

Providing an audited financial statements for the benefit of investors and other market participants by an issuer that could potentially raise hundreds of millions a year in unregistered offerings is not overly burdensome. Additionally, that information allows for a modicum of confidence among investors who can rely on the independent review and opinions of financial auditors. These audited financial statements enable investors to protect themselves and increases the confidence of market participants in the unregistered offerings generally.

<u>Investor Status Verification Would Allow Issuers To Raise Money From Investors That Have Lost Their Accredited Status Due To Changes In Income Or Asset Depreciation.</u>

The Commission is proposing to add an item to Rule 506(c) which would allow companies to not verify an accredited investor's status if the accredited investor had been verified in the past by the issuer or an intermediary and if the investor asserts that they remain accredited. This self-assertion could be a check-the-box input. If an issuer is not aware of new information, the issuer or its intermediary can use the past accredited investor verification to continue offering securities to the same investor. The Commission states that this will relieve issuers of the extra costs and burdens, especially when partaking in multiple offerings. They also believe that this will help protect investors because they will not have to continually submit private financial information.

We oppose this change.

The supposed need to provide issuers or their intermediaries with flexibility tailored to specific facts and circumstances is not supported with any specific data or analysis in the Release. And in fact, there is no persuasive reason why requiring the validation of the investor status is burdensome. We are not aware of any evidence—and none is offered in the Release—that the current investor status validation rule under SEC Rule 506(c) for Regulation D is in need of fixing. Given this sensible and workable verification mechanism available to the Commission, and the industry practices that have comfortably adapted to these requirements, it is unacceptable that the Commission would not require that issuers or persons acting on their behalf that choose to offer unregistered securities to investors to validate the status of the investor in accordance with minimum guidelines and standards.

The Commission has also failed to strike the right balance between the speculated burden on issuers versus the very real threat that the wrong type of investor may become subject to

offerings of unregistered securities. While it may be sensible from a regulatory perspective not to hold an issuer liable when they are being actively lied to by an overzealous investor who is willing to falsify his or her way into an investment offering, it is much easier to see countless other scenarios where an investor is confused into signing a self-certification form that follows an incomprehensible fine-print on a webpage. Given the intent to maximize participation and returns, it is only reasonable to expect that issuers and persons acting on their behalf (like underwriters, promoters, and unscrupulous or incompetent brokers), especially issuers of risky investments like penny stocks and certain asset-backed securities, will design mechanisms that maximize self-certification. As the Commission is all too familiar, these types of materials too often contain hype, wildly optimistic prognoses about the prospects of the issuer, and in many cases attempt to inappropriately condition the investor so that he or she becomes less critical of the issuer and/or the risks associated with investing in the offered security.

<u>The Commission Lacks The Authority To Expand Testing The Waters Communications Provisions. Permitting Testing-the-Waters Would Allow Issuers—And Those Paid By Issuers—To Detrimentally Condition Investors Against Risks Of Investment Loss.</u>

The Commission is proposing to permit all issuers to test-the-water orally and in writing. By allowing issuers to test-the-waters, they can gain valuable market information that will benefit their future offerings. The SEC also believes that testing the waters benefits the investor as well, because they can have input on the offering structure and "be able to convey to the issuer the types of information about which they are most interested."[32] The SEC believes that these benefits will help the issuer by lowering the cost of capital.

We oppose these Proposals.

As a threshold matter, it does not appear that the Commission has the requisite authority to finalize the Proposal, and the Release makes little effort to demonstrate the existence of any such authority. Section 5(c) of the Securities Act has long prohibited issuers or persons affiliated with issuers from making written or oral offers of securities prior to the filing of a registration statement with the SEC. In 2012, Congress created a clearly defined exemption for the benefit of EGCs who seek to engage in TTW communications with QIBs and IAIs. Now the Commission proposes to permanently expand that exception, by rule, to cover any and all issuers for any and all investors. The Release offers no analysis of the legal authority that would justify this extraordinary exercise of regulatory power. Certainly, the JOBS Act itself provides none. There, Congress created a limited exemption from the normal prohibitions governing the offer and sale of securities, for the benefit of a defined class of issuers, the EGCs.

Section 5(d) provides that EGCs may engage in oral or written communications with certain potential investors, notwithstanding the broad prohibition in Section 5(c). However, Congress chose not to extend this exemption beyond EGCs. Moreover, it conspicuously omitted any language in Section 5(d) granting the Commission the authority to later expand upon the exemption through rules that the agency might deem necessary or appropriate in the public interest.

[32] *See* Release 17978

Similar to the matter on raising crowdfunding thresholds discussed above, the Release offers a single, one-line paragraph titled "B. Legal Basis," which simply lists the sections of the Securities Act and the Investment Company Act pursuant to which the Commission is proposing the amendments. However, they are not persuasive grounds on which to base such a sweeping regulatory exemption. For example, Section 19(a) titled "Special Powers of the Commission" confers upon the Commission the authority to make rules necessary to carry out the provisions of the subchapter, "including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms in this subchapter." Clearly, however, this section does not confer an exemptive authority, and is in fact aimed at authorizing rules necessary to carry out—not rewrite—the statute. Neither does Section 28 of the Securities Act, also cited in the "Legal Basis" portion of the Release.

As discussed above in reference to raising monetary and income thresholds for certain exempt offerings, Congress's general grant of the SEC's exemptive authority has its limits. It allows for the exemption of "persons" or "classes of persons" from the provisions of the subchapter, but in this case, the Commission is proposing to exempt all issuers seeking to engage in testing the waters communications with all investors, not just a subset. At a minimum, the Commission has an obligation to more fully identify and explain the legal authority it contends allows it to effect such a broad amendment to the statute.

As a general proposition, we agree with the Commission that large, sophisticated investors commanding hundreds of millions of dollars in investable assets have the wherewithal to understand complex financial products and their specific risks and can sustain investment losses should their understanding of and confidence in their investments not materialize. But the Commission's primary mission and duty is to protect investors. Therefore, any such changes must be crafted to ensure that they will not compromise investor protection. One of the important investor protection safeguards in this case is the strict limitation on the type of investors that could be subject to testing the waters communications.

Permitting blank check, penny stock issuers, asset-backed securitizers, leveraged business development companies, and certain investment companies to engage in TTW communications with non-sophisticated investors using materials that hype, inappropriately condition (making them less critical in their analysis of the eventual offering), or worse, mislead investors would be a dereliction of SEC's duty of investor protection. The SEC must vigilantly prevent capital raising mechanisms designed for sophisticated investors from being used and abused to attract and dupe retail or other investors who lack the means and sophistication to bear the financial harm that could arise out of such investment "decisions." The SEC must not engage in efforts that would weaken critical investor protection safeguards built through decades of painful lessons and financial calamities that have befallen vulnerable Americans.

Diluting Integration Doctrine Would Enable Continuous Offering Of Unregistered Securities To Financially Unsophisticated Investors, And Would Detrimentally Condition Them Against Risks Associated With Unregistered Securities.

The Commission is proposing a general principle of integration that will simplify the current integration framework. The Proposal states that, "The general principle of

integration…would apply to all offers and sales of securities not covered by one of the four safe harbors…Specifically, our proposed general principle of integration provides that offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering."[33] The Commission also proposed four, non-exclusive safe harbors that issuers could use to determine whether two or more of their issuance should be integrated. One of these safe harbors would amend a current safe harbor that forces integration if two or more issuances are within 180 days. The Proposal would cut that waiting period to 30 days. The Commission believes that changes these safe harbors will reduce the uncertainty and increase the confidence of issuers when planning their capital raising options.

We oppose these changes.

As proposed, this would allow companies to continuously raise needed capital *ad infinitum* without providing information to the growing number of investors at various levels of sophistications. This would short-circuit the integration doctrine, which is designed to prohibit evasion of registration requirements. This change alone would mean hundreds of companies would never have the pursue an IPO and hundreds more deciding to "go dark" and begin offering unregistered securities, instead of registered. These outcomes would harm capital formation and investor protection, as investors and other market participants would have fewer choices of viable companies to invest in and lesser information to make informed investment decisions.

