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CONGRESSIONAL TESTIMONY

"Reforming the SEC"

Testimony before
The Financial Services Committee
Subcommittee on Capital Markets
United States House of Representative

at a hearing on

"SEC Overreach: Examining the Need for Reform"

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David R. Burton
Senior Fellow in Economic Policy
The Heritage Foundation

My name is David R. Burton. I am Senior Fellow in Economic Policy at The Heritage Foundation. I would like to express my thanks to Chairman Wagner, Ranking Member Sherman, and members of the committee for the opportunity to be here this morning. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

As the most important regulator of U.S. capital markets, the Securities and Exchange Commission has a vital mission.[1] We need an effective cop on the beat to prevent fraud, to ensure adequate disclosure and to promote efficient markets if we are to have strong capital markets, a vibrant economy and secure savings for the American people. Unfortunately, despite its glowing self-image, the Commission does an increasingly ineffective job of discharging its core functions. Moreover, although the Commission is statutorily required to promote efficiency, competition, and capital formation by responsible participants in the capital markets, it increasingly does the opposite.

There are at least five reasons for this. First, Commission resources have flowed into unnecessary management, "support," and ancillary functions, while core functions have been neglected. The SEC is managed exceedingly poorly and has been for quite some time. Its organizational structure is unwieldy and inconsistent with sound management practices. It is among the most management heavy and bureaucratic agencies in government. Its information technology function is among the most expensive and least effective in government. Oversight of its contracting process is poor. Second, it provides inadequate oversight of so-called self-regulatory organizations. In the aggregate, these non-governmental organizations to whom regulatory authority has been delegated, have personnel levels and budgets that are comparable to the SEC itself. Third, the Commission does an extraordinarily poor job of providing the information necessary for policy makers, whether Commissioners or members of Congress, to make informed judgments about the policy choices that they face. Fourth, the Commission has failed to address critical regulatory issues, opting instead to pursue regulation by enforcement or to largely ignore serious problems. Fifth, the Commission is pursuing political and ideological objectives that are unrelated to its core mission.

The first four of these problems have existed for quite some time but are growing relentlessly worse. The fifth – the extreme politicization of the Commission and its forays far beyond its statutory mission – is a new development and undoubtedly one of the reasons that this hearing is being held. I address these five problems in some detail and propose specific solutions. Because the Commission is floundering in so many different ways, major reforms are necessary to restore its effectiveness. Tinkering will not get the job done. I also address 13 specific bills that the Committee has asked me to discuss.

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[1] The Commission's statutory charge is: "Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." See Securities Exchange Act of 1934, Public Law 73–291, § 3(f), and Securities Act of 1933, Public Law 73–22, § 2(b). The SEC usually describes itself as having a three part mission: to protect investors, to maintain fair, orderly, and efficient markets, and to facilitate capital formation.

The Commission is Poorly Managed and Core Functions are Neglected

Commission Spending and Staffing

One of the great myths surrounding the SEC is that it is under resourced. Its staff and budget have grown rapidly for two decades. The resources that it does have, however, are mismanaged. The table below shows SEC spending and staff levels for the past twenty years.

Securities and Exchange Commission Full-Time Equivalent Employees and Expenditures
(Fiscal Year 2004-2024; FY 2025 Request)

Fiscal Year	FTEs	Expenditures (billions)
2004	3,550	$0.76
2005	3,851	$0.89
2006	3,695	$0.89
2007	3,465	$0.88
2008	3,511	$0.91
2009	3,656	$0.96
2010	3,748	$1.10
2011	3,844	$1.21
2012	3,770	$1.18
2013	4,023	$1.28
2014	4,150	$1.42
2015	4,301	$1.55
2016	4,554	$1.68
2017	4,616	$1.65
2018	4,682	$1.65
2019	4,350	$1.70
2020	4,411	$1.83
2021	4,459	$1.95
2022	4,547	$2.02
2023	4,673	$2.19
2024	5,005	$2.15
2025 (request)	5,156	$2.59

Source: Securities and Exchange Commission, Congressional Budget Justification and Annual Performance Plan (various years)

During the past 10 years (FY 2014-2024), SEC spending has increased 51 percent. During the past 20 years (FY 2004-2024), SEC spending has increased by 183 percent. Over the same period, the price level (as measured by CPI-U) has increased by 32 percent (10 years) and 67 percent (20 years). Thus, SEC spending has been growing very substantially in real terms. Commission staff levels have increased by one-fifth during the past decade and by two-fifths over the past 20 years. The SEC has requested, and President Biden has included in his budget, a one-year increase of 20 percent for FY 2025.

Commission Resource Mismanagement

In FY 2023, the Office of Inspector General had 61 positions (51 FTEs), well over one percent of all SEC positions.[2] In FY 2008, the office had 11 FTEs.[3] So, in 15 years, its staff has grown 363 percent. It may be that this level of staffing is warranted by the level of malfeasance or other operational difficulties at the Commission. More likely, the staff level, which stood at 18 as recently as FY 2013, was ramped up and has not been seriously re-evaluated since by either the Commission or Congress due to bureaucratic and political inertia.

I have not had the opportunity to update my research in preparation for this testimony, but when I did my 2019 study of the SEC, the SEC spent massive amounts of money buying outside services for IT and for "support."[4] The SEC spent $377,529,843 in FY 2017 on contracts. This amounted to 23 percent of its FY 2017 spending and nearly $82,000 per employee. The overwhelming majority of these contracts fell into two categories: information technology and telecommunications ($186 million or 49.2 percent of obligated amounts) and "support" ($138 million or 36.5 percent of obligated amounts). Combined, these two categories amounted to 85.7 percent of all SEC contractually obligated amounts. Spending appears to be much too high and IT contracting poorly managed. There is almost certainly a great deal of room here to reallocate resources towards the SEC's mission and away from bureaucratic foolishness. Congress should require an Inspector General's report and a Government Accountability Office (GAO) report regarding Information Technology spending and "support" contracting by the SEC. The next SEC Chairman should look at this spending very, very closely and reallocate spending toward core mission functions.

The Commission has one of the most expensive, and least effective, information technology (IT) departments in government. The Commission had 211 information technology FTEs in FY 2023 up from 171 in FY 2017. This was 4.6 percent of its employees in FY 2023, up from 3.7 percent of its employees in FY 2017. When I did my 2019 study, total IT expenditures in FY 2017 were approximately $227 million, or nearly 14 percent of the commission's overall FY 2017 spending. This was *five times* higher than the government average of 2.8 percent. Since the Commission's IT FTEs have increased as a share of all FTEs and federal IT spending as a share of overall federal spending has not changed much,[5] the cost ineffectiveness of the SEC's IT department is probably worse, not better, than it was. I would have to conduct a thorough review of SEC IT contracting, as I did in 2019, to be sure.

