Statement of the U.S. Chamber of Commerce

ON: Putting Investors First: Reviewing Proposals to Hold Executives Accountable

TO: United States House Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship and Capital Markets

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The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities.

The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Chairman Maloney, Ranking Member Huizenga, and members of the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets: my name is Tom Quaadman, executive vice president of the Center for Capital Markets Competitiveness ("CCMC") at the U.S. Chamber of Commerce ("Chamber"). Thank you for the opportunity to testify today about ways to put investors first and hold executives accountable.

The public company model has been a key source of strength and growth, which has made the American economy the strongest and most prosperous in world history. A 2012 Kauffman Foundation report found that the 2,766 companies that went public from 1996-2010 cumulatively increased employment by over 2.2 million workers, and that revenue increased by over $1 trillion during that period.[1] And a report by the IPO Task Force – a group whose recommendations contributed greatly to passage of the JOBS Act – found that the post-IPO job growth for companies is 92%.[2] Whatever the exact impact on hiring and growth may be, there is little doubt that an IPO greatly increases a company's ability to expand its workforce and grow from small to large.

Not only does "going public" benefit the economy from a jobs and growth standpoint, but it also affords Main Street investors and employees of companies that hold IPOs greater opportunities to invest in America's next great companies. During the 1980s and 1990s, stories of the Microsoft executive assistant or the UPS driver becoming a millionaire were not uncommon after a company went through the IPO process. And millions of retail investors and retirees can benefit directly by owning stock in individual companies, or more indirectly when stock is owned by their pension or 401(k) plan.

While the public company model has been significant for retail investors and workers alike, the integrity of the public capital markets is equally important in order to ensure the confidence of investors. Investors must know that they are receiving accurate, decision-useful disclosures, and that executives are held accountable for actions they take that impact shareholders. In addition to capital formation and promoting competition, the SEC as part of its mission is equally tasked with protecting investors and maintaining fair, orderly and efficient markets.

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[1]Post-IPO Employment and Revenue Growth for U.S. IPOs June 1996-2010, available at: https://www.kauffman.org/-/media/kauffman_org/research-reports-and-covers/2012/05/post_ipo_report.pdf

[2] Rebuilding the IPO On-Ramp: Putting Companies and the Job Market Back on the Road to Growth, available at: https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf

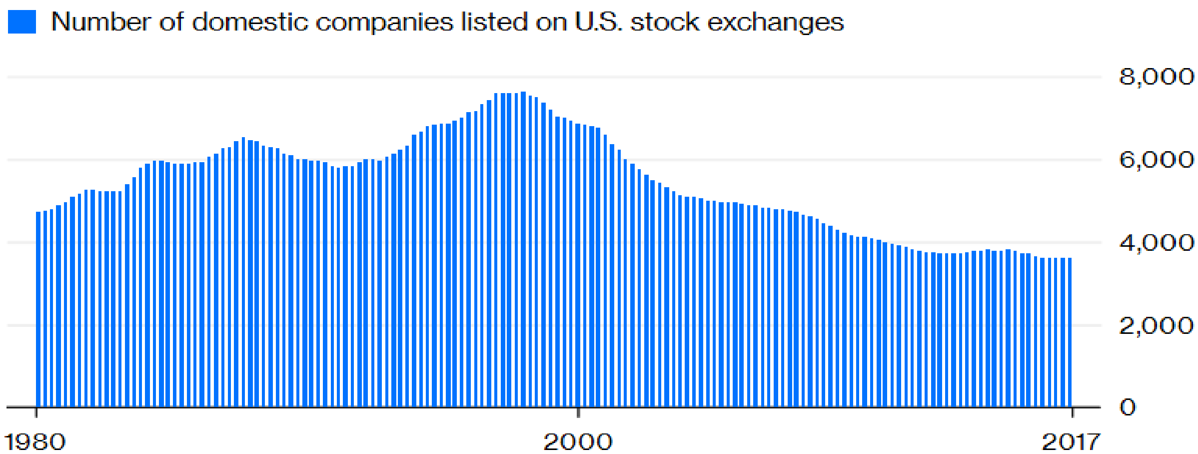
The Chamber views a strong and fair SEC as an essential element of maintaining efficient capital markets by providing investors and businesses with the certainty needed to transfer capital for its best use. A rigorous enforcement regime ensures efficient markets by rooting out fraudsters and other bad actors, but if not properly calibrated, could discourage public capital market activities. Additionally, further disclosures regarding public company corporate governance should allow for accurate metrics for evaluating companies without imposing a one-size-fits-all model.