CONCLUSION

We hope our comments are helpful. We emphasize that retail investors are not clamoring for exempt offerings, that there is in fact a glut of funding available for high-growth and promising companies, and that those companies who are passed by various sophisticated investors and banks should not gain access to solicit unsophisticated investors. Moreover, the Commission's shocking lack of evidence or even information—separate and apart from assumptions and conjecture—dictates that it should not take any action regarding these matters until it and the public can conclude by clear evidence that retail investors will not be harmed by such actions and that indeed their cumulative effect would indeed facilitate socially-useful capital formation.

Sincerely,

Lev Bagramian
Senior Securities Policy Advisor

33 *See* Release 17965

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May 26, 2020

Hon. Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20002

Via electronic delivery

Re: Corporate Transparency and Accountability and the Coronavirus Pandemic
Comments on Selected Rulemakings (Appendix)

Dear Chairman Clayton:

America is in crisis. The raging coronavirus pandemic has infected more than 1.6 million Americans and killed nearly 100,000 to date.[1] The health crisis has also caused a unprecedented economic shutdown that threw more than 20 million Americans out of work in April alone.[2] Unemployment is predicted to remain above 10 percent through the end of 2021, long after social distancing measures have ended.[3] Making this crisis worse are the decades of economic and financial regulatory policies that have stripped workers and investors of information and rights, while allowing anti-competitive and abusive corporate practices to flourish.

The Securities and Exchange Commission (SEC or Commission) is operating in a profoundly different world than that which existed just a few months ago. However, rather than taking stock of how the world and capital markets have fundamentally changed since February, the Commission seems to be acting as if little has happened. This is a mistake.

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[1] The COVID Tracking Project, available at https://covidtracking.com/data/us-daily (last accessed May 25, 2020).
[2] Jerome H. Powell, Opening Remarks, At "A Fed Listens Event: How Is COVID-19 Affecting Your Community?," sponsored by the Board of Governors of the Federal Reserve System, Washington, D.C. (May 21, 2020), https://www.federalreserve.gov/newsevents/speech/powell20200521a.htm (noting this is "a downturn without modern precedent.").
[3] Phil Swagel, *CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, Congressional Budget Office, Apr. 24, 2020, *available at* https://www.cbo.gov/publication/56335; see also Jacob Leibenluft and Andres Vinelli, "The Trump Administration's Handling of Coronavirus Threatens a Long Unemployment Crisis," Center for American Progress, May 7, 2020, *available at* https://www.americanprogress.org/issues/economy/news/2020/05/07/484795/trump-administrations-handling-coronavirus-threatens-long-unemployment-crisis/.

If anything, the extraordinary shocks and interventions arising from the coronavirus crisis have demonstrated that U.S. capital markets need more, not less market transparency and accountability. Investors and the public are demanding the ability to scrutinize corporations and their management, as they and other stakeholders rightly need to know which firms are receiving trillions of dollars of Federal support, how they are spending it, whether workers are getting the monies intended for the survival of their households, and whether companies remain susceptible to future waves of the pandemic, future lockdowns, and other economic shocks.[4]

Moreover, the pandemic makes it more difficult for the agency to solicit, and for interested parties to provide, input. This on its own justifies slowing down and freezing many rulemakings.[5] More importantly, the new circumstances that are still developing must be taken into account as the Commission and staff develop reforms. The epidemic is shaking every part of the capital markets to their core—many capital markets have frozen or required emergency government loans or liquidity, established businesses have sought emergency funding, and businesses from start-ups to public companies have shed businesses and terminated thousands of employees. Far more needs to be done to understand which capital markets are functioning, which are fundamentally unstable, and what regulatory remedies are required. The data simply does not support sweeping deregulation under these circumstances.

We urge the SEC to reverse course. Instead of undermining the working families and retirees whose investment nest egg has only shrunk further in recent weeks, the SEC should be taking regulatory actions to protect those workers and investors, promote sustainable corporate practices, and promote competition. This would include immediately taking action to promote corporate transparency, enhance investor rights, enforce the rule of law, and promote competition.

To achieve these objectives, the Commission should:

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[4] See Marc Jarsulic and Gregg Gelzinis, *Making the Fed Rescue Serve Everyone in the Aftermath of the Coronavirus Pandemic*, Center for American Progress, May 14, 2020, *available at* https://www.americanprogress.org/issues/economy/news/2020/05/14/484951/making-fed-rescue-serve-everyone-aftermath-coronavirus-pandemic/; Better Markets, *Better Markets Applauds Federal Reserve's Announced Commitment for CARES Act Program Transparency*, Apr. 23, 2020, *available at* https://bettermarkets.com/newsroom/better-markets-applauds-federal-reserve%E2%80%99s-announced-commitment-cares-act-program; Marc Jarsulic and David Madland, *Industry and Firm Bailouts Amid the Coronavirus Pandemic*, Center for American Progress, Mar. 18, 2020, *available at* https://www.americanprogress.org/issues/economy/news/2020/03/18/481945/industry-firm-bailouts-amid-coronavirus-pandemic/. On regulatory actions, see Better Markets, "Tracker of Regulatory Agencies Coronavirus Emergency Responses," *available at* https://www.bettermarkets-tracer.org/ (last accessed May 2020).

[5] This doubly goes for public interest groups, who cannot employ an army of lobbyists to address the never-ending series of matters emerging in this crisis as well as on-going "ordinary" rulemakings.

(1) Reduce—not expand—exemptions to public offering rules to ensure capital is allocated in brightly lit U.S. public markets;
(2) expand—not undermine—disclosures that protect investors, workers, taxpayers, and other corporate stakeholders; and
(3) lower—not raise—barriers to the exercise of corporate suffrage.

<u>Background and the Importance of Disclosure and Accountability in the Public Markets</u>

For decades, the federal securities laws ensured that investors had essential information about the companies in which they might invest, as well as the power to take actions based on what they learned. The justification was simple: as the Commission explains on its website:

> Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.
>
> The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy.[6]

We agree.[7] Congress came to the same conclusion nearly 90 years ago, when it adopted the federal securities laws.

> Whatever may be the full catalogue of the forces that brought to pass the present depression, not least among these has been this wanton misdirection of the capital resources of the Nation … The bill closes the channels of such commerce to security issuers unless and until a full disclosure of the character of such securities has been made.[8]

Unfortunately, this bedrock principle underpinning the securities laws and the Commission's own existence is under attack. Sweeping deregulation has resulted in companies no longer needing to tell the public basic information about themselves in order to raise billions of dollars. From the 1930s through the 1970s, strict Commission rules required nearly all offerings of securities to be registered. Beginning in the early 1980s, however, holes began to be poked in this regime. Those holes—the exemptions and exceptions—have now overwhelmed the

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[6] U.S. Securities & Exchange Commission, What We Do, *available at* https://www.sec.gov/Article/whatwedo.html.
[7] See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2019, *available at* https://healthymarkets.org/wp-content/uploads/2019/09/SEC-Concept-Release-9-30-19-1.pdf; see also Andy Green, *Opinion: Could the SEC secretly abolish investors' right to sue?*, MarketWatch, Mar. 2, 2019, *available at* https://www.marketwatch.com/story/could-the-sec-secretly-abolish-investors-right-to-sue-2018-03-02#false.
[8] H. Rep. 73-85 (1933), at 2-3.

general rule. In fact, by 2019, nearly 70 percent of capital was raised outside of the SEC's public registration and disclosure regime.[9] To put it mildly, the "channels of commerce" are clearly not "closed" to companies selling securities without "full disclosure."