The expenditure of all of this money might be warranted if the SEC's IT function was being competently discharged. It is not. The Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) is the core mechanism by which SEC disclosure documents are provided to the public. It was established in 1984. It. Its search functions and user-friendliness have progressed little since the 1990s. Using EDGAR is a form of time travel because using it makes you feel like you

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[2] Fiscal Year 2025 Congressional Budget Justification and Annual Performance Plan https://www.sec.gov/cj .
[3] FY 2010 Congressional Justification https://www.sec.gov/files/secfy10congbudgjust.pdf .
[4] See David R. Burton, "Reforming the Securities and Exchange Commission, Heritage Foundation Backgrounder No. 3378, January 30, 2019, the section entitled "Contract Oversight and Spending" https://www.heritage.org/sites/default/files/2019-01/BG3378.pdf.
[5] As reported in Special Analysis 15 in Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2025 https://www.whitehouse.gov/wp-content/uploads/2024/03/ap_15_it_fy2025.pdf .

have traveled back to the 1990s. The system is so inadequate that most investors use private systems (based on EDGAR data) that display the information in a more useful and accessible format. In addition, the system has proved to be insecure. It was hacked in 2016.[6] This is highly problematic since the information in EDGAR documents can move markets considerably. Being able to access that information before it is made public could yield hackers considerable profit were they to trade on that information. The SEC X Account was also hacked in 2024.[7]

Commission Bureaucracy

The organization and structure of the SEC has not really been rethought for many decades. It shows. Under reorganization Plan No. 10 of 1950,[8] the Chairman has executive authority over the SEC budget, staff and, absent the rare statutory requirement, the structure of the SEC. Both the next Chairman and the Congress need to take steps to reform the SEC.

Both informal conversations with agency personnel and data support the proposition that the agency has become management heavy and overly bureaucratized. The SEC Office of Minority and Women Inclusion reports that the SEC had 918 Supervisors and Managers in FY 2022 which was 20 percent of its workforce of 4,547.[9] This means that 918 people are supervising 3,629 non-supervisory personnel, a ratio of one supervisor for every four non-supervisory employee. In most organizations, the ratio is between 5 to 1 and 10 to 1.[10] In the federal government generally, the average for all agencies is 7.6 to 1 (90 percent higher than the SEC).[11] Reducing the number of managers per non-supervisory worker will free up resources to better achieve the Commission's mission. Assuming the non-supervisory staff is competent, it will enable them to be more effective at their jobs by reducing micro-management.

Conversely, the number of direct reports to the SEC *Chairman* is absurdly high. At 23,[12] the SEC Chairman has approximately 2 ½ to three times the number of reports regarded as optimal. Nobody can effectively manage 23 people. The SEC should be restructured to reduce the number of direct reports to the Chairman. Specifically, the following offices should be merged into other offices and their managers made to report to an SEC official other than the Chairman:

1. Office of the Secretary;
2. Office of the Ethics Counsel;
3. Office of International Affairs;

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[6] News release, "SEC Chairman Clayton Issues Statement on Cybersecurity," U.S. Securities and Exchange Commission, September 20, 2017 https://www.sec.gov/news/press-release/2017-170 .
[7] See "SECGov X Account" https://www.sec.gov/secgov-x-account.
[8] Title 5, United States Code, Appendix, Reorganization Plans, pp. 140-141 https://www.govinfo.gov/content/pkg/USCODE-2018-title5/pdf/USCODE-2018-title5-app.pdf . See also 15 U.S. Code §78d-2.
[9] SEC Office of Minority and Women Inclusion, Annual Report to Congress, March 2023, p. 42 https://www.sec.gov/files/omwi_annual_report_fy2022.pdf .
[10] See, for example, Gary L. Neilson and Julie Wulf, "How Many Direct Reports?," *Harvard Business Review* (April 2012), https://hbr.org/2012/04/how-many-direct-reports .
[11] 2,260,354 total employees and 261,972 supervisors. (2,260,354-261,972)/261,972 = 7.63 October 2023. Federal Workforce Data https://www.fedscope.opm.gov/ .
[12] For a list, see David R. Burton, "Reforming the Securities and Exchange Commission, Heritage Foundation Backgrounder No. 3378, January 30, 2019, pp. 7-8 https://www.heritage.org/sites/default/files/2019-01/BG3378.pdf.

4. Office of the Chief Accountant;
5. Office of Credit Ratings;
6. Office of Municipal Securities;
7. Office of Public Affairs;
8. Office of Legislative and Intergovernmental Affairs;
9. Office of Equal Employment Opportunity;
10. Office of Minority and Women Inclusion; and
11. Office of Investor Education and Advocacy.

The Office of the Secretary, the Office of the Ethics Counsel, and the Office of International Affairs should be merged into the Office of the General Counsel. Alternatively, all or some functions of the Office of International Affairs could be moved to the Division of Corporate Finance. Legal functions, such as providing ethics advice and enforcement, providing legal advice to the Commission regarding Commission procedures, and administrative law and international comparative law and coordination should be unified under one chief legal officer, the General Counsel. The Office of Municipal Securities should be merged into either the Division of Corporate Finance or the Division of Trading and Markets. The Office of the Chief Accountant should become an office within the Division of Corporate Finance and their functions integrated. The primary duty of the Office of the Chief Accountant involves financial accounting disclosures. That, combined with nonfinancial accounting disclosure, is also the core function of the Division of Corporate Finance. The Office of Credit Ratings also plays a key function in the disclosure process, particularly with respect to debt securities and ensuring the integrity of the rating process by rating organizations. It also should become an office within the Division of Corporate Finance. The Office of Public Affairs and the Office of Legislative and Intergovernmental Affairs discharge allied functions. They should be integrated into a single office. There is no need to have two separate directors reporting separately to the Chairman. The director of the new office could also report to someone other than the Chairman such as the Chief of Staff.

These changes would reduce the number of direct reports to the Chairman from 23 to 12. Most of these changes can be undertaken by the Chairman because of the authority granted by Reorganization Plan No. 10 of 1950.

