

May 26, 2020

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

Via electronic delivery

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

Dear Chairman Clayton:

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

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

¹ The COVID Tracking Project, available at <https://covidtracking.com/data/us-daily> (last accessed May 25, 2020).

² Jerome H. Powell, Opening Remarks, At "A Fed Listens Event: How Is COVID-19 Affecting Your Community?," sponsored by the Board of Governors of the Federal Reserve System, Washington, D.C. (May 21, 2020), <https://www.federalreserve.gov/newsevents/speech/powell20200521a.htm> (noting this is "a downturn without modern precedent.").

³ Phil