



July 27, 2023

The Honorable Patrick McHenry
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman McHenry and Ranking Member Waters:

The U.S. Chamber of Commerce appreciates the House Committee on Financial Services' convening of a legislative markup on corporate governance topics and their intersection with ESG ("environmental, social, and governance") issues.

The U.S. business community has risen to the challenge of meeting investor demand regarding ESG-related and other information. Companies active in the public markets have worked rigorously to provide investors with material information on issues related to governance, environmental and other matters requested by investors. In this sense, the U.S. capital markets – and, by extension, U.S. securities laws – have functioned efficiently toward the allocation of capital.

There are, however, concerning trends in the corporate governance space that must be addressed. The influence of just a few activist investors¹ in advancing shareholder proposals focused on ESG subjects demonstrates how systems of corporate governance can be used to push a political agenda, and why those systems can and should be improved. Increasingly, corporate governance processes have been co-opted by activists as the *en vogue* vehicle for garnering attention to issues that are either only tangentially related or unrelated to a company's economic success. Activist shareholders have publicly recognized that investor meetings are one way to garner attention in the press and the C-suite.²

The Committee's recent hearings examining the machinations of corporate governance – from the Exchange Act 14a-8 process to the operations of Proxy Voting Advice Businesses ("PVABs") – have been timely and appropriate. They are particularly welcome as the Securities and Exchange Commission ("SEC") seeks to make conditions more challenging for public companies by further deviating from the standard of materiality that undergirds U.S. capital markets and by failing to adequately provide important justifications for rulemakings. Since 2021, the SEC has proposed or finalized at least 9 rulemakings affecting corporate governance,

¹ In one analysis of the 2022 Proxy Season, Sullivan & Cromwell found that just ten proponents were responsible for 60% of all proposals submitted. "2022 Proxy Season Review: Part 1"; Sullivan & Cromwell LLP. Available at: <https://www.sullcrom.com/files/upload/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf>

² See: POLITICO. "Conservative Shareholders Strike Back". Jun. 6, 2022. Available at: <https://www.politico.com/newsletters/the-long-game/2022/06/10/conservative-shareholders-strike-back-00038806>

the cost-benefit analyses of which have been conducted discretely and without regard for the aggregate impact of the changes. Rather than seeking to keep businesses focused on long-term economic success for the benefit of investors, the SEC has instead pursued a political agenda. The Commission has sought to subvert 2020 final rules on shareholder proposal resubmission thresholds,³ arbitrarily reversed a modest reform effort to invite greater transparency and accountability for proxy advisors,⁴ and proposed the biggest increase in total costs for corporate reporting in a generation without adequately justifying the benefits.⁵ Through proposed and final changes such as these, the SEC is taking steps that weaken the purpose of corporate governance.

The Chamber plays a role in holding the SEC accountable, with pending lawsuits against the SEC on its 2022 reversal of the 2020 Proxy Advisor Rule⁶ and its 2023 Rule to Modernize Share Repurchase Disclosure.⁷ The Commission's robust agenda and expedited pace has prompted hurried work at the Commission, resulting in inadequate cost-benefit analyses and errors. The Chamber is concerned that, under current leadership, the SEC is moving away from its historical role as an impartial market regulator and is increasingly becoming a politicized agency to the detriment of American companies and the competitiveness of U.S. capital markets.

The Chamber has brought and will continue to bring legal challenges to SEC rules that fail to meet the SEC's tripartite mission and requirements under the Administrative Procedure Act ("APA"). In this regard, the Chamber appreciates the efforts of the Committee to exercise oversight of the Commission and hold the agency accountable.

We are also concerned about the role of the SEC and other financial market regulators in addressing potential extraterritorial disclosure mandates from the European Union ("EU"). The EU's Corporate Sustainability Reporting Directive ("CSRD") and Corporate Sustainability Due Diligence Directive ("CS3D") pose significant challenges and risks for U.S.-parented companies active in Europe, but also open the door to regulatory protectionism. The SEC,

³ See: Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8 (Release No. 34-95267). Until the SEC's 2020 Final Rule on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, the shareholder ownership thresholds for submitting a shareholder proposal had not been updated since 1998, and resubmission thresholds had not been updated since 1954. See also: Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness at U.S. Chamber of Commerce responding to SEC Proposed Rule on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8. Sep. 12, 2022. Available at: <https://www.centerforcapitalmarkets.com/letter/u-s-chamber-comments-on-sec-proposed-rule-under-exchange-act-rule-14a-8/>