The offices still reporting directly to the Chairman would be:

1. Division of Corporation Finance;
2. Division of Investment Management;
3. Division of Enforcement;
4. Division of Trading and Markets;
5. Division of Economic and Risk Analysis;
6. Division of Examinations;
7. Office of the General Counsel;
8. Office of the Chief Operating Officer;
9. Office of Administrative Law Judges;
10. Office of Inspector General;
11. Office of the Investor Advocate; and

12. Office of the Advocate for Small Business Capital Formation.

The Office of the Investor Advocate and the Office of the Advocate for Small Business Capital Formation are required by law to report to the Chairman. Congress may want to reconsider that. To me, the important thing regarding these offices is not to whom the advocates report but whether they have the authority to communicate directly to Congress and to the public on substantive policy matters without getting prior approval of the SEC bureaucracy.

Poor SRO (and PCAOB) Oversight

So-called self-regulatory organizations (SROs) include The Financial Institution Regulatory Authority (FINRA), the Municipal Securities Rulemaking Board (MSRB) and the regulatory functions of the national securities exchanges such as the NYSE and NASDAQ.[13] The Public Company Accounting Oversight Board (PCAOB), while a "non-governmental" not-for-profit regulator like FINRA, is not usually considered an "SRO" but it operates in a similar fashion. Furthermore, SROs are no longer actually "self-regulatory" because their boards are not member controlled as they once were.[14] In other words, the term SRO is now a misnomer.

In the aggregate, FINRA, PCAOB and the exchanges have more personnel conducting regulatory functions than the SEC and combined budgets roughly comparable to the SEC. Yet, Congressional oversight of these regulators is nothing close to the oversight conducted on the SEC. And the oversight of these regulators conducted by the SEC is highly inadequate.[15]

FINRA – a so-called self-regulatory organization or SRO[16] – is the primary regulator of broker-dealers and their registered representative employees. FINRA is currently the only registered national securities association. It has been delegated regulatory authority by the SEC and Congress. FINRA is organized as a not-for-profit Delaware corporation. It regulates roughly 621 thousand registered representatives and about 3,400 broker dealers. Its board has industry members but the board is not controlled by the industry. FINRA is supervised by the SEC and its rules must be approved by the SEC. It spent about $1.42 billion in 2023.[17] This is about two-thirds of the SEC budget. In 2023, it had 4,200 employees, 90 percent of the SEC staffing level.

FINRA is largely unaccountable to the industry or to the public. Due process, transparency, and regulatory-review protections normally associated with regulators are not present, and its rulemaking and arbitration process are flawed. Reforms are necessary.[18] Despite its importance,

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[13] The National Futures Association is the SRO (and FINRA analog) in the derivatives field.

[14] Neither FINRA nor the MSRB have a majority of directors from the industry. Both the New York Stock Exchange and NASDAQ are now investor owned, not member owned.

[15] The FINRA and Securities Industry Oversight (FSIO) Examination Program in the Division of Examinations is primarily responsible for this oversight along with the Division of Trading and Markets and the Office of Municipal Securities.

[16] FINRA is not actually a self-regulatory organization since its board is not controlled by the industry. See also Hester Peirce, "The Financial Industry Regulatory Authority: Not Self-Regulation After All," Mercatus Center at George Mason University Working Paper, January 2015, https://www.mercatus.org/research/working-papers/financial-industry-regulatoryauthority-not-self-regulation-after-all .

[17] FINRA 2023 Annual Budget https://www.finra.org/sites/default/files/2023-06/FINRA-2023-Annual-Budget-Summary.pdf .

[18] David R. Burton, "Reforming FINRA," Heritage Foundation Backgrounder No. 3181, February 1, 2017,

Congress provides little meaningful oversight of FINRA. And the oversight provided by the SEC is highly insufficient. Thus, the second most important regulator of the capital markets, and the most important regulator of financial services providers, operates largely free of meaningful oversight. That is a serious problem.

FINRA has proven to be largely impervious to reform and, given its governance structure, that is unlikely to change. Accordingly, FINRA's regulatory function (which is most of what it does) should be moved to the SEC.

In the absence of merging FINRA into the SEC, as recommended, Congress (or the SEC) should require that:

1. FINRA's Board of Governors meetings be open to the public unless the board votes by a supermajority to meet in executive session.
2. FINRA's Board of Governors' agenda be made available to the public in advance.
3. FINRA's Board minutes describing actions taken be published without delay.
4. FINRA make available to the public in advance rulemakings that the FINRA board is expected to consider.
5. FINRA arbitration and disciplinary hearings should be open to the public and reported.
6. FINRA arbitrators make findings of fact based on the evidentiary record and demonstrate how those facts led to the award given (except with respect to very small claims). These written FINRA arbitration decisions should be subject to SEC review and limited judicial review.
7. All fines imposed by FINRA (and other SROs) should go either to a newly established investor reimbursement fund or to the Treasury. SROs should not have a financial interest in imposing fines.
8. All SROs conduct meaningful cost-benefit analysis as part of the rulemaking process with respect to major rules.
9. All SROs publish rules in proposed format, seek public comment and respond to those comments before they are submitted to the SEC.
10. All SROs submit an annual report to Congress with detailed, specified information about their budget and fees, their enforcement activities (including sanctions and fines imposed by type of violation and type of firm or individual), their dispute resolution activities, and their rulemaking activities.
11. Congress conduct annual oversight hearings for each SRO.
12. Either (a) FINRA, the Municipal Securities Rulemaking Board (MSRB), and the National Futures Association (NFA) are "Designated Federal Entities" and an inspector general is established with respect to financial SROs (including FINRA, the MSRB, and the NFA) or (b) place FINRA, the MSRB, and the NFA within the ambit of an existing inspector general.
13. The SEC publish a detailed annual report on SRO supervision.

FINRA reform or replacement is an area of potential agreement between progressives and conservatives. The Committee should explore this opportunity to work together.

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https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf .

Created by Congress with the Sarbanes-Oxley Act, the Public Company Accounting Oversight Board (PCAOB) is another largely unaccountable regulator.[19] It has about 800 employees (18 percent of the SEC) and a budget of about $300 million (15 percent of the SEC budget).[20] Although it is deemed a not-for-profit corporation, its board is appointed by the SEC. The SEC has oversight authority over the PCAOB, including the approval of the Board's rules, standards, and budget. Most of the due process, transparency and rulemaking protections associated with government are not present. Oversight by both Congress and the SEC is not robust.[21] PCAOB, like FINRA, should be rolled into the SEC. Its creation was a mistake. Rep. Huizenga's Streamlining Public Company Accounting Oversight Act, discussed below, would accomplish this result.

MSRB is much smaller than FINRA or the PCAOB. It spends about $40 million annually and has about 125 employees.[22] I do not have readily available information about the budgetary and personnel aspects of the regulatory functions of the exchanges. In terms of their impact on the markets, however, they are extremely important.