Following the financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act or "Dodd-Frank") which imposed a number of new disclosure and other requirements on public companies. As this hearing points out, there are rulemakings from Dodd-Frank that have not yet been completed, particularly in regards to executive compensation. Additionally, Dodd-Frank gave the SEC discretionary authority to prohibit broker-dealers and investment advisers from including mandatory arbitration clauses in their customer agreements; however, the SEC has not used this authority to date. This hearing also raises other important issues such as insider trading and whistleblower protections that are important topics to discuss in overall protecting investors and holding executives accountable.

In considering these proposals, we must ensure that these proposals will protect investors and help businesses raise the capital they need to grow and create jobs. Ineffective disclosures or requirements that create burdens or obstacles to the promotion of investor protection, competition and capital formation will make the atmosphere for public companies unhospitable harming the economy.

Decline in Public Companies

One of the more pressing problems that has afflicted our capital markets has been the drastic decline in public companies over the last two decades. The United States is now home to roughly half the number of public companies than existed twenty years ago, and while the IPO market has recently shown signs of life, the Chamber remains concerned that the long term trajectory of this issue is not on a good path. The JOBS Act certainly helped make the public markets marginally more attractive to a number of companies, but Congress and the SEC must do more to revive the public company model. As part of Congress and the SEC deliberating further issues, they should be careful not to impose further burdens that ultimately do not protect investors or hold executives accountable, and instead impose further restrictions that would reverse gains made by the JOBS Act and continue the trend in the declining number of public companies.



Sources: Jay R. Ritter, Warrington College of Business Administration, University of Florida; University of Chicago Center for Research in Security Prices

When more companies choose to stay private, the investment returns generated are largely reserved for wealthier "accredited investors" and certain institutional investors. Main Street investors are typically left out. So the decline in public companies – and the dearth of investment options it leaves to most households – can actually exacerbate wealth disparities in the United States. It should also be noted that investors in general benefit from the transparency and disclosure requirements that are hallmarks of our public company regulatory regime. We think these are important points to consider in any discussion about putting investors first.

To be clear, we do not seek to minimize the strength of our private markets and do not believe that financing for businesses is a "zero sum game." Our economy clearly benefits when both public and private markets are strong. However, we believe that the roadblocks which have been placed in front of the public company model are largely self-inflicted, and it is completely within the control of Congress and the SEC to address them or at the very least to not contribute to the problem.

Federalization of Corporate Governance

The legislative mandates of the 2002 Sarbanes-Oxley Act ("Sarbanes-Oxley") and the Dodd-Frank Act have also contributed to the "federalization" of corporate governance and a one-size-fits-all regulatory approach that harms capital formation.

Traditionally, corporate governance was structured under the state laws where a business is incorporated, as well as the by-laws of the corporation. This system allowed directors and shareholders to create governance structures that fit the needs of individual businesses and its investors.

From the time of the New Deal up until the passage of Sarbanes-Oxley, with some exception in the area of compensation, the role of securities laws was a disclosure-based regime intended for investors to have the material information needed to make informed investment decisions.

Sarbanes-Oxley started a trend towards "federalizing" corporate governance by placing the federal government and the Securities and Exchange Commission ("SEC") in a more predominant role. This trend was exacerbated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which mandated new rules on compensation committee independence, pay versus performance, compensation disclosures, claw-back policies, incentive compensation rules for financial firms, "say on pay" votes, new disclosure regarding the Chairman and CEO structures, conflict minerals disclosures, resource extraction disclosures, and mine safety report disclosures. Furthermore, the Investor Advisory Committee at the SEC – created by Dodd-Frank – has produced recommendations that would further expand the use of federal mandates, such as the mandated use of universal proxy ballots in contested director elections.