⁴ See: Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce responding to SEC Re-Proposed Rules on Proxy Voting Advice. Dec. 23, 2021. Available at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2021/12/211222_Comments_Proxy-AdvisorRule_SEC_FINAL.pdf?#

⁵ According to the SEC's own estimate, the cost of the SEC's proposed climate disclosure rule would increase the cost burden associated with corporate disclosure from \$3.9 billion to \$10.2 billion, over a 2.5-fold increase. See: Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce responding to SEC Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors. Apr. 19, 2022. Available at: <https://www.centerforcapitalmarkets.com/letter/ccmc-urges-the-sec-to-extend-comment-period-on-proposed-rule-regarding-the-enhancement-and-standardization-of-climate-related-disclosures-for-investors/>

⁶ See: *U.S. Chamber of Commerce v. SEC* (2022). <https://www.uschamber.com/cases/capital-markets-and-corporate-law/chamber-of-commerce-v-sec-4>

⁷ See: *U.S. Chamber of Commerce v. SEC* (2023). <https://www.uschamber.com/cases/capital-markets-and-corporate-law/chamber-of-commerce-v-sec-3>

Department of Treasury, and other regulators must engage with European policymakers to avoid, as Secretary Yellen recently stated on CS3D, the potential “negative, unintended consequences...” related to the CS3D.⁸ The Chamber supports members of Congress exercising oversight of financial regulators related to these developments.

We appreciate the Committee’s efforts to spotlight developments in corporate governance and their intersection with ESG, including that ESG has different meaning to different people, creating its own confusion, and has had impacts across the U.S. marketplace and globally. Below are the Chamber’s perspectives on legislation that has been considered by the Committee during recent legislative hearings.

I. SEC Accountability

The SEC has an imperative role to play in the appropriate function of the U.S. capital markets, and a main principle underlying that role is materiality. Since the securities laws were first enacted, materiality has been the standard to determine what information public companies must disclose to investors. In the 1976 *TSC Industries, Inc. vs. Northway, Inc.* decision, the Supreme Court established a meaningful standard of materiality that was designed to provide investors with the significant information they need to make informed voting and investing decisions. Importantly, the Court provided further guidance but noted that the “disclosure policy” under the federal securities laws “is not without limit” because investors should be safeguarded from being overwhelmed with information that runs counter to the goal of better investor decision making. The Court operationalized this principle in its decision – subsequently affirmed by the Court in *Basic, Inc. v. Levinson* – by rejecting⁹ the notion that information is material if it “might” be important to an investor in favor of the following test: information is material for purposes of federal securities regulation if “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote” or invest. The Court has noted its concern that absent a defined materiality standard, investors could be buried “in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking.” The materiality standard has served investors well for decades and has been a bedrock of corporate disclosure in the United States.

The Chamber has been a staunch advocate for the standard of materiality the Court formulated and supports a legislative effort that would codify the standard expressed by the Supreme Court, and prohibit the SEC from mandating disclosure requirements that are outside the scope of the securities laws or are intended to promote objectives that are at odds with the interests of investors. The Chamber’s 2017 report on materiality¹⁰ emphasized that the Supreme Court’s materiality standard helps shield investors from the harms of information overload and appropriately tethers federal securities regulation to the SEC’s and securities laws’

⁸ See: Bloomberg. “Yellen Says US Is Concerned About EU’s ESG Supply Chain Rules.” June 13, 2023. Available at: <https://www.bloomberg.com/news/articles/2023-06-13/yellen-says-us-is-concerned-about-eu-s-esg-supply-chain-rules>

⁹ 485 U.S. 224 (1988).

¹⁰ Center for Capital Markets Competitiveness, U.S. Chamber of Commerce. “Essential Information: Modernizing Our Corporate Disclosure System”. Winter 2017. Available at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL.pdf?x48633

reason for existence. Traditionally, materiality has centered on information that is important for investors focused on understanding the financial and operating performance of companies as investors attempt to gain wealth and earn income.