To the contrary, along with unprecedented volumes of exempt offerings, we've seen a slew of "private" trading venues emerge,[10] some of which extract enormous costs from investors[11] and provide exceedingly little information to them. "Private" securities offerings and any subsequent trading in these increasingly large and numerous companies lack much of the essential information and many of the investor protections that have been hallmarks of U.S. capital markets since the 1930s.[12] Without robust information and accountability, companies have engaged in a myriad of troubling practices, ranging from taking dubious financial risks, to inappropriately compensating senior executives, to putting workers at risk.[13] Just about every aspect of the market is less efficient too, featuring exacerbated agency costs, elevated risks (including trading costs, valuation risks, and market risks),[14] and more fertile ground for fraud

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[9] *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, SEC, 85 Fed. Reg. 17956, 17957 (Mar. 31, 2020). Notably, even the SEC is forced to estimate the totals because the SEC's record-keeping and disclosure requirements regarding such offerings are so lax. See, id., n.12. This has given rise to calls by investor advocates and the North American Securities Administrators Association for the Commission to impose significantly enhanced disclosures on parties relying on offering exemptions and for enhanced data collection by the agency itself. See, e.g., Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment, Hearing before the Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, 116th Cong. (2019) (Testimony of Michael Pieciak) *available at* https://www.nasaa.org/wp-content/uploads/2019/09/NASAA-Written-Testimony-HFSC-IPECM-Commissioner-Michael-Pieciak.pdf.

[10] See, e.g., Miles Kruppa, *Carta plans private share trading platform to rival Nasdaq*, Financial Times, May 10, 2020, *available at* https://www.ft.com/content/d52b0487-b13c-4bae-bf27-770518ff083d (quoting Carta CEO Henry Ward saying "If CartaX wins, in 10 years there won't be a NYSE or a Nasdaq."); see also, Alexander Osipovich, *High-Speed Trader GTS to Create Online Market for Pre-IPO Shares*, Wall St. J., Apr. 22, 2020, *available at* https://www.wsj.com/articles/high-speed-trader-gts-to-create-online-market-for-pre-ipo-shares-11587555001.

[11] See, e.g., EquityZen, Frequently Asked Question, *available at* https://equityzen.com/faq/?utm_source=google&utm_medium=ad&utm_campaign=888752132&utm_term=sitelink&utm_content=none&gclid=EAIaIQobChMIyfLIqf296QIVFaSzCh3h_w4ZEAAYASACEgLHFvD_BwE (reflecting five percent transaction fees per side per trade, plus potential ongoing fees).

[12] *Concept Release on Harmonization of Securities Offerings*, SEC, Sec. Act Rel. No. 33-10649, at 33, Jun. 18, 2019 (stating "Issuers in [Rule 506] offerings are not required to provide any substantive disclosure and are permitted to sell securities to an unlimited number of accredited investors with no limit on the amount of money that can be raised from each investor or in total.").

[13] Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online (2017), *available at* https://scholarship.law.upenn.edu/penn_law_review_online/vol166/iss1/9.

[14] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2019, *available at* https://healthymarkets.org/wp-content/uploads/2019/09/SEC-Concept-Release-9-30-19-1.pdf.

and manipulation.[15] These unavoidable realities negatively impact far more than just investors, but also business partners, competitors, workers, and more.[16]

Indeed, the recent crisis has starkly illustrated the profound risks to workers, companies, and the economy from the rapid expansion of private markets. As a recent statement recognizes, investors, taxpayers, and other stakeholders in America's companies need to know how companies are navigating the crises, including their use of various governmental assistance programs.[17] These disclosures are essential to effective oversight—in corporate governance matters, in labor-management relations, and in broader public policy areas. And we have already seen disclosure work as intended. Once some public companies began disclosing their receipt of federal assistance, for example, there was an immediate public outcry, the terms of the programs were revised, and companies were advised to give funds back to the government.

Yet with far too many large companies no longer in the public markets, this critical oversight protection is lost. Investors in private companies, their workers, their business partners, and even their government may lack this essential information.

For example, without company-mandated disclosures, the public may never know the true scope of the Federal Reserve System's bailout of oil and gas companies, and if aide has wrongfully flowed to undeserving hands.[18] The negative impacts extend not only to the carbon-related financial stability risk that the Federal Reserve itself is now financing—one which needs full transparency across the Fed's portfolio—but also the efficient allocation of capital.[19] The Fed is using its resources to support the finances of some companies, and not others, with implications on those companies' investors, employees, business partners and more. Are these choices being made wisely? Without transparency and accountability, the public's trust in business and government is undermined.

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[15] Verity Winship, *Private Company Fraud*, University of Illinois College of Law, 2020, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538499. *See also* Elizabeth Pollman, *Private Company Lies*, 109 Geo. L.J. __ (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551565.

[16] Urska Velikonja, *The Cost of Securities Fraud*, 54 William & Mary Law Review 1887–1957 (2013), *available at* https://scholarship.law.wm.edu/wmlr/vol54/iss6/4/.

[17] Statement of Jay Clayton and William Hinman, *The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19*, SEC, Apr. 8, 2020, *available at* https://www.sec.gov/news/public-statement/statement-clayton-hinman.

[18] See Victoria Guida and Zack Colman, *Fed's expansion of lending program sparks oil bailout worries*, Politico, Apr. 30, 2020, *available at* https://www.politico.com/news/2020/04/30/feds-expansion-of-lending-program-sparks-oil-bailout-worries-227545.

[19] Important questions have been raised too about the SEC's role in inflating oil and gas company balance sheets. See Mark K. DeSantis, *How Cheap Federal Leases Benefit Oil and Gas Companies*, Center for American Progress, August 29, 2018, *available at* https://www.americanprogress.org/issues/green/reports/2018/08/29/455138/cheap-federal-leases-benefit-oil-gas-companies/.

Concerns for investors and the public that are multiplying in this crisis are not confined to COVID-19. Twice over the past dozen years, corporate America has demanded and received trillion-dollar taxpayer-backed bailouts. With climate change a systemic risk to the financial system, it is essential to that ensure investors and the public are better prepared to address economic shocks.[20] The SEC must do things differently.

The Commission needs to restore public capital markets to help address these challenges.

<u>The SEC Is Moving In the Wrong Direction</u>

The Commission's numerous recent deregulatory actions have and will (1) reduce the requirements for companies to make disclosures, and (2) reduce the ability of investors to act based on that information. These actions do not protect investors, maintain fair, orderly, and efficient markets, facilitate capital formation, or serve the broader public interest. Instead, they will do the opposite.

We wish to highlight several examples in which the Commission should change direction.

Eroding the Public Company Regulatory Framework

The SEC and Congress, in various measures since the 1980s, have engaged in successive rounds of deregulation attacking the public company regulatory framework.[21] As noted above, the impact of these changes has been enormous, dramatically undermining the scope of the public markets and replacing them with "private" securities markets.

Against this already troubling backdrop, the agency has proposed its most sweeping reforms to its public company regulatory framework in decades. The Commission's June 2019 Concept

[20] Gregg Gelzinis and Graham Steele, *Climate Change Threatens the Financial System*, Center for American Progress, Nov. 21, 2019, *available at* https://www.americanprogress.org/issues/economy/reports/2019/11/21/477190/climate-change-threatens-stability-financial-system/; and see, also, e.g., Lael Brainard, *Why Climate Change Matters for Monetary Policy and Financial Stability*, Board of Governors of the Federal Reserve System, Nov. 8, 2019, *available at* https://www.federalreserve.gov/newsevents/speech/brainard20191108a.htm; Federal Reserve Bank of San Francisco, *The Economics of Climate Change*, Nov. 8, 2019, *available at* https://www.frbsf.org/economic-research/events/2019/november/economics-of-climate-change/; Mark Carney, *Breaking the tragedy of the horizon – climate change and financial stability: Speech at Lloyd's of London*, Bank for International Settlements, Sept. 29, 2015, *available at* https://www.bis.org/review/r151009a.pdf.

[21] See Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, (Duke University School of Law, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951158; Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165, 178 (2017), *available at* https://scholarship.law.upenn.edu/penn_law_review_online/vol166/iss1/9; Letter from Erik F. Gerding, et. al., to Vanessa Countryman, SEC, Sept. 24, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf.

Release,[22] as well as subsequent rulemaking proposals in December 2019[23] and March[24] of this year are breathtaking both in scope and impact. By expanding the scope of persons outside the protections of the public company regulatory framework and further loosening important limitations on offerings outside of that framework, these "private markets" proposals together represent aggressive deregulation of the capital markets.