Executive Compensation

For decades, our American system of bifurcated corporate responsibilities between boards of directors, who owe a fiduciary duty to shareholders, and management, which runs the company's daily operations, has contributed to the collective success of an economy that has been, and today remains, the envy of the world. Thousands of innovators, entrepreneurs, Main Street businesses, and multinational companies have benefitted from the ability to tailor corporate decision-making to the particular needs of their respective firms, taking into account the unique competitive pressures of the industries and geographies in which they operate.

Across our diverse American business community, human capital is the foundational cornerstone of growth and organizational success. Every day, businesses in the financial services industry compete fiercely in an increasingly globalized market to attract and retain the services of talented professionals through the use of incentive-based compensation arrangements that are designed to align organizational and individual incentives. These compensation plans are uniquely designed by boards of directors and management and are tailored for the employees of a particular institution.

It should also be noted that companies compete on a global basis to attract the talent needed to fill CEO and senior management positions. Compensation is an important tool to attract the talented needed to keep companies competitive and make them successful.

In 2009, the Chamber released principles for effective corporate governance, investor responsibility and executive compensation. Those principles stated:

> Policy makers in the past have not adequately taken into account the unintended consequences of reform, which have included excessive executive compensation and poor governance practices. While effective corporate governance and executive compensation policies are important, extreme solutions will lead to a flight of talent as well as capital. Balancing the need for effective policy development with the goal of creating economic growth, the Chamber has developed the following principles for appropriate policy making related to corporate governance, investor responsibility and executive compensation:

- **Corporate governance policies must promote long-term shareholder value and profitability but should not constrain reasonable risk-taking and innovation.**

- **Long-term strategic planning should be the foundation of managerial decision-making.**

- **Corporate executives' compensation should be premised on a balance of individual accomplishment, corporate performance, adherence to risk management and compliance with laws and regulations, with a focus on shareholder value.**

- **Management needs to be robust and transparent in communicating with shareholders.**

> These principles provide a template for policies that will allow for reasonable risk taking, continued innovation, the ability to acquire and retain talent and the protection of investor rights.[3]

The Chamber believes that executive compensation is already strongly evaluated by shareholders through "say-on-pay" votes, which for the vast majority of companies are held annually. Indeed investors have overwhelmingly voted in favor of pay packages through say on pay votes. These votes are typically 80-90% in favor of pay packages. To the extent that further disclosure of executive compensation metrics are warranted, the Chamber believes that the SEC and other regulators should ensure flexibility for individual companies, rather than a one-size-fits-all approach, in order to provide investors with decision useful information. Disclosures surrounding executive compensation ultimately should be rooted in the Supreme Court-articulated materiality standard, otherwise investors risk becoming inundated with information that does not inform their voting and investment decisions.

It is therefore essential that any regulator charged with writing compensation rules (or any corporate governance rules, for that matter) comprehensively study all relevant issues and data and analyze the likely effects of its regulations on the highly competitive market for talent. If they don't, and if the costs of a rule outweigh its benefits, professionals may flee covered businesses in favor of other financial firms, other industries or seek opportunities in jurisdictions whose regulators more appropriately balance the putative governmental interest in regulating compensation plans with management's ability—and, under prevailing corporation law, its statutory duty—to make business judgments for the benefit of the firm's owners. This result could actually have the effect of undermining the regulator's goals by discouraging the most talented individuals—those most capable of preventing or managing the types of losses the regulator is trying to proscribe—from working in the financial services sector. It might also chill the kind of risk-taking—lending, financing, investing—that spurs economic growth and job creation, resulting in a "freezing in place" or corporate stagnation.

The American economy is the strongest, most diverse, and most innovative economy in the world. We benefit from having well-regulated capital markets as the foundation of our free enterprise system. Our economy is built to encourage prudent risk-taking, entrepreneurship, and opportunity, which yield positive externalities like

[3] See letter from U.S. Chamber of Commerce to Treasury Secretary Timothy Geithner, February 6, 2009

job creation, productivity, and financial stability. That is why many foreign nationals, especially those with backgrounds in the STEM fields, seek attractive employment opportunities in the United States. Other nations' economies have different ontologies and social purposes and thus are regulated quite differently.