Information Desert

Commissioners and Congress operate in an almost data free environment because the SEC is so bad at collecting and publishing relevant data. Data available to the Commission and Congressional policymakers with respect to securities markets, securities offerings, securities market participants and securities law enforcement is seriously deficient. This becomes evident when what is available to the Commission and Congress in the securities regulation field is compared to, for example, the Internal Revenue Service Statistics of Income and IRS Databook relevant to tax policy,[23] the data provided with respect to health care by the National Center for Health Statistics, the Centers for Medicare & Medicaid Services and others,[24] the data provided regarding labor and employment by the Bureau of Labor Statistics and others,[25] education data,[26] transportation data[27] and the general economic data provided by the Bureau of Economic Analysis[28] or the Census[29] and so on.

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[19] Peter J. Wallison, "Rein in the Public Company Accounting Oversight Board," American Enterprise Institute, February 1, 2005 https://www.aei.org/research-products/report/rein-in-the-public-company-accounting-oversight-board/.
[20] PCAOB, 2022 Annual Report https://assets.pcaobus.org/pcaob-dev/docs/default-source/about/administration/documents/annual_reports/2022-annual-report_final.pdf .
[21] At the very least, Congress should require a detailed annual report from the SEC regarding its supervision of the PCAOB and hold an annual oversight hearing requiring the PCAOB and those at the SEC who oversee it to testify.
[22] MSRB, Form 990, 2022 https://www.msrb.org/sites/default/files/2023-08/FY-2022-Form-990.pdf .
[23] Tax Statistics https://www.irs.gov/statistics.
[24] The National Center for Health Statistics https://www.cdc.gov/nchs/index.htm; The Centers for Medicare & Medicaid Services (CMS), Research, Statistics, Data & Systems https://www.cms.gov/Research-Statistics-Data-and-Systems/Research-Statistics-Data-and-Systems.html.
[25] Bureau of Labor Statistics https://www.bls.gov/; National Labor Relations Board. Graphs & Data https://www.nlrb.gov/news-outreach/graphs-data; U.S. Equal Employment Opportunity Commission, Statistics https://www.eeoc.gov/eeoc/statistics/.
[26] National Center for Education Statistics https://nces.ed.gov/.
[27] Bureau of Transportation Statistics https://www.bts.gov/.
[28] Bureau of Economic Analysis http://www.bea.gov/.
[29] Census Bureau, Data Tools and Apps https://www.census.gov/data/data-tools.html.

The Division of Economic and Risk Analysis (DERA) should substantially improve the collection and regular publication of data on securities offerings, securities markets and securities law enforcement and publish an annual data book of time series data on these matters. With a budget of about $89 million and about 168 employees, it has adequate resources to do so. It should conduct surveys and collect information internally available (both data from filings and from enforcement actions). It should publish on a regular basis time series data in compliance with OMB's Standards and Guidelines for Statistical Surveys and the Paperwork Reduction Act.[30] DERA should consult with the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA) and the Interagency Council on Statistical Policy and secure advice from key statistic agencies such as the Census Bureau and the Bureau of Economic Analysis regarding the most effective means of collecting information and protecting the privacy of those providing the information.

Specifically, Congress should require DERA to publish annual data on:

> (1) the number of offerings and offering amounts by type (including type of issuer[31], type of security[32] and exemption used[33]);
> (2) ongoing and offering compliance costs by size and type of firm and by exemption used or registered status (e.g. emerging growth company, smaller reporting company, fully reporting company) including both offering costs, the cost of ongoing compliance and fees imposed by federal and state regulators;
> (3) enforcement (by the SEC, state regulators and SROs), including the type and number of violations,[34] the type and number of violators and the amount of money involved;
> (4) basic market statistics such as market capitalization by type of issuer and type of security; the number of reporting companies, Regulation A issuers, crowdfunding issuers and the like; trading volumes by exchange or ATS; and
> (5) market participants, including the number and, if relevant, size of broker-dealers, registered representatives, exchanges, alternative trading systems, investment companies, registered investment advisors and other information.

This data should be presented in time series over multiple years (including prior years to the extent possible) so that trends can be determined.

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[30] Statistical Programs & Standards, Directives and Standards, OMB Directives 1-4 https://www.whitehouse.gov/omb/information-regulatory-affairs/statistical-programs-standards/ .

[31] By industry; by measures of size such as gross revenues, assets or employees; by age (i.e. years in existence); reporting status; and so on.

[32] Common stock, preferred stock, bond, (and whether the bond or preferred stock is convertible into common stock), other classes of security, whether options or warrants were attached; and so on.

[33] Regulation D (Rule 504 and 506 (including 506(b) and 506(c)); Regulation A (Tier 1 and Tier 2); Crowdfunding (Tiers 1, 2 & 3); non-Regulation D section 4(a)(2) offerings, Rule 144A and other exemptions.

[34] Civil or Criminal (referrals, convictions, settlements); with respect to broker-dealers (Breach of Fiduciary Duty, Suitability violations, Negligence, Failure to Supervise, Misrepresentation, Fraud, Breach of Contract, Omission of Facts, Violation of Blue Sky Laws, Unauthorized Trading, Manipulation, Churning); issuer violations by type of violation (e.g. fraud, non-compliance with Regulation S-K, Regulation S-X, failure to file an 8-K, Regulation A, Regulation CF, etc.) and type of issuer ((private issuer, Regulation A issuer, crowdfunding issuer, reporting company, investment company, registered investor advisor, broker-dealer, registered representative, etc.).

Failure to Address Important Regulatory Issues and Regulation by Enforcement

The Commission is no slouch when it comes to imposing rules, interfering in markets and increasing costs borne by market participants. But, in a number of areas, it has also acted irresponsibly by refusing to develop rules – engaging instead in regulation by enforcement or simply largely ignoring a problem. I will discuss three areas in particular: digital assets, finders and private placement brokers and entrepreneurial capital formation.

Digital Assets

Perhaps the leading area in which the Commission has been irresponsible is the area of digital assets, or crypto assets. For over a decade, it has failed to provide basic rules for responsible actors to follow. I am not entirely sure whether this irresponsible failure to provide basic rules is a function of the limited understanding of those charged with regulating in this area or their desire to simply have no rules so that the Commission can engage in regulation by enforcement. It has tried to crush the adoption of new technologies. And yet it has also failed to protect investors from massive fraud and misappropriation by politically connected bad actors in the digital asset area. If you were to write a book on how not to regulate, the Commission's *modus operandi* in this area would be the first chapter. And the Commission leadership continues to plod blithely along as if nothing is wrong with their approach.