Together, these proposals aggravate an initial public offering (IPO) off-ramp that enables large companies to avoid disclosure requirements and effective corporate governance features. Moreover, these proposals drain liquidity from the public markets—liquidity that protects investors and also drives economic growth. Although ostensibly about adding investment choice, these policies actually reduce information and choice by encouraging current public companies to go dark and other companies to not pursue the IPO route. What is perhaps most disappointing, the Commission has been repeatedly marketing these proposals in the name of investors, yet, as shown in letter[25] after letter, real investors and their advocates—unlike the troubling astroturfing campaign orchestrated to fool the Commission[26]—overwhelmingly oppose them.

Put simply, at the very moment that investors and the public are demanding more information about companies, the Commission is proposing to dramatically expand the scope of securities offerings and trading transactions for which the public disclosure regime and other investor protections will generally not apply.

The harms from the SEC's trajectory are tangible. Capital markets function best and are most stable when robust disclosure allows investors to police the decisions of management and also enables markets to price risk. By eliminating the ability of investors and broadly distributed stakeholders to hold companies and their executives accountable to longer term interests, expanded private markets further concentrate corporate power in a small number of

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[22] *Concept Release on Harmonization of Securities Offering Exemptions*, SEC, 84 Fed. Reg. 30460, (June 26, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf ("Exemptions Concept Release").

[23] *Amending the 'Accredited Investor' Definition*, SEC, 85 Fed. Reg. 2574, (Jan. 15, 2020), *available at* govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28304.pdf.

[24] *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, SEC, 85 Fed. Reg. 17956, (Mar. 31, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-03-31/pdf/2020-04799.pdf.

[25] *Recommendation Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals*, Investor Advisory Committee of the Securities and Exchange Commission, Jan. 24, 2020 *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.

[26] Letter from Better Markets to Jay Clayton, SEC, Dec. 9, 2019, *available at* https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_SEC_12-9-19.pdf

unaccountable hands.[27] Fraud and market manipulation are all too common in private securities markets, and Rule 10b-5 liability, by itself, provides an inadequate check.[28]

But there are many other concerns. The Commission and the public has seen the power of the registration process over the years. Despite increasingly problematic business cultures, when several very large private companies became subject to public disclosures and scrutiny, market discipline forced change.[29] In just one notable recent case, the public registration process brought to light self-dealing by executives and the use of questionable accounting metrics. Armed with this information, valuations quickly plummeted to more realistic levels and executives were replaced.[30]

Adding private offering alternatives with more limited (or no) disclosures does not, in fact, add options for investors—it eliminates them. Even if companies voluntarily provide more information than required, markets have a difficult time evaluating such information without the ability to compare with other companies. As a result, investors will discount such information, thereby eliminating the high-disclosure, high-value option for investors and companies alike.

Corporations and executives also work better when they know they will be held accountable for their actions. That can only happen when investors, corporate stakeholders like workers, and the public have meaningful information and corporate governance rights. In particular, the rapid expansion of environmental, social and governance (ESG) investing and accountability are

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27 *Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures*, Hearing Before the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, Comm. on Fin. Svcs, 116th Cong. (2019) (Testimony of James Andrus, CalPERS, at 3)("This raises an important point for today's discussion: most of the ESG-related policy dialogue focuses only on the public markets. Moving forward, we encourage you to also consider how important ESG issues like those we are discussing today can be carried into the non-public market space as well."), *available at* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=404000.

28 Verity Winship, *Private Company Fraud*, University of Illinois College of Law, 2020, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538499. *See also* Elizabeth Pollman, *Private Company Lies*, 109 Geo. L.J. __ (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551565.

29 See Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165, 178 (2017), *available at* https://scholarship.law.upenn.edu/penn_law_review_online/vol166/iss1/9.

30 See, e.g., Eliot Brown, *How Adam Neumann's Over-the-Top Style Built WeWork. 'This Is Not the Way Everybody Behaves.'*," Wall St. Journal, Sept. 18, 2019, *available at* https://www.wsj.com/articles/this-is-not-the-way-everybody-behaves-how-adam-neumanns-over-the-top-style-built-wework-11568823827; Alex Wilhelm, *WeWork CEO Returns $5.9M To Company, Promises To Add Woman To Board After IPO*, *Crunchbase*, Sept. 4, 2019, *available at* https://news.crunchbase.com/news/wework-ceo-returns-5-9m-to-company-promises-to-add-woman-to-board-after-ipo/; Jordan French, *Tech IPO stumbles beg the question: Why are startup internal controls so poor?*, *VentureBeat*, Oct. 13, 2019, *available at* https://venturebeat.com/2019/10/13/tech-ipo-stumbles-beg-the-question-why-are-startup-internal-controls-so-poor/.

almost entirely dependent on the public company regulatory regime. Any attack on public markets is an attack on that vision of corporate long-termism and shared prosperity.[31]

The current pandemic crisis has further underscored the significant risk of certain types of securities, such as collateralized loan obligations, being issued into and traded on private markets, where there are weak disclosure regimes and anemic price discovery.[32] Indeed, financial crises fester in darkened capital markets. Markets with high incidences of risk, fraud, and manipulation also are unlikely to inhibit strong and stable valuations, which are essential to enabling investor confidence and a speedy recovery.[33]

Ultimately, the Commission's efforts to turbocharge the growth of private markets comes at the expense of the public markets[34] that are vital to recapitalizing American businesses and making our economy more resilient to upcoming threats, such as climate change.[35] Indeed, public companies appear, initially, to be faring somewhat better than private companies during the pandemic, with even some of the more troubled larger companies able to raise money in the public markets while a number of prominent private companies have entered bankruptcy.[36] Even before the pandemic, private equity (one corner of the private markets) was no longer

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[31] Andy Green and Andrew Schwartz, *Corporate Long-Termism, Transparency, and the Public Interest*, Center for American Progress, Oct. 2, 2018, *available at* https://www.americanprogress.org/issues/economy/reports/2018/10/02/458891/corporate-long-termism-transparency-public-interest/.

[32] *Emerging Threats to Stability: Considering the Systemic Risk of Leveraged Lending, Before the Subcommittee on Consumer Protection and Financial Institutions, Committee on Fin. Svcs*, 116th Cong. (2019), (Testimony of Erik Gerding), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403090.

[33] Elizabeth Pollman, *Private Company Lies*, 109 Geo. L.J. __ (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551565.

[34] Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, (Duke University School of Law, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951158.

[35] Center for International Environmental Law, *Trillion Dollar Transformation: Fiduciary Duty, Divestment, and Fossil Fuels in an Era of Climate Risk*, (2016), *available at* https://www.ciel.org/wp-content/uploads/2016/12/Trillion-Dollar-Transformation-CIEL.pdf.

[36] See, e.g., Joshua Franklin, Cruise operator Carnival pays high price to get credit investors on board, April 1, 2020, Reuters, available at https://www.reuters.com/article/us-health-coronavirus-carnival/cruise-operator-carnival-pays-high-price-to-get-credit-investors-on-board-idUSKBN21K07H; William Louch and Laura Cooper, *Coronavirus Unravels Private-Equity Playbook for Some Retailers*, *Wall St. Journal*, May 10, 2020, *available at* https://www.wsj.com/articles/coronavirus-unravels-private-equity-playbook-for-some-retailers-11589115600; see also Brad Moon, *14 Bankruptcy Filings Chalked Up to COVID-19*, *Kiplinger*, May 22, 2020, *available at* https://www.kiplinger.com/slideshow/investing/T052-S001-bankruptcy-filings-chalked-up-to-covid-19/index.html Notably, many of the public company bankruptcies appear to be in the oil and gas sector, which exhibits certain similar dynamics to the private markets with heavy reliance on debt and especially leveraged loan debt. See Institute for Energy Economics and Financial Analysis, *The Oil Industry Has Been in Financial Trouble for Years*, April 2, 2020, *available at* https://ieefa.org/wp-content/uploads/2020/04/IEEFA-Oil-Industry-Finance_April-2020.pdf; Fitch Wire, "Low Oil Prices, Record Volatility Will Hasten US Energy Defaults," April 27, 2020, *available at* https://www.fitchratings.com/research/corporate-finance/low-oil-prices-record-volatility-will-hasten-us-energy-defaults-27-04-2020.

yielding significantly better financial returns than public markets.[37] Yet even core users of private markets themselves, such as venture capital funds and private family businesses, are harmed by the decline of robust public markets, as exit options, valuations, and investor confidence all deteriorate.[38]

The Healthy Markets Association,[39] the Council of Institutional Investors,[40] the Consumer Federation of America,[41] Americans for Financial Reform Education Fund,[42] Better Markets,[43] more than a dozen of the leading securities law academics,[44] and many others all indicated that the health of the U.S. capital markets depends on robust and transparent public markets, which are being directly undermined by the Commission's recent regulatory actions and would be decimated by the adoption of its numerous proposals. The Commission should be supporting a more robust IPO on-ramp by limiting, not dramatically expanding, private markets.