We would like to we offer our perspectives on the following proposals before the committee today that relate to executive compensation and corporate governance.

H.R. ___, a bill to require the SEC to complete rulemaking required by section 14(i) of the Securities Exchange Act of 1934

Section 953(a) of the Dodd-Frank Act mandated that the SEC amend its executive compensation disclosure rules to more clearly demonstrate the "relationship between compensation actually paid and the financial performance of the issuer." In 2015, the SEC proposed rules implementing the Dodd-Frank pay versus performance requirements. The legislation under consideration would require the SEC within 60 days of enactment to finalize pay versus performance rulemaking, and if unable to do so, the SEC Chairman would be required to testify once per month in front of the Senate Banking Committee and House Financial Services Committee until the rulemaking has been finalized.

The CCMC believes that a pay versus performance disclosure can assist investor decision making, but that the current proposal fails to do so. The proposal would increase the complexity of disclosures (counter to the SEC's current efforts to promote disclosure effectiveness), fails to provide investors with decision useful information on compensation or performance and may incentivize short-termism. Rather, the CCMC believes that the pay for performance disclosure should follow a principles-based format allowing companies to describe the performance metrics they use and to explain their processes for establishing compensation guidelines in a way that best expresses how pay and performance are aligned for their individual circumstances.

In the eight decades since the securities laws were enacted, public company disclosure requirements have increasingly expanded and become more complex, as evidenced by the voluminous annual and quarterly reports filed today. This expansion and increased complexity of disclosure has contributed to the phenomenon of "disclosure overload", whereby investors are so inundated with information it becomes difficult for them to determine the most salient factors they need to make informed voting and investment decisions. Retail investors are particularly vulnerable, as they often do not have the resources to help them make sense of the detailed SEC filings of the companies they invest in. In fact, we believe the disclosure overload phenomenon is the leading contributor to why retail shareholder participation has dropped to levels as low as five percent at some annual shareholder meetings. In a very real way, information overload has led to the disenfranchisement of retail shareholders at many public companies.

We believe that the current proposal will fail to provide investors with decision-useful information to understand the companies in which they invest. On the contrary, the proposal will layer more complex disclosures into the proxy statement and make it even more difficult for investors to decipher and understand the surrounding information in that disclosure document.

A formulaic approach fails to show the worth of a CEO or management team to a company. A business in need of a turn-around may go out and hire a new CEO and have to pay a premium to attract the talent needed to execute a plan critical to the success of the firm. Under a formula as envisioned by the SEC proposal, such a firm would be cast as an outlier. Yet, the company in taking this action is doing exactly what it should do to help the company. Therefore, the question must be asked if the disclosure is meeting its intended purpose. Under a more principles based approach, we believe the data can be provided within the appropriate context providing investors with decision-useful information.

<u>Entrench Proxy Advisory Firms</u> The Chamber also believes that the current proposal will continue to entrench proxy advisory firms' influence over corporate governance structures of U.S. public companies. Proxy advisory firms currently develop voting policies and make recommendations on executive compensation and total shareholder return. Some of the activities of proxy advisory firms have been controversial, and the Chamber has previously been critical of proxy advisor policies including "one size fits all" recommendations, a lack of due process around the development of voter policies and recommendations, failure to link recommendations with the economic interests of the firm's clients and failure to disclose specific conflicts of interests. In 2014, the SEC Staff issued Staff Legal Bulletin No. 20 to address some of these issues, as well as the concerns of other stakeholders

In September 2014, the Chamber filed a comment letter with Institutional Shareholder Services ("ISS") on its policies for the upcoming proxy season and raised serious concerns with the ISS recommendations on Pay Versus Performance. The Chamber's letter raised concerns that the ISS view on Pay Versus Performance did not accurately look at CEO pay and also failed to develop and construct information in a manner that was beneficial to investors. We believe that these points are important for two reasons. First, ISS's treatment of the Pay Versus Performance issue has some of the same flaws as the proposed rule. Second, if the proposed rule is adopted, proxy advisory firms' recommendations on executive compensation under Item 402(v) will be a significant factor in how companies draft their Pay Versus Performance disclosures in practice and whether shareholders support a company's advisory vote on executive compensation (Say-on-Pay)[4]. Therefore, we believe it is important for issuers and investors to understand both how the SEC views the role of proxy advisory firms in the implementation of the proposed rule and how Staff Legal Bulletin No. 20 will apply to ensure executive compensation matters on the topic of pay versus performance are reviewed by proxy advisory firms in a balanced manner.