In other words, investment returns – as compared to other interests that, even when worthwhile, fall outside the SEC’s remit – is the well-established touchstone of materiality. Bounding the meaning of materiality with reference to the SEC’s mission keeps the SEC and the federal securities laws from being politicized, injects regulatory certainty and predictability into the U.S. capital markets, avoids placing the SEC in the difficult position of regulating outside its expertise, and protects investors.

Related, the Chamber supports additional efforts to improve SEC disclosure transparency. Despite the issuer community being significantly affected by SEC regulation, companies do not have a meaningful seat at the table in providing input during discourse at the Commission. Creating an advisory committee for this important constituency would allow for better calibration of disclosure requirements. In the same spirit, requiring the SEC to aggregate its immaterial disclosure requirements and report on the need for those disclosures would help the SEC and Congress examine reporting requirements against their costs.

II. Proxy Voting Advice Businesses

The Chamber strongly supports efforts to create greater transparency and accountability for Proxy Voting Advice Businesses (“PVABS”). In 2020, SEC adopted reforms to the proxy voting system for public companies.^{11,12} The SEC’s reforms addressed longstanding problems within the proxy advisory industry, which wields enormous influence over public companies but is dominated by only two firms and operates with significant conflicts of interest. Proxy advisory firms have established themselves as an indispensable ally of special interest activists and often support shareholder resolutions that advance social or political objectives at the expense of long-term shareholder returns.

Regrettably, the current leadership at the SEC has sought to weaken and undermine the 2020 reforms, including finalized regulations that effectively neutralize the 2020 proxy advisor rules^{13,14} and has proposed changes to the shareholder proposal rules that would increase the number of frivolous proposals companies receive.^{15,16} The SEC’s recent actions would tilt the scales in favor of special interests, distract companies from focusing on long-term performance,

¹¹ Final Rule on Exemptions From the Proxy Rules for Proxy Voting Advice. Sep. 2020. Available at:

<https://www.federalregister.gov/documents/2020/09/03/2020-16337/exemptions-from-the-proxy-rules-for-proxy-voting-advice>

¹² See also: U.S. Chamber of Commerce letter on Exemptions From the Proxy Rules for Proxy Voting Advice. Available at:

<https://www.sec.gov/comments/s7-22-19/s72219-6730872-207435.pdf>

¹³ Final Rule on Proxy Voting Advice. Jul. 2022. Available at: <https://www.federalregister.gov/documents/2022/07/19/2022-15311/proxy-voting-advice>

¹⁴ See also: U.S. Chamber of Commerce letter on Proxy Voting Advice. Available at: <https://www.sec.gov/comments/s7-17-21/s71721-20110258-264516.pdf>

¹⁵ Proposed Rule on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8. Jul. 2022. Available at: <https://www.federalregister.gov/documents/2022/07/27/2022-15348/substantial-implementation-duplication-and-resubmission-of-shareholder-proposals-under-exchange-act>

¹⁶ See also: U.S. Chamber of Commerce letter on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8. Available at: <https://www.sec.gov/comments/s7-20-22/s72022-20138937-308638.pdf>

and ultimately harm investors that have no interest in using their 401(k)'s or other savings vehicles to engage in contentious social or political debates.

The Chamber welcomes legislation that would reorient the SEC back toward investor protection and transparency for the proxy voting system and require PVABs to register with the SEC, becoming subject to rigorous oversight. The Chamber also supports efforts to introduce greater liability for proxy advisors, holding them accountable for making false or misleading statements to customers and failing to disclose essential information. Finally, the Chamber supports efforts to rein in robovoting. These are necessary provisions that will protect investors and improve the regulatory model for public companies in the United States.

III. Shareholder Proposals

Since its origins in the 1940s, the shareholder proposal process under Rule 14a-8 has evolved from a modest effort to provide shareholders a tool for influencing corporate governance to a complex and over-politicized process that is neither satisfactory to issuers nor investors. The issuer community often finds itself devoting significant time and attention to proposals that are not germane to the business and are, in the majority of cases, destined to fail when put to a vote.