Lastly, we are deeply troubled by the SEC's decision to loosen, without any public input or justification, the requirements for its Regulation Crowdfunding rules.[45] While we are sympathetic to the needs of small businesses for financial assistance in these extraordinary times,[46] we see no evidence that exposing investors to greater risks and less information—while in the midst of an economic crisis—will spur sound investments and economic growth.

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[37] See, e.g., Robert S. Harris, Tim Jenkinson & Steven N. Kaplan, *How Do Private Equity Investments Perform Compared to Public Equity?*, 14 J. INV. MGMT. 14, 15 (2016); Ludovic Phalippou, *Performance of Buyout Funds Revisited?*, 18 REV. FIN. 189, 189 (2014); Ludovic Phalippou & Oliver Gottschalg, *The Performance of Private Equity Funds*, 22 REV. FIN. STUD. 1747, 1747 (2009); Berk A. Sensoy, Yingdi Wang & Michael S. Weibach, *Limited Partner Performance and the Maturing of the Private Equity Industry*, 112 J. FIN. ECON. 320, 341-42 (2014).

[38] Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, (Duke University School of Law, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951158; see also Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online (2017), *available at* https://scholarship.law.upenn.edu/penn_law_review_online/vol166/iss1/9.

[39] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2019, a*vailable at* https://www.sec.gov/comments/s7-08-19/s70819-6233891-192709.pdf.

[40] Letter from Jeffrey P. Mahoney, Council of Institutional Investors, to Vanessa Countryman, SEC, Oct. 3, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6249226-192752.pdf.

[41] Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America, to Vanessa Countryman, SEC, Oct. 1, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6235037-192692.pdf.

[42] Letter from Marcus Stanley and Heather Slavkin Corzo, Americans for Financial Reform Education Fund, to Vanessa Countryman, SEC, Sept. 30, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6233332-192690.pdf.

[43] Letter from Dennis M. Kelleher and Lev Bagramian, Better Markets, to Vanessa Countryman, SEC, Sept. 24, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6190689-192472.pdf.

[44] Letter from Erik F. Gerding, et. al., to Vanessa Countryman, SEC, Sept. 24, 2019, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf.

[45] *Temporary Amendments to Regulation Crowdfunding*, SEC, Temporary Final Rule, May 4, 2020, *available at* https://www.sec.gov/news/press-release/2020-101.

[46] See, e.g., Alexandra Thornton and Andy Green, *How Congress Can Help Small Businesses Weather the Coronavirus Pandemic*, Center for American Progress, April 13, 2020, *available at* https://www.americanprogress.org/issues/economy/news/2020/04/13/483067/congress-can-help-small-businesses-weather-coronavirus-pandemic/.

Even more troublingly, we fear that the Commission is failing to fulfill its most basic procedural obligations. Simply ignoring the law and deregulating based upon ideological dispositions and anecdote, without public input, is not a sustainable model. This practice also raises serious concerns under the Administrative Procedure Act.

Eroding the Value of Existing Public Company Disclosures

The Commission has proposed stripping existing disclosures for public companies. Investors and the public are increasingly seeking more comparable information from companies regarding a broader scope of issues than ever before. For example, in response to the COVID-19 crisis, investors are seeking more information on companies' supply chain risks and worker health and wellbeing. Investor concerns may range from tax policies to political spending to any number of other ESG issues.[47] At the same time, modern technologies permit issuers to more easily aggregate and disclose, and stakeholders to assimilate, analyze, and use that information more effectively than ever before.

Nevertheless, the SEC is proposing to eliminate, reduce, and otherwise undermine the utility of disclosures by public companies. Recently, for example, the agency proposed "modernizing" Regulation S-K, ostensibly to reflect the fact that capital markets and the economy have both changed in the more than 30 years since adoption.[48] However, the focus of the proposal is to move disclosure away from detailed, objective, and comparable standards to ambiguous, amorphous, less comparable "principles."

As various experts,[49] including Commissioners Robert Jackson and Allison Lee[50] have noted, a more principles-based approach to disclosures gives companies more discretion over what kind of information they share with investors. This would reduce the quality and comparability of

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[47] *See, e.g.*, Bruce F. Freed and Karl J. Sandstrom, Center for Political Accountability, *Taking the Lead in Adopting Political Transparency in the COVID-19 Crisis*, Harvard Law School Forum on Corporate Governance, May 7, 2020, *available at* https://corpgov.law.harvard.edu/2020/05/07/taking-the-lead-in-adopting-political-transparency-in-the-covid-19-crisis/; see also Rachel Curley, *Silenced No More, A Champion of Transparency Speaks Out*, Public Citizen, Nov. 4, 2019, *available at* https://www.citizen.org/news/sec-political-spending/; Testimony of Heather Slavkin Corzo Before Financial Services Committee Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, U.S. House of Representatives, *On Promoting Economic Growth: A Review of Proposals to Strengthen the Rights and Protections for Workers*, May 15, 2019, *available at* https://www.congress.gov/116/meeting/house/109493/witnesses/HHRG-116-BA16-Wstate-SlavkinCorzoJDH-20190515.pdf; Christian Freymeyer*, Trending Toward Transparency*, FACT Coalition, Apr. 2019, *available at* https://thefactcoalition.org/report/trending-toward-transparency/?utm_medium=policy-analysis%2Freports%2Ffact-reports; Letter from Cynthia Williams and Jill Fisch to Brent Fields, SEC, Petition for Rulemaking on ESG Disclosure, Oct. 1, 2018, *available at* https://www.sec.gov/rules/petitions/2018/petn4-730.pdf.

[48] *Modernization of Regulation S-K Items 101, 103, and 105*, SEC, 84 Fed. Reg. 44538, *available at* https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17410.pdf ("S-K Modernization Proposal").

[49] Letter from Dennis Kelleher, Stephen Hall, Lev Bagramian, Better Markets to Vanessa Countryman, Oct. 22, 2019, *available at* https://bettermarkets.com/sites/default/files/CL_SEC_Modernization_of_Reg_S-K_10-16-19__0.pdf.

[50] Hon. Robert J. Jackson, Jr. and Hon. Allison Herren Lee, *Joint Statement on Proposed Changes to Regulation S-K*, SEC, Aug. 27, 2019, *available at* https://www.sec.gov/news/public-statement/statement-jackson-lee-082719.

information disclosed. Moreover, we note that a lack of specific disclosure requirements will mean that industry practices may diverge over time. This would leave the Commission in a position of either not enforcing intended disclosure requirements or being subject to accusations that it is pursuing regulation by enforcement.[51] Just as significantly, private investors that have been the victim of fraud will be in a far weakened position in protecting their own property rights.[52] Capital markets and broader economic efficiency will be negatively impacted by the inability of market participants to effectively distinguish between quality corporate leadership and poor management strategies.[53]

The materiality standard is too often misunderstood and misapplied. Too many securities professionals forget that the legal lodestone is whether information is material *to investors*, and not how executives of the company might perceive it impacts the company's finances.[54] Although the addition of "human capital" as one of the topics to be disclosed is one of the few bright spots in the SEC's recent agenda,[55] the proposed rule[56] fails to include information around climate change as a required topic for disclosure. This failure is glaring given how many investors now view climate change as a critically important factor in making decisions—a point made by thousands of comments to the Commission over the years, and with distinct clarity by Commissioner Lee in recent months.[57]

The Commission's proposed changes to the management discussion and analysis section of corporate disclosure exhibit a similar thrust towards reducing disclosure content, comparability,

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[51] Mark Schoeff, Jr., *Financial industry opponents remain wary of SEC's crackdown on share class disclosure*, Investment News, Apr. 20, 2020, *available at* https://www.investmentnews.com/advisers-wary-sec-share-class-disclosure-191798.