The pay versus performance rules mandated by the Dodd-Frank Act can be enacted in a way that provides necessary flexibility, creates fewer burdens on companies (particularly smaller reporting companies), and avoids unnecessary investor confusion. Unfortunately, the SEC's past proposal does not achieve these objectives. The CCMC believes that the concerns with the proposal can be easily addressed and that when it ultimately finalizes these rules, the Commission should modify the proposal to create a pay versus performance reporting regime that balances the desire to provide useful information to investors with the need to accurately reflect the complexities of companies' compensation policies.

H.R. ___, a bill to require the SEC to complete rulemaking required by section 10D of the Securities Exchange Act of 1934

The Sarbanes Oxley Act allowed the SEC to require claw backs of CEO and CFO compensation in the event of misconduct by the company results in a material financial restatement. Additionally, Section 954 of the Dodd-Frank Act included a claw back provision which requires the SEC to implement rules requiring stock exchanges to adopt listing standards that require listed companies to adopt "no-fault" claw back policies for current and former executive officers, triggered in the event of an accounting restatement due to "material noncompliance" with a financial reporting requirement. On July 1, 2015, the SEC proposed rulemaking that would implement the Dodd-Frank claw back provision. The legislation under consideration would

[4] It should also be noted that the proxy advisory firms frustrated the intent of Congress regarding the frequency of say on pay votes. Congress allowed shareholders to determine the frequency of say on pay votes ranging from one to three years. The advisory firms decided on a standard of one year without any data existing as to what frequency is best for an individual company. That in turn set the standard.

require the SEC within 60 days of enactment to finalize the Dodd-Frank claw back rulemaking, and if unable to do so, the SEC Chairman would be required to testify once per month in front of the Senate Banking Committee and House Financial Services Committee until the rulemaking has been finalized.

CCMC believes that claw back policies, appropriately calibrated for the circumstances of a company, can be an effective means of instilling good governance practices. However, we believe that the proposal, in its current form, is overly complex and prescriptive and may cancel out any potential benefits that may otherwise derive from the implementation of a balanced system, while being overly burdensome for smaller reporting companies. The proposal is not clear as to what would constitute a restatement for purposes of triggering a claw back, and the proposal would apply to all executive officers, regardless of whether they were involved in preparing the issuer's financial statements. We also believe that financial reporting policies should be modernized in order for a claw backs proposal to work as intended by Congress. Finally, we also believe that it is incumbent for the SEC to perform an analysis on how the rule will impact capital formation and competition and whether the rule will create conditions that will lead to an increase in the number of U.S. public companies.

H.R. ___, the 8-K Trading Gap Act of 2019

The Chamber believes it is important to root out bad actors from capital markets. However, we do not believe the 8-K Trading Gap Act will prevent future insider trading activity.

First, it is already unlawful to trade on the basis of material, non-public information (MNPI) in violation of a fiduciary duty. Corporate insiders may not trade or make tips on the basis of MNPI learned during the course of employment. A bad actor who has determined to violate the federal securities laws by engaging in conduct as serious as insider trading is not likely to be deterred by a second, redundant prohibition against the same misconduct that is found in an employer's internal policies, procedures, and controls.

Second, the Act assumes that all Form 8-K events are certain on Day 1 of what is often a four-business-day reporting cycle, but decisions may take several days and consultations with counsel. In many cases, a public company will not determine to file until closer to the reporting deadline of Day 4.