For over a decade the Commission has not bothered to promulgate basic rules governing the area or even provide meaningful guidance. It's one attempt is a complete failure. Its 2019, 13-page "Framework for 'Investment Contract' Analysis of Digital Assets" [35] is an attempt to apply the Supreme Court Howey test (from a 1946 case relating to orange groves) to digital assets.[36] Although the actual decision is not so concise, the test is usually articulated as "an 'investment contract' exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others." The reason that matters is that an "investment contract" falls with the definition of a security under the Securities Act.[37] The Howey test is, therefore, a four-prong test. Making an investment in art, other collectibles, any commodity or reals estate involves (1) the investment of money and (2) the expectation of profit that is (3) derived from the effort of others. Ergo, for purposes of evaluating whether digital assets are a security, the key issue is whether buying it involves an investment in a common enterprise (i.e. a business). In a 13-page document, this is the entirely of the SEC's discussion of the common enterprise prong of the Howey test:

> Courts generally have analyzed a "common enterprise" as a distinct element of an investment contract. In evaluating digital assets, we have found that a "common enterprise" typically exists.

[35] Framework for "Investment Contract" Analysis of Digital Assets, April 3, 2019 https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets or https://www.sec.gov/files/dlt-framework.pdf (PDF).
[36] *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).
[37] Securities Act of 1933, sec. 2(1).

Nobody at the SEC has *ever* explained what equity interest, what debt interest or what interest at liquidation any owner of bitcoin, for example, has in any common enterprise. That is because there is none. But if you don't have an equity interest in a common enterprise, or a debt interest in a common enterprise, or an interest upon liquidation of the common enterprise, then you don't have an interest in a common enterprise.

Yet the SEC marches along as if all of these assets should be registered securities and their issuers should treat them as stocks or bonds. It has launched over 225 enforcement actions.[38] To be sure, there is real fraud in this space. Both the SEC and the CFTC need to police actual fraud, most of which would be fraud or misappropriation under common law principles even in the absence of the Securities Act, the Securities Exchange Act or the Commodity Exchange Act. But the SEC and the CFTC failed to protect investors from the biggest such fraud, the multibillion FTX fraud perpetrated by the politically connected[39] Sam Bankman-Fried.[40] The SEC did not get involved until FTX was collapsing.[41]

Finders and Private Placement Brokers

Another example of irresponsible regulating by the SEC relates to finders. A finder, or private placement broker, is a person who is paid to assist small businesses to find capital by making introductions to investors. Finders are particularly important to Main Street small business people who do not have access to many highly affluent accredited investors. In 2000, the Securities and Exchange Commission created a regulatory cloud surrounding finders, and entrepreneurs that use finders to raise capital, by withdrawing the relevant guidance and declaring that finders would be pursued as unregistered broker-dealers (even though many of them are no such thing) and that issuers that raised capital using finders may have to rescind those transactions.[42] Although there was one attempt late in Chairman Clayton's tenure to resolve this Commission-created problem, the Commission has never done so.[43] Legislation to provide a safe harbor for finders and a reasonable regulatory regime for more active private placement brokers passed the House earlier this month. It would resolve the problem and have a substantial

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[38] Crypto Assets and Cyber Enforcement Actions https://www.sec.gov/spotlight/cybersecurity-enforcement-actions.
[39] Nik Popli, "Here's What We Know About Sam Bankman-Fried's Political Donations," *Time*, December 14, 2022 https://time.com/6241262/sam-bankman-fried-political-donations/.
[40] Luc Cohen and Jody Godoy, "Sam Bankman-Fried convicted of multi-billion dollar FTX fraud," Reuters, November 3, 2023 https://www.reuters.com/legal/ftx-founder-sam-bankman-fried-thought-rules-did-not-apply-him-prosecutor-says-2023-11-02/ .
[41] "Sam Bankman-Fried and the SEC," Editorial, *Wall Street Journal*, November 3, 2023.
[42] David R. Burton, "Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers," Heritage Foundation Backgrounder No. 3328, July 10, 2018 https://www.heritage.org/sites/default/files/2018-07/BG3328.pdf.
[43] "Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders," Securities and Exchange Commission, *Federal Register*, Vol. 85, No. 198, October 13, 2020 https://www.govinfo.gov/content/pkg/FR-2020-10-13/pdf/2020-22565.pdf; "SEC Proposes Conditional Exemption for Finders Assisting Small Businesses with Capital Raising," SEC Press Release, October 7, 2020 https://www.sec.gov/news/press-release/2020-248 .

positive impact on the ability of Main Street entrepreneurs to raise capital.[44] We can hope that the Senate will follow suit and put an end to this Commission-created confusion.

Entrepreneurial Capital Formation

The Commission has, for a very long time, stood in the way of entrepreneurs seeking to raise capital to launch or grow their business. The 2012 JOBS Act, signed into law by President Obama, was a bi-partisan effort to scale back these obstacles. With a few exceptions, the Commission has remained intransigent. It typically only takes action on these matters when forced to do so by Congress.[45] It consistently makes it more, rather than less, difficult for small businesses to raise capital. Even its regulations implementing JOBS Act provisions are highly complex and bureaucratic, imposing unnecessary burdens. There is serious need for reforms in this area by both the SEC and Congress. Elsewhere, I have made detailed suggestions for improvements.[46] I should also note that the SEC is working on a potentially highly destructive amendment to Regulation D that may radically reduce the number of persons that can invest in Regulation D offerings, harming investors, and harm the ability of entrepreneurs to raise capital.[47]

Regulatory Agenda Driven by Politics Rather than Core Mission

The SEC's Mission

Under Chairman Gensler, massive amounts of Commission and Commission staff time and resources are being diverted to ideological projects that are unrelated to the Commission's statutory charge, which is:

> Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[48]

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[44] The "Unlocking Capital for Small Businesses Act of 2023" was incorporating into the "Expanding Access to Capital Act of 2023" [H. R. 2799, 118th Congress] as Title I of Division B which passed the House on March 08, 2024.

[45] This can take the form of the Commission grudgingly implementing statutes by piling on unnecessary requirements or preemptively adopting a no-action letter, for example, to try to take the momentum from a Congressional reform effort.

[46] See, for example, David R. Burton, "Improving Entrepreneurs' Access to Capital: Vital for Economic Growth," Heritage Foundation Backgrounder No. 3182, February 14, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3182.pdf; David R. Burton and Norbert J. Michel, "Proposals to Foster Economic Growth and Capital Formation," Submission to U.S. Senate Banking Committee, March 18th, 2021 https://www.banking.senate.gov/download/david-burton-and-norbert-michel; David R. Burton, Comments regarding the Concept Release on Harmonization of Securities Offering Exemptions, September 24, 2019 https://www.sec.gov/comments/s7-08-19/s70819-6193328-192495.pdf.