[52] See, generally, Andy Green, *Opinion: Could the SEC secretly abolish investors' right to sue?*, MarketWatch, Mar. 2, 2019, *available at* https://www.marketwatch.com/story/could-the-sec-secretly-abolish-investors-right-to-sue-2018-03-02#false.

[53] See Urska Velikonja, *The Cost of Securities Fraud*, 54 William & Mary Law Review 1887–1957 (2013), *available at* https://scholarship.law.wm.edu/wmlr/vol54/iss6/4/.

[54] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).
Giving investors the chance to understand management's perceptions is what the Management's Discussion and Analysis section of the SEC's reporting is supposed to provide. See Sondra L. Stokes, *Remarks Before the 2006 AICPA National Conference on Current SEC and PCAOB Developments*, SEC, Dec. 13, 2006, *available at* https://www.sec.gov/news/speech/2006/spch121306sls.htm.

[55] Amanda Iocone, *Return to Work Puts Spotlight on Disclosure, SEC's Clayton Says*, Bloomberg, May 4, 2020, available at https://news.bloombergtax.com/financial-accounting/return-to-work-puts-spotlight-on-disclosure-secs-clayton-says; See generally, Angela Hanks, Ethan Gurwitz, Brendan Duke, and Andy Green, *Workers or Waste?*, Center for American Progress, June 8, 2016, *available at* https://www.americanprogress.org/issues/economy/reports/2016/06/08/138706/workers-or-waste/.

[56] S-K Modernization Proposal.

[57] See, e.g., Hon. Allison Herren Lee, *Modernizing Regulation S-K: Ignoring the Elephant in the Room*, SEC, Jan. 30, 2020, *available at* https://www.sec.gov/news/public-statement/lee-mda-2020-01-30; see also Tyler Gellasch, *Towards a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release*, Public Citizen, 2016, *available at* https://www.citizen.org/sites/default/files/sustainableeconomyreport.pdf.

and utility.[58] As the CFA Institute and Council of Institutional Investors point out, these proposals shift the burden from companies to investors in terms of collecting and providing useful information.[59]

The Commission's recent reduction in disclosure on mergers and acquisitions (M&A) transactions exhibit the same flaws.[60] In the face of high levels of M&A activity in the markets in recent years,[61] this misguided final rule reduces transparency, including by lowering the necessary financial statements from three years to two. The current economic crisis is likely to lead to more M&A activity, including in high risk situations of rising insolvencies and in the context of extraordinary Federal support for targets and acquirers.[62] In the face of a declining number of public companies,[63] the SEC should be expanding the ability for investors, other stakeholders, and the public to carefully scrutinize the wisdom of mergers and reject those that will harm investors, raise consumer prices, and undermine robust competition.

The Commission's proposal to weaken transparency around extractive industries practices is another example of its deregulatory agenda facilitating concentration and abuse by decreasing transparency.[64] It is also out of step with international disclosure standards and the needs of investors and stakeholders for robust anti-corruption protections.[65]

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[58] *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, SEC, 85 Fed. Reg. 12068, *available at* https://www.govinfo.gov/content/pkg/FR-2020-02-28/pdf/2020-02313.pdf.

[59] Letter from Sandra Peters, CFA Institute and Jeff Mahoney, Council of Institutional Investors, to Vanessa Countryman, SEC, Apr. 28, 2020, *available at* https://www.sec.gov/comments/s7-01-20/s70120-7135305-216147.pdf.

[60] *Amendments to Financial Disclosures about Acquired and Disposed Businesses*, SEC, Final Rule, RIN 3235-AL77, (May 21, 2020), *available at* https://www.sec.gov/news/press-release/2020-118.

[61] Andy Green, Christian E. Weller, and Malkie Wall, *Corporate Governance and Workers*, Center for American Progress, Aug. 14, 2019, *available at* https://www.americanprogress.org/issues/economy/reports/2019/08/14/473095/corporate-governance-workers/.

[62] See generally, Letter from American Economic Liberties Project, et al., to Hon. Jerome Powell, Federal Reserve Board of Governors and Hon. Steven Mnuchin, Treasury Dep't, May 7, 2020, *available at* https://www.economicliberties.us/press-release/the-federal-reserve-must-not-finance-a-merger-wave/#; Press Release, *Open Markets Calls for Ban on Takeovers by Large Corporation and Funds for Duration of Crisis*, Open Markets Institute et al, Mar. 21, 2020, *available at* https://openmarketsinstitute.org/blogs/open-markets-calls-ban-takeovers-large-corporation-funds-duration-crisis/.

[63] See Craig Doidge, G. Andrew Karolyi, and René M. Stulz, *The U.S. Listing Gap*, Columbia Business School, 2015, *available at* https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Finance%20Seminar/Fall%202015/Doidge_Karolyi_Stulz_Listing_Gap_July2015.pdf.

[64] Disclosure of Payments by Resource Extraction Issuers, SEC, 85 Fed. Reg. 2522 (Jan. 15, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28407.pdf.

[65] Letter from Lev Bagramian, Better Markets to Vanessa Countryman, SEC, Mar. 16, 2020, *available at* https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_to_the_SEC_on_Disclosure_of_Payments_by_Resource_Extraction_Issuers.pdf; Letter from Clark Gascoigne to Vanessa Countryman, SEC, March 18, 2020, *available at* https://thefactcoalition.org/comments-to-sec-on-proposed-rule-on-disclosure-of-payments-by-resource-extraction-issuers/; see also Business & Human Rights Resource Centre, *USA: SEC's latest draft of payment disclosure rules for oil and mining companies draws criticism from anticorruption groups*, Dec. 18, 2019,

Additionally, the Commission's proposed changes to weaken internal controls[66] and auditor independence[67] further place the disclosure regime at risk. As the CFA Institute explained, expanded exemptions from internal control findings will not achieve the goal of capital formation but will weaken investor protections.[68] The CFA Institute noted that "the industry deriving the most benefiting from this Proposed Rule change – the banking industry – is subject to current concerns regarding its ability to adopt a new critical audit matter that requires strong internal controls."[69] Similarly, the Consumer Federation of America has noted that a lack of quality independent financial reporting leads to financial scandal and investor abuses, with Enron, WorldCom, and the Dot Com crash leading Congress to enshrine auditor independence in the law.[70] Indeed, the U.S. Senate just this week voted 100-0 in support of ensuring that companies listing in U.S. public markets are subject to robust audit quality inspections.[71]

Put simply, the SEC should not be materially reducing the quantity, quality, integrity, and comparability of information that companies provide investors and the public.

Eroding Shareholder Rights

In addition to facilitating the expansion of private securities markets, the Commission has proposed dramatically reducing shareholders' rights in the rapidly decreasing number of public companies.[72]

In particular, the Commission has proposed significantly limiting shareholders' abilities to submit and resubmit proposals for consideration to a company's board of directors.[73] Shareholder proposals provide an essential mechanism for shareholders to communicate with the executives of the companies they own and other shareholders. The proposed changes

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available at https://www.business-humanrights.org/en/usa-secs-latest-draft-of-payment-disclosure-rules-for-oil-and-mining-companies-draws-criticism-from-anticorruption-groups (last accessed May 2020).

[66] *Amendments to the Accelerated Filer and Large Accelerated Filer Definitions*, SEC, 84 Fed. Reg. 24876 (May 29, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-05-29/pdf/2019-09932.pdf.

[67] *Amendments to Rule 2-01, Qualifications of Accountants*, SEC, 85 Fed. Reg. 2332, (Jan. 15, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28476.pdf.