If this timing problem raises several questions and the company is unsure of the reporting status on Days 1, 2, and 3, how is it going to develop policies and procedures to bar insiders from trading? And how would insiders even know they are blacked out if their employer has not provided notice to them? What if the company unintentionally misses a filing deadline and the company makes a late filing months later? What are the consequences then? How do policies, procedures, and controls address these kinds of hypotheticals in any realistic, enforceable way?

The Chamber is concerned that this legislation adds unnecessary complexity regarding an activity that is already illegal under current law. While we cannot support the legislation in its current form, we look forward to working with Rep. Maloney and members of the Committee to find a workable solution.

H.R. ___, a bill to amend the Securities and Exchange Act of 1934 to amend the definition of whistleblower

Section 922 of the Dodd-Frank Act established a whistleblower program at the SEC to allow for monetary awards to whistleblowers that results in monetary sanctions of over $1 million, while also providing whistleblower protections particularly regarding retaliation. In 2018, the U.S. Supreme Court held in *Digital Realty Trust, Inc. v. Somers* that whistleblower protections in Dodd-Frank apply only to when the whistleblower disclosed potential securities law violations to the SEC, rather than protecting internal whistleblowing including disclosures made to a corporate ethics or compliance program, unless the whistleblower also made a disclosure to the SEC. The draft legislation would reverse this decision and continue to provide whistleblower protections provided by Dodd-Frank to those who report wrongdoing internally without also reporting directly to the SEC.

CCMC believes that employees should be able to first report any wrongdoing internally within their compliance departments at their company. Ideally, this would lead to quicker resolutions and stop misconduct from continuing for extended periods of time, with eventual reporting to the SEC being done for egregious cases or when misconduct continues. However, we have concerns regarding the scope of providing whistleblower protections under Dodd-Frank as proposed by the draft legislation and whether that would contribute to frivolous employment litigation as well as excessive internal reporting. It should be noted that whistleblowers already receive anti-retaliatory protections under Sarbanes-Oxley.

In addition, the Chamber has continuing concerns about the Whistleblower program as mandated by the Dodd-Frank Act and believe that other reforms should be undertaken as well. For instance, the Chamber believes that a person who knowingly participates in wrongdoing that harms investors should not profit from having unclean hands by being eligible for a bounty award of any kind. Rule 21F-2(a) should therefore be revised to make this point abundantly clear.

The bounty program established by the Dodd-Frank Act and administered by the SEC has operated on a broad set of nebulous and subjective criteria. While a certain degree of confidentiality is required under Section 21F of the Exchange Act the paucity of details in the orders granting (and denying) bounty awards provides little if any decision-useful information to regulated persons as to what conduct they should avoid.

We continue to be concerned about the ongoing impact the Commission's bounty rules have had on the efficacy of internal corporate compliance programs. The bounty program suffers from a significant structural flaw in that it permits a wrongdoer—one who actually planned, aided, abetted or caused a violation of law--to be eligible to receive a bounty.

H.R. __, the "Insider Trading Prohibition Act"

The U.S. Chamber strongly opposes any form of insider trading and believes that it weakens the integrity of our markets as well as investor confidence when there is an unfair system where some people benefit from being able to trade on information that others do not possess. In those instances where clear insider trading on material non-public information occurred, the U.S. Chamber supports strong enforcement against those individuals in order to protect investors and the viability of our public capital markets.

For more than 30 years, the Supreme Court's decision in *Dirks v. SEC* has guided the distinguishing between lawful trading and unlawful insider trading on whether the tipper has breached a duty in exchange for a "personal benefit." In recent years, a number of court decisions has further elaborated on the definition and threshold of insider trading, most notably the Second Circuit's 2014 decision in *United States v. Newman*.

In deciding these cases, courts have attempted to define the personal benefit requirement, particularly when there is an absence of a financial benefit, as well as relationship between tipper and tippee to determine when insider trading occurs. In these decisions, courts have sought to help provide clear lines to help market participants while limiting unintended consequences in chilling legitimate communications between market professionals and company insiders and blurring the line between lawful and unlawful trading. There is concern that innocent conduct would be swept up in insider trading actions, particularly in the context of communications between company insiders and market professionals.