[47] See Regulation D and Form D Improvements https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AN04 .

[48] See Securities Exchange Act of 1934, Public Law 73–291, § 3(f), and Securities Act of 1933, Public Law 73–22, § 2(b).

Entirely independent of the merits of his ideological objectives, this pursuit of ideological objectives unrelated to the SEC mission has real world consequences simply because the Commission is not doing its real job but is instead focusing on climate regulation, diversity equity and inclusion, board diversity and various social justice objectives under the rubric of human capital management.

The Commission is a securities regulator. Its mission is to protect investors and promote efficiency, competition and capital formation. It is not meant to right every imaginable social wrong, nor can it do so. It is not an environmental regulator. It is not the EEOC or the Civil Rights Commission. It is not the Department of Labor or the NLRB. It should discharge the mission that Congress gave it.

Materiality

The concept of materiality has been described as "the cornerstone" of the disclosure system established by the federal securities laws.[49] The Supreme Court has held that information or facts (or omitted information or facts) are material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.[50] The Court has also indicated that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.[51]

There is no definition of material or materiality in the Securities Act or the Securities Exchange Act although the term "material" is used in both many times. The Commission has defined the term "material" in its regulations and changed its definition over the years (often to conform to Supreme Court holdings). The current definition found in 17 CFR § 240.12b-2 is:

> Material. The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.

These definitions are fine as far as they go but they are quite general and provide little practical guidance to issuers. There is a spirited debate about whether "principles-based" or more "prescriptive," bright-line rules should govern disclosure by issuers of material information. The Commission's rules presently balance these two approaches.

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[49] SEC Concept Release on Business and Financial Disclosure Required by Regulation S-K, April 13, 2016 at p. 33 https://www.sec.gov/rules/concept/2016/33-10064.pdf; "Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission," Committee Print 95-29, House Committee on Interstate and Foreign Commerce, 95th Congress, 1st Session, November 3, 1977 http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.

[50] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic Inc. vs. Levinson*, 485 U.S. 224 (1988).

[51] *Matrixx Initiatives, Inc. v. Siracusano*, 131 U.S. 1309 (2011).

There is now a major effort to effectively redefine what is material to include information that is really directed at achieving various social or political objectives. In other words, the information would be deemed material if a woke fund investment advisor or proxy advisory firm deems it "important," or would like to see the information, whether or not the information has any bearing on the financial results of the issuer.[52] The European Union has already gone down this path, calling it "double materiality."[53]

Instead, the focus of the materiality standard in the United States should remain on what actual investors need to know to meet their financial, economic or pecuniary objectives, not the preferred political or social objectives of investment advisers, corporate managers or regulators at the SEC. The vast majority of underlying beneficial owners in investment funds and the vast majority of direct shareholders care about the returns earned in their retirement and other accounts and not whether the political objectives of the Commission, their advisors or corporate management are being met. While investors are free to invest in funds or corporations that explicitly sacrifice returns to achieve political objectives, few do so.[54]

Congress should statutorily define materiality in terms generally consonant with Supreme Court holdings on the issue making it clear that the term refers to financial returns and financial risks. It should also specifically exclude social and political objectives unrelated to investors' financial, economic or pecuniary objectives.[55] Investors would remain free to invest in funds or corporations that explicitly state that they are seeking to achieve political or social objectives by

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[52] See, for example, Allison Herren Lee, "Living in a Material World: Myths and Misconceptions about 'Materiality,'" May 24, 2021 https://www.sec.gov/news/speech/lee-living-material-world-052421 (especially, the discussion of "Myth #4: Climate and ESG are matters of social or "political" concern, and not material to investment or voting decisions) and Brian Tomlinson and Lucy Godshall, "Doubling Down: ESG Regulation Gives Materiality a Bigger Stake," Ernst & Young LLP, August 22, 2023 https://www.ey.com/en_us/assurance/esg-regulation-gives-materiality-a-bigger-stake.

[53] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (see especially paragraphs 29, 37 and 39 of the 'whereas' preamble) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464.

[54] See, for example, Shane Shifflett, "Wall Street's ESG Craze Is Fading: Investors Pulled More than $14 billion from Sustainable Funds this Year," *Wall Street Journal*, November 19, 2023.

[55] This could be accomplished by amending section 2 of the Securities Act to define "material" as follows:

> "(20) The term "material" means, when used to qualify a requirement for the furnishing of information as to any subject, information limited to those matters regarding which there is a substantial likelihood that a reasonable investor would attach importance when –
>
> (i) evaluating the potential financial return and financial risks of an existing or prospective investment, or
>
> (ii) exercising, or declining to exercise, any rights appurtenant to securities for the purpose of earning a financial return or managing financial risk.
>
> The term "material" does not include, when used to qualify a requirement for the furnishing of information as to any subject, information that –
>
> (i) primarily furthers non-pecuniary, non-economic or non-financial social, political or ideological goals or objectives, or
>
> (ii) primarily relates to events that –
>
> (A) involve a high degree of uncertainty regarding what may or may not occur in the distant future, and
>
> (B) are systemic, general or not issuer specific in nature.

sacrificing return. But the funds, investment advisers and issuers would no longer be able to misrepresent what they are doing.

The Merits of the SEC's Ideological Agenda

On the merits, while the proposed climate change rules would have had a devastating impact on U.S. capital markets, the final rule will simply have a highly negative impact.[56] The final rule raises costs by about 20 percent as opposed to the proposed rule's 300 percent. The final rule will have no material impact on the climate. Its only material effects will be (1) to enrich lawyers, accountants, climate consultants and NGOs. (2) to raise the cost of capital and (3) make it harder for entrepreneurs to access public capital markets.[57] Those effects are not consistent with the mission of the SEC.

The adopting release is 886 pages long and contains 3,241 footnotes. The final rule requires public companies to report their "Scope 1" and "Scope 2" emissions of greenhouse gases expressed in metric tons of carbon dioxide equivalent. Greenhouse gases are defined to include carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Scope 1 emissions are direct greenhouse gas emissions from operations that are owned or controlled by the reporting company. Scope 2 emissions are indirect emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a reporting company. All of this is in addition to the existing EPA Greenhouse Gas Emissions Reporting Program that covers emissions from more than 8,000 facilities in the United States and about 85% to 90% percent of total emissions.