[68] Letter from Kurt N. Schacht and Sandra J. Peters, CFA Institute, to Vanessa Countryman, SEC, Aug. 22, 2019, *available at* https://www.sec.gov/comments/s7-06-19/s70619-6009673-190811.pdf.

[69] *Id.*; see also Letter from Dennis M. Kelleher, Lev Bagramian, Better Markets, to Vanessa Countryman, SEC, July 29, 2019, *available at* https://www.sec.gov/comments/s7-06-19/s70619-5885211-188734.pdf.

[70] Letter from Barbara Roper, Consumer Federation of America, to Vanessa Countryman, SEC, May 4, 2020, *available at* https://www.sec.gov/comments/s7-26-19/s72619-7146025-216304.pdf.

[71] Daniel Flatley and Benjamin Bain, *Senate Passes Bill to Delist Chinese Companies From Exchanges*, Bloomberg News, May 20, 2020, *available at* https://www.bloomberg.com/news/articles/2020-05-20/senate-passes-bill-to-delist-chinese-companies-from-exchanges?sref=T513XH2G.

[72] Notably, the Commission generally establishes no investor rights in so-called private offerings.

[73] *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC, 84 Fed. Reg. 66458, (Dec. 4, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24476.pdf ("Rule 14a-8 Proposal").

would dramatically increase stock ownership requirements and vote resubmission requirements, making the entire shareholder proposal process inaccessible to all but the largest investors. The thresholds are so high that even many of the largest investors may lose access to these important corporate governance rights.[74]

To be clear, there is no overwhelming glut of shareholder proposals currently overburdening corporate executives. In fact, as the Council of Institutional Investors has explained to the Commission:

> Most public companies do not receive any shareholder proposals. On average, 13% of Russell 3000 companies received a shareholder proposal in a particular year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a proposal once every 7.7 years. For companies that receive a proposal, the median number of proposals is one per year.[75]

The already limited use of proxy proposals suggests that these efforts to restrict the process are not being driven by facts, but by ideology.

The proposed changes unfortunately seem to target the very types of proposals that have been gaining favor in recent years: those related to workers' rights, climate risks, supply chain risks, taxes, and other critical ESG issues—the very ESG issues that the SEC's own Investor Advisory Committee recently found to be material to investment and voting decisions.[76]

Not only would the limitations on resubmissions dramatically undermine corporate long-termism, they would also cut off pioneering risk management efforts by smaller investors—ones that have often built support among shareholders thanks to multi-year efforts. Stock option expensing, director independence requirements, and executive compensation clawbacks are just a few of the many examples of multi-year shareholder proposals that have at times been successful, and which would likely be cut off under the new rule.[77]

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[74] See Letter from Marcie Frost, CalPERS, to Vanessa Countryman, SEC, Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6744100-207900.pdf.

[75] Letter from Kenneth Benson and Jeff Mahoney, Council of Institutional Investors, to Vanessa Countryman, SEC, Jan. 30, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6729684-207400.pdf.

[76] SEC Investor Advisory Committee, Recommendation from the Investor-as-Owner Subcommittee Relating to ESG Disclosure, May 14, 2020, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf.

[77] Letter from Brandon J. Rees, AFL-CIO, to Vanessa Countryman, SEC, Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6744323-207881.pdf; see also Investor Rights Forum, *Demonstrating Positive Impacts Of Shareholder Proposals*, *available at* https://www.investorrightsforum.com/casestudies.

The ability of shareholders to exercise meaningful corporate governance rights has become all the more important with the COVID-19 crisis. Investors have legitimate concerns and interest in a company's readiness for pandemics, the climate crisis, and other supply chain and macroeconomic disruptions. Investors and stakeholders want more power not less to engage the companies and industries worst prepared for such calamities.

Lowering the accountability of management in the midst of a massive economic and health care crisis risks undermining investor confidence in issuers. At a minimum, shareholders need to have the ability to demand accountability from management to ensure that capital, including capital being supported by unprecedented taxpayer-funded interventions, is not being misused to enrich corporate management or well-connected creditors. Investors also must have the ability to demand greater disclosure of the political activities of management, including contributions to 501(c)(4) "dark money" organizations and lobbying for government support, legislation, or regulatory changes.[78] Reducing the ability of stakeholders to demand accountability from management not only increases agency costs, it also threatens the legitimacy of corporate governance and public trust in the financial system.

Furthermore, the pandemic and economic crises have revealed the extent to which workers have inadequate health and economic security, imperiling not only individual households, but also the collective viability of corporations and the greater economy.[79] Constraining the ability of investors to make proposals to protect workers and promote social governance initiatives at this particular historical moment presents grave risks for companies, investors, the economy, and the legitimacy of the Commission.

Investors and market thought-leaders overwhelmingly opposed these anti-investor actions: CalPERS,[80] the Center for Political Accountability,[81] Ceres,[82] CFA Institute,[83] the Council of

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[78] See Bruce F. Freed and Karl K. Sandstrom, *Taking the Lead in Adopting Political Transparency in the COVID-19 Crisis, Harvard Law School Forum on Corporate Governance*, May 7, 2020, *available at* https://corpgov.law.harvard.edu/2020/05/07/taking-the-lead-in-adopting-political-transparency-in-the-covid-19-crisis/; Bruce Freed, "Taking government money? Disclose your political spending: Companies should opt for transparency now more than ever," *New York Daily News*, May 8, 2020, available at https://www.nydailynews.com/opinion/ny-oped-taking-government-money-20200508-inu4noupqfg53iq3mjfebsuspe-story.html.

[79] See David Madland, Sarah Jane Glynn, Jacob Leibenluft, and Simon Workman, *How the Federal Government Can Protect Essential Workers in the Fight Against Coronavirus*, Center for American Progress, Apr. 8, 2020, *available at* https://www.americanprogress.org/issues/economy/news/2020/04/08/482881/federal-government-can-protect-essential-workers-fight-coronavirus/.

[80] Letter from Marcie Frost, CalPERS, to Vanessa Countryman, SEC, Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6744100-207900.pdf.

[81] Letter from Bruce Freed and Dan Carroll, Center for Political Accountability, Jan. 31, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6730871-207448.pdf.

[82] Letter from Mindy Lubber, Ceres, to Vanessa Countryman, SEC, Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6771580-208107.pdf.

[83] Letter from James Allen, CFA Institute, to Vanessa Countryman, SEC, Feb. 3, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6738827-207642.pdf.

Institutional Investors,[84] Consumer Federation of America,[85] and more.[86] While the comment period for this proposal ended before the COVID-19 crisis began in earnest in the United States, the negative implications for its adoption would be even greater today. The Commission's proposed rollback of corporate accountability would be especially egregious considering the exceptional level of interest among investors and companies in *expanding* corporate accountability to stakeholders.

Moreover, these changes must also be considered against the backdrop of the Commission's proposed limitations and burdens on proxy advisory firms,[87] such as requirements to provide companies with an advance opportunity to review the analyses of these firms and other steps to burden and stifle independent viewpoints.[88] Without the effective check on management that was formerly played by much more widespread union collective bargaining, this toxic mix of proposals builds on one another to strengthen corporate management and weaken stakeholders.[89]

Individually and especially in combination, these proposals would stifle shareholder democracy as a vital mechanism of risk management, result in an alarming concentration of corporate voting and power in the hands of a tiny number of investment firms, and further empower executives at the expense of stakeholders. These efforts, in our view, result in the Commission straying from its obligations to protect investors, promote competition, and facilitate fair and efficient markets. If adopted, the proposed reforms would do grave injustice to Ms. and Mr. 401(k) who are invested for the long-term.

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[84] Letter from Ken Bertsch and Jeff Mahoney, Council of Institutional Investors, to Vanessa Countryman, SEC, May 19, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-7214366-216887.pdf; Letter from Ken Bertsch and Jeff Mahoney, Council of Institutional Investors, to Vanessa Countryman, SEC, Jan. 30, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6729684-207400.pdf.

[85] Letter from John Coates, Harvard Law School and Barbara Roper, Consumer Federation of America, to Vanessa Countryman, SEC, Jan. 30, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6729667-207388.pdf.