However, this has left a situation where lower courts are determining the scope and threshold for insider trading and definitions are constantly changing based on new case law. The market, as well as investors, could certainly stand to benefit from a clearer definition of what constitutes insider trading, and it is certainly within the authority of Congress to consider these definitions.

That being said, the Chamber has some concerns with the Insider Trading Prohibition Act. The bill attempts to codify decades of insider trading cases and all of its nuances into a handful of general principles, and in doing so will inevitably lead to a standard that is both under-inclusive and over-inclusive. There are additional concerns that the bill would establish insider trading as a strict liability crime in removing any scienter requirement, or at least making it narrower than current law.

Additionally, by placing insider trading in a standalone section separate from Rule 10b-5 and Section 10(b), where insider trading has previously been deemed illegal, and by stating a Sense of Congress that the amendments by this Act are not intended to supersede section 10(b) or 14e of the Securities Exchange Act, it could create a scenario where prosecutors can choose which avenue to bring insider trading cases under. If the goal of the legislation is to make insider trading standards clearer, this potential dual approach for prosecutors to bring insider trading cases does not seem to lend itself to that goal.

A reading of the bill could also prohibit 10b-5 plans which themselves are designed to avoid insider trading. We don't believe this is the intent of the bill, but it is a potential consequence of the existing language. We hope to work with Congressman Himes to address these issues.

H.R. __, the "Investor Choice Act of 2019"

The Investor Choice Act of 2019 seeks to limit the use of arbitration agreements to resolve disputes between broker dealers, investment advisers, and their customers. The legislation also would prohibit public companies from requiring the use of an arbitration forum to resolve disputes that arise with their shareholders.

Arbitration is an important means of resolving disputes that provides significant benefits to consumers and businesses. Arbitration of customer disputes has been common practice for decades, and there are currently hundreds of millions of contracts currently in force—including many that relate to consumer financial products and service—that include arbitration agreements.

Many of the criticisms of arbitration are based upon the flawed premise that alternative mechanisms – such as litigating through the courts – provide better outcomes for consumers and investors and give them a meaningful and realistic option for resolving a dispute. In fact, the opposite is true. Litigation typically involves enormous costs, delays, and – in the case of class actions – the majority of cases result in no recovery at all for members of the class. In fact, according the American Arbitration Association, from 2011-2015 delays in the court system cost consumers up to $13.6 billion.[5]

The Financial Industry Regulatory Authority (FINRA), which oversees the arbitration system for broker-dealers, estimates that the average arbitration dispute is settled in a little over a year, and that a significant number of cases are resolved by other means (e.g. settlement or withdrawal) before an arbitration decision is necessary. This stands in stark contrast to class action lawsuits which can drag on for years without a resolution, and the best case for consumers is typically receiving a minimal portion of settlement funds.

In the context of public companies and arbitration, the impact of securities class action lawsuits on businesses has been significant. In the past decade, the settlements of securities class action lawsuits related to U.S. public companies have totaled more than $50 billion. That is money that comes directly from the pockets of American investors, and the current system serves as a disincentive for companies that may be looking to go public at some point in the future.

The Investor Choice Act of 2019 seeks to impose yet another federal corporate governance mandate by prohibiting public companies from including mandatory arbitration clauses as part of their bylaws. Such decisions are best left to be made between companies and their shareholders, taking into account the long-term interests of the company as well as relevant state and federal law. Investors can then make a

[5] Measuring the Costs of Delays in Dispute Resolution. American Arbitration Association, available at http://go.adr.org/impactsofdelay.html

decision as to whether or not they wish to invest in a certain company if has mandatory arbitration agreements as part of its bylaws.

This legislation would deprive consumers and investors of a valuable tool for resolving disputes and being compensated for harm done to them, and imposes new mandates upon businesses that further expands the federal government's role in corporate governance. For these reasons, the Chamber opposes the bill.

Conclusion

The Chamber appreciates the Committee's work to examine ways to protect investors and make our capital markets efficient. Those are important policy objectives to achieve long-term economic growth and job creation. We have concerns with some aspects of the legislation before us and we look forward to working with the authors and this subcommittee to address those issues.