The rule also requires detailed reporting regarding oversight by the board of directors and management of climate-related risks, transition plans, scenario analysis, or internal carbon prices. It requires reporting information about a reporting company's climate-related targets or goals, carbon offsets and renewable energy credits or certificates and a host of other matters. It imposes requirements to report large amounts of immaterial information that has a trivial impact on company finances—but is of interest to climate activists. As Commissioner Peirce wrote in her dissent, "While the Commission has decorated the final rule with materiality ribbons, the rule embraces materiality in name only. The resulting flood of climate-related disclosures will overwhelm investors, not inform them."

The rule explicitly creates a new profession. Firms must hire so-called "GHG emissions attestation providers." These providers, in turn, will be certified by "oversight inspection programs" run by left-wing nongovernmental organizations. Those providers and NGOs will then become a potent lobby dedicated to preserving the SEC's climate rule and the revenue stream of the attestation providers and NGOs.

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[56] David R. Burton Comment Letter to the SEC re: The Enhancement and Standardization of Climate-Related Disclosures for Investors June 17, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf.
[57] David Burton, "Legal Challenges Follow SEC Adoption of Costly, Burdensome Climate Rule," March 12, 2024 https://www.dailysignal.com/2024/03/12/sec-adopts-destructive-climate-rule/.

The final rule will have a pronounced negative effect on entrepreneurs and average investors. By increasing the cost of becoming a public company by at least 20%, it will make it more costly to access public capital markets. Fewer companies will be able to raise the capital needed to launch and grow, and they will do so later in their life cycle. That effect has been observed for the past two decades as the number of initial public offerings and the number of public companies declined because the regulatory burden on public companies steadily increased. It also means that ordinary investors will have less opportunity to invest in successful, growing entrepreneurial ventures. Most of the profits will have been made while the company was still a private company. Access to private offerings by ordinary investors is generally barred by the SEC.

On the merits, the SEC's approval of NASDAQ's racist board diversity rule is deeply disappointing.[58] Specifically, Nasdaq now requires each of its listed companies, subject to certain exceptions, to provide statistical information regarding "diversity" among the members of its board, and to either have, or explain why it does not have, at least two "diverse" directors on its board. "Diverse" would mean a director who self-identifies as female (without regard to the individual's biological sex), self-identifies as an under-represented minority, or self-identifies as LGBTQ+. Nasdaq defines an underrepresented minority as black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities. The rule is inconsistent with the principles underpinning the Civil Rights Act of 196414 which makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees…because of such individual's race, color, religion, sex, or national origin." It is also a violation of the equal protection principles of the United States Constitution. Quotas, such as those instituted by the rule, are particularly suspect constitutionally. Discrimination on the basis of race, ethnicity, national origin or sex should be a relic of the past. That the SEC[59] and the FDIC[60] are considering going down this path is troublesome.

The Human Capital Management[61] proposed rule is more likely to read like a DOL, NLRB or EEOC release than a securities regulation.

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[58] David R. Burton, "Nasdaq's Proposed Board-Diversity Rule Is Immoral and Has No Basis in Economics," Heritage Foundation Backgrounder No. 3591, March 9, 2021 https://www.heritage.org/sites/default/files/2021-03/BG3591_0.pdf.

[59] Corporate Board Diversity https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AL91.

[60] Comment Letter of David R. Burton to the Federal Deposit Insurance Corporation re: Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More February 9, 2024 https://thf_media.s3.amazonaws.com/2024/Regulatory_Comments/Comment%20Letter%20of%20David%20R%20Burton%20re%20FDIC%20Guidelines%20Establishing%20Standards%20for%20Corporate%20Governance%20and%20Risk%20Management%20020924.pdf .

[61] Human Capital Management Disclosure https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AM88 .

Analysis of Specific Legislation

1. *Streamlining Public Company Accounting Oversight Act (Rep. Huizenga)*

This draft legislation would close the PCAOB and return its functions to the SEC by creating an Office of Public Accounting Oversight in the Office of the Chief Accountant of the SEC.[62] The Chief Accountant would serve as the Director of the Office of Public Accounting Oversight. It retains the basic functions of the PCAOB but houses them within the SEC. Thus, it would have the salutary effect of increasing the oversight and accountability of those discharging these functions and make the due process, transparency and regulatory process protections normally associated with government apply once again to this area of regulation.

2. *SEC Regulatory Accountability Act (Rep. Wagner)*

This draft legislation would codify in the Securities Exchange Act, using well-drafted language, the requirement to conduct rigorous cost-benefit analysis in the rule-making process, a very robust and detailed retrospective review process and, effectively, regulatory flexibility analysis. It would apply these requirements not only to the Commission but also to FINRA and MSRB in that the Commission would be unable to approve FINRA and MSRB rules unless the Commission determines that FINRA or MSRB complied with the requirements. In effect, the bill would impose a process similar to that required of non-independent agencies under Executive Order 12866.[63] It would codify and extend Regulatory Flexibility Act requirements. The legislation is likely to force the SEC to more seriously evaluate the costs and benefits of proposed and existing regulations and more seriously explore less burdensome alternatives. Furthermore, applying these requirements to FINRA and MSRB is well past due. FINRA, especially, is a highly important regulator and it has been able to regulate with only a passing nod to serious economic analysis.

The retroactive review provisions are robust and likely to make a difference. The legislation would require the Commission's Chief economist to establish an assessment plan, with specified metrics and data collection provisions, and require a post-adoption impact assessment conducted in accordance with those specifications within two years. They will also provide Congress with very useful information.

3. *Reviewable Action (Rep. Meuser)*

This proposed legislation appears to me to be constructive in that it creates additional information and transparency relating to Commission delegation of authority. This is, of course,

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[62] On a technical note, if this legislation were to pass, I might reconsider my proposal, above and elsewhere, to place the Office of the Chief Accountant within the Division of Corporate Finance (made in an effort to reduce the number of direct reports to the SEC Chairman).

[63] The Trump Administration's Department of Justice issued an opinion that the President has authority to require independent agencies to comply with Executive Order 12866 but Executive Order 12866 was not amended. See Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, October 8, 2019 https://www.justice.gov/olc/opinion/extending-regulatory-review-under-executive-order-12866-independent-regulatory-agencies ; Henry B. Hogue, Baird Webel and Marc Labonte, "Independence of Federal Financial Regulators: Structure, Funding, and Other Issues," Congressional Research Service, August 3, 2023.

how a lot of the Commission's day to day work gets done. I am, however, not an expert on the finer points of Commission delegation of authority.