[86] Letter from Dennis Kelleher, Stephen Hall, Lev Bagramian, Better Markets to Vanessa Countryman, SEC, Febr. 3, 2020, *available at* https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Procedural_Requirements_and_Resubmission_Thresholds_Under_Exchange_Act_Rule_14a-8_%28Release_Number_34-87458%29.pdf.

[87] We appreciate that the Commission has been sharply divided on many of these controversial efforts. Contrast, Hon. Robert J. Jackson Jr, *Statement on Proxy-Advisor Guidance*, SEC, Aug. 21, 2019, *available at* https://www.sec.gov/news/public-statement/statement-jackson-082119 from Hon. Elad Roisman, *Statement Regarding Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice*, SEC, Aug. 21, 2019, *available at* https://www.sec.gov/news/public-statement/statement-roisman-082119.

[88] *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice*, SEC, 84 Fed. Reg. 66518 (Dec. 4, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf.

[89] See Andy Green, Christian E. Weller, and Malkie Wall, *Corporate Governance and Workers*, Center for American Progress, Aug. 14, 2019, *available at* https://www.americanprogress.org/issues/economy/reports/2019/08/14/473095/corporate-governance-workers/.

We urge the Commission to move in the opposite direction, and pursue actions to expand stakeholder rights, including expanding access to proxies and abilities of investors to more directly identify, evaluate, and vote their interests. [90]

<u>Towards a transparency and accountable corporate governance agenda for COVID-19</u>

The Commission's response to the current crisis should entail three phases.

First, the Commission should immediately cease all regulatory actions that would remove information or rights from investors. This includes all of the proposals outlined above. The Commission should also freeze the rulemaking processes on all non-essential actions until the Commission has a chance to fully evaluate dramatic developments in the markets and give stakeholders the opportunity to ensure their voices are heard in this rapidly-changing environment.[91] Again, the Commission needs to collect data on which markets and companies were fundamentally destabilized and which remain vulnerable. Any emergency actions should be temporary, subject to a sunset, and tightly connected to the COVID-19 emergency.

Second, the Commission should require additional disclosures, effective as soon as possible, to ensure investors and the public have essential information throughout the crisis. A comprehensive, detailed, investor and public policy-driven disclosure mandate should be implemented, and not just for public companies [92] but so-called private companies as well.[93] Investors and taxpayers alike deserve to know how their money is being spent.

For existing reporting companies, the Commission could adopt an interim final rule that would build upon the joint-statement released recently[94] to cover information related to worker rights, healthcare, reliance on direct and indirect federal, state, or other governmental funding or support, and more. The Commission should also urge the Public Company Accounting Oversight

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[90] See, e.g., Letter from Stephen Hall, Lev Bagramian, Better Markets to Brent Fields, SEC, Jan. 9, 2017, *available at* https://www.sec.gov/comments/s7-24-16/s72416-1470144-130398.pdf.

[91] Letter from Lev Bagramian, Better Markets to Jay Clayton, SEC, March 31, 2020, *available at* https://bettermarkets.com/sites/default/files/documents/Better_Markets_Letter_to_Chairman_Clayton_Regarding_Tolling_of_Comment_Periods.pdf (arguing that not-freezing rulemaking particularly impacts investor advocates and public interest organizations that are fighting on all fronts and, unlike interested industry representatives, public interest groups do not have the necessary resources to analyze highly complex regulatory proposals not-related to COVID).

[92] We appreciate the Chairman's limited statement regarding disclosures of some relevant topics to investors and the public. Statement of Jay Clayton and William Hinman, *The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19*, SEC, Apr. 8, 2020, *available at* https://www.sec.gov/news/public-statement/statement-clayton-hinman. Interestingly, as the unprecedented federal intervention has unfolded, some of the best sources of information regarding who is receiving what have not been the government, but instead public company filings.

[93] See, Press Release, Waters Announces Committee Plan for Comprehensive Fiscal Stimulus and Public Policy Response to Coronavirus Pandemic, Comm. on Fin. Svcs, Mar. 18, 2020, *available at* https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406440.

[94] Clayton/Hinman Statement.

Board to prioritize audit reviews by firms who received significant federal assistance. For non-reporting companies, the Commission should work with the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York, to establish basic disclosures as a condition for a company using any federal program.

At a minimum, the Commission should implement immediate special disclosure requirements or conditionality around fundraising focused on:

- the receipt of or reliance upon the federal government's unprecedented financial assistance;
- the treatment of workers—such as paid sick leave, health and safety measures, worker bargaining opportunities, and more;
- present and future supply chain risks, including disruptions that may be caused by extreme weather and natural disaster; and
- pandemic risk disclosures and other similarly urgent, COVID-relevant matters.

Finally, the Commission should undertake a restoration of the public markets, including limiting the private markets and demanding more robust disclosures and rights for investors in the public markets. These efforts should be guided by the principles of promoting the efficient allocation of our people's capital, protecting investors, and promoting sustainable businesses for workers and communities. These efforts should include new disclosures tailored to specific industries, such as the oil and gas industry, and relate not just to operating companies, but to lenders as well. For example, financial institutions should be required to disclose their financing of greenhouse gas emission and the risks associated with such financing.[95] Corporate governance also needs modernization. For example, top-level governance of public companies or those that receive significant governmental support should be reflective of a broad group of stakeholder interests, including the views of workers and their communities.[96]

<u>Conclusion</u>

The Commission's recent deregulatory agenda is further undermining the express purpose of the federal securities laws—to provide for full and fair disclosure of information about securities and issuers to investors and the public, and the ability to act thereupon.

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[95] See, e.g., a methodology set out by the Partnership for Carbon Accounting Financial, available at https://carbonaccountingfinancials.com/. On accounting issues relating to oil and gas leases, see Mark K. DeSantis, *How Cheap Federal Leases Benefit Oil and Gas Companies*, Center for American Progress, August 29, 2018, available at https://www.americanprogress.org/issues/green/reports/2018/08/29/455138/cheap-federal-leases-benefit-oil-gas-companies/.

[96] See, e.g., Andy Green and Andrew Schwartz, *Corporate Long-Termism, Transparency, and the Public Interest*, Center for American Progress, Oct. 2, 2018, *available at* https://www.americanprogress.org/issues/economy/reports/2018/10/02/458891/corporate-long-termism-transparency-public-interest/.

In the face of the most severe economic crisis since the 1930s, America needs robust public markets to finance the economic recovery and recapitalize American businesses. Facing a similar challenge, the New Deal architects of the federal securities laws recognized that economic recovery depended ensuring that capital formation took place within brightly lit public markets where government, investors, workers, and other stakeholders could monitor and discipline management.

We urge the Commission to step back from the path of undermining the decades of success from the federal securities laws and, instead, take steps to constrain the growth of private securities markets and promote corporate disclosure and stakeholder accountability. These changes, which come at minimal costs, would better protect investors and other corporate stakeholders, promote fairer, more orderly and long-term efficient markets, and ensure more sustainable, competitive capital formation.

Thank you for your consideration.

Sincerely,

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Appendix

We wish to have this comment included in the comment files for the below selected rulemakings:

- Amendments to the Accelerated Filer and Large Accelerated Filer Definitions, Release No. 34-85814, File No: S7-06-19, May 9, 2019.
- Modernization of Regulation S-K Items 101, 103, and 105, Release No. 33-10668, File No: S7-11-19, Aug. 8, 2019.
- Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458, File No: S7-23-19, Nov. 5, 2019.
- Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457 File No: S7-22-19, Nov. 5, 2019.
- Amending the “Accredited Investor” Definition, Release No. 33-10734, File No: S7-25-19, Dec. 18, 2019.
- Disclosure of Payments by Resource Extraction Issuers, Release No. 34-87783, File No: S7-24-19, Dec. 18, 2019.
- Amendments to Rule 2-01, Qualifications of Accountants, Release No. 33-10738, File No: S7-26-19, Dec. 30, 2019.
- Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10750, File No: S7-01-20, Jan. 30, 2020.
- Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10763, File No: S7-05-20, Mar. 4, 2020.