Over the past several decades, boards have increased their communication with investors. Some shareholders have increasingly used proposals at annual meetings as a means to raise the profile of an issue. In 2020, the SEC promulgated reforms to further improve these communications channels.¹⁷ Unfortunately, the current leadership at the SEC has sought to weaken these communication channels. In November of 2021, the SEC issued Staff Legal Bulletin 14L (SLB 14L), announcing that the SEC will no longer examine shareholder proposals on a company-by-company basis, but rather through the lens of 'broad societal impact.' Consequently, investor protection, competition, and capital formation are not prioritized, and the SEC now opines on societal issues well outside of its legal remit. At best, SLB 14L fails to provide companies, boards and investors with certainty. At worst, the SEC has positioned itself as a subjective governmental arbiter of how the capital markets should assess social issues. The Chamber supports efforts to reverse SLB 14L and restore the 14a-8 process' focus to economic return.

Related, the Chamber is concerned about the SEC's recent proposed amendments governing substantial implementation, duplication, and resubmission of shareholder proposals under Exchange Act Rule 14a-8. The SEC's proposed rule undermines the Commission's promulgated 2020 Shareholder Proposal Rule, which, after substantial public consideration and staff justification, sought to address the criteria for resubmission to "relieve companies and their shareholders of the obligation to consider, and spend resources on, matters that had previously been voted on and rejected by a substantial majority of shareholders without

¹⁷ Exemptions from the Proxy Rules for Proxy Voting Advice (July 22, 2020); Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (September 23, 2020)

sufficient indication that a proposal could gain traction among the broader shareholder base in the near future.”¹⁸

The Chamber supports legislative efforts to affirm the 2020 Shareholder Proposal Rule, including increased resubmission thresholds. The Chamber also supports legislation that would create certainty in the shareholder proposal exemption process, which would allow companies to remain focused on creating value for investors, and prevent the SEC from allowing politically-motivated investors to further coopt investor meetings.

We urge the Committee to advance legislation to block the SEC’s 2022 amendments to 14a-8, and that the Committee continue to push back on the concept of “shareholder suffrage,” which injects political and special interest considerations into the shareholder proposal process and was rejected by the SEC in the past.¹⁹

Finally, the Chamber appreciates the effort to study the function of the entire proxy system to gauge whether the system is best serving retail investors.

IV. International Disclosure Requirements

The Chamber supports legislation that would require the Government Accountability Office (“GAO”) to study the impact of the EU’s proposed Corporate Sustainability Due Diligence Directive (“CS3D”).

The CS3D is a major concern because the CS3D’s requirements would apply globally. Requirements for subsidiaries and partners in other jurisdictions should not dictate what companies should have to report at the parent level, and U.S.-headquartered companies should not be subject to European regulation at the parent-company level. Understanding the impacts of the CS3D for the American market will help arm U.S. regulators and the business community in pushing back on the CS3D and serve as a check on EU policymakers who are otherwise not accountable to U.S. companies.

V. Values Investing

American markets should preserve the ability of individual investors to invest their own money based on whatever criteria they think appropriate, including their values and priorities. The Chamber appreciates the efforts of the Committee to advance legislation that prioritizes economic return when investing on behalf of others, but we maintain some concerns about the practical application of legislation of this nature. While the spirit of such legislation is laudable,

¹⁸ <https://www.sec.gov/news/press-release/2020-220>

¹⁹ Indeed, when asked in 1943 about the potential for the proposal process to be usurped by “either the nuisance man or the man with a particular idea or even an ‘ism’ or something he wants to advance,” then-SEC Commission Ganson Purcell told Congress that such a case would require the SEC to “make such appropriate changes as might seem necessary” to prevent such an outcome from occurring. “Security and Exchange Commission Proxy Rules ... Hearings ... H.R. 1493, H.R. 1821, and H.R. 2019.” P. 163. Available at: <https://play.google.com/books/reader?id=7RaCMxk2dH8C&pg=GBS.PP8&hl=en>

the increased liability resulting from the need to demonstrate economic return through various contingent scenarios would make the legislation difficult to implement. We appreciate the dialogue with the Committee on this text and remain committed to helping produce the best possible legislation.

Conclusion

The Chamber supports legislative efforts to refocus the proxy process on economic return, hold the SEC accountable, and push back on extraterritorial regulatory requirements. The Chamber looks forward to continued collaboration with the Committee in achieving these priorities.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long horizontal flourish.

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: Members of the House Committee on Financial Services