4. Review the Expansion of Government (REG) Act [H. R. 7030] (Rep. Kim)

This bill has laudatory intentions and may actually help. Similarly, the requirement that the Commission consider the cumulative cost of regulations has laudatory intentions and I certainly support anything that is designed to force them to holistically consider the impact of the massive regulatory edifice that has been erected by the Commission over the years. Unfortunately, generalized retroactive review requirements, however, have had a very limited real-world impact in the past because agencies have simply not taken them seriously.

5. Private Fund Advisers (Rep. Mooney)

The SEC private fund advisers final rule,[64] adopted in August of 2023, is highly burdensome and prescriptive.[65] It will add substantial operating expenses that will harm, rather than protect, investors since those costs will be reflected in lower returns and higher fees. The Commission's economic justification for the rule is inadequate. Its statutory foundation is also highly questionable. This Congressional Review Act resolution of disapproval would reverse the rule and put an end to its counterproductive effect.

6. Information Technology Study (Rep. Wagner)

As I discussed above in some detail, the SEC's information technology programs are among the most expensive and least effective in government. Therefore, I welcome the draft legislation's requirement that the GAO "perform an independent audit of the information technology infrastructure." I would welcome the opportunity to work with the committee to refine the requirements of the GAO study of the SEC's IT systems.

7. International Securities Standard Setting Bodies Meetings

This draft legislation would require the SEC to disclose to Congress discussions and meetings between staff of the Commission and international securities standard setting bodies, who participated in the meetings and what was discussed. Given the importance of these bodies and their increasing, and not always constructive, influence on American law, increased transparency would appear to be warranted.

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[64] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Final Rule https://www.govinfo.gov/content/pkg/FR-2023-09-14/pdf/2023-18660.pdf .

[65] These two statements outline in detail the problems with the rule. Commissioner Hester M. Peirce, "Uprooted: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews," August 23, 2023 https://www.sec.gov/news/statement/peirce-statement-doc-registered-investment-adviser-compliance-reviews-08232023; Commissioner Mark T. Uyeda, "Statement on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews," August 23, 2023 https://www.sec.gov/news/statement/uyeda-statement-private-fund-advisers-082323.

8. Cost Benefit Analysis Study

I am very sympathetic to the objectives of this draft legislation. It would require that the GAO conduct a study of the costs of up to 10 major rules and compare the GAO estimates to those made by the Commission staff. I think it is very important to try to start establishing some independent analysis of the Commission's economics work since it is clear to me at this point that it is entirely inadequate and needs serious improvement. The SEC, FinCEN and the banking agencies all do a very poor job of estimating costs (or benefits) and the economic impact of proposed rules. Sometimes the work is embarrassingly bad. There was effectively no rational economic argument for the monstrously complex and prescriptive Basel III endgame proposed rule[66] and a recent FinCEN economic analysis was arithmetically impossible.[67] The economic analysis in the SEC's climate change rule was a little more sophisticated but it boiled down to this: (1) disclosure requirements can have positive economic externalities, (2) this rule requires disclosure, (3) ergo, this rule may have positive externalities. Once stripped of all of the verbiage and obfuscation, the analysis was entirely unconvincing. The economic analysis in the proposing release appeared to be oblivious to the fact that tripling or quadrupling the cost of being a public company, as the proposed rule would have done, would have devastating negative effects while the impact of the proposed rule on climate change would be non-existent.[68] It is becoming increasingly obvious that many of these agencies just do what they have to do to give an economic analysis patina to the proposed rulemaking. In fact, I am increasingly coming to believe that for cost benefit analysis to be impartial and more accurate, we probably need to seriously rethink the institutional arrangements governing how it is done.

9. Amendment for Crowdfunding Capital Enhancement and Small-business Support (ACCESS) Act [H. R. 6825] (Rep. Meuser)

This bill would increase the threshold before reviewed financial statements are required in a crowdfunding offering from $100,000 to $250,000. Tax returns and financial statements certified by the top executive of the issuer would still be required. It is an appropriate change to the scaling requirement that would only affect the smallest of issuers.

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[66] David R. Burton Comment Letter to the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation re: Regulatory Capital Rule: Large Banking Organizations with Significant Trading Activity January 16, 2024 https://thf_media.s3.amazonaws.com/2024/Regulatory_Comments/Comment%20Letter%20of%20David%20R%20Burton%20re%20Basel%20III%20Endgame.pdf ("In a 316-page proposing release making 160 pages in CFR changes, containing about 74 complex formulas and over 25 tables assigning risk weights to various types of assets and operations, the economic analysis runs 4 ½ pages long. A reader of this economic analysis will search in vain for a justification of the various assigned risk weights or an analysis of why the chosen formulas and models are appropriate or any better than the models or formulas used by banks that they will replace. Such justification is not provided. The reason is probably that it simply does not exist but that instead the entire rulemaking is an exercise of arbitrariness.").

[67] See "Economic Analysis" section of David R. Burton Comment Letter to FinCEN re: Beneficial Ownership Information Reporting Requirements, February 7, 2022 http://thf_media.s3.amazonaws.com/2022/Regulatory_Comments/FINCEN-2021-0005-0438_attachment_1.pdf.

[68] David R. Burton Comment Letter to the SEC re: The Enhancement and Standardization of Climate-Related Disclosures for Investors June 17, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf.

10. Minimum Public Comment Period

This draft legislation would generally require, with an emergency exception, that the comment period for proposed SEC rules be at least 60 days. This is entirely warranted. Anything less simply does not give the public sufficient time to become aware of the proposed rule, read it, think through its implications and write a comment.

11. Semiannual Testimony (Rep. Wagner)

This draft legislation would require the Chairman of the Commission to testify to the House Financial Services Committee and the Senate Banking Committee at least twice annually and for other Commissioners to do so once annually. I think this makes sense and will facilitate a more active exchange of views between Commissioners and Congress that both should find beneficial. It will help to better inform the public and should result in more robust oversight of the Commission. I see little downside to the provision, although I am sure that some Chairman may find the additional scrutiny by elected officials to be unwelcome.

12. Protecting Investors' Personally Identifiable Information Act [H. R. 4551] (Rep. Loudermilk)

This bill provides welcome protection for investors' personally identifiable information and would probably effectively end the very misguided SEC Consolidated Audit Trail program.[69]

13. Protecting Private Job Creators Act [H. R. 7092] (Rep. Mooney)

I do not have any particular knowledge with respect to the markets or regulations governing fixed-income securities sold pursuant to Rule 144A, so I am unable to comment on this bill.

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[69] David R. Burton, "Why the SEC's Consolidated Audit Trail Is a Bad Idea," December 5, 2019 https://www.heritage.org/monetary-policy/commentary/why-the-secs-consolidated-audit-trail-bad-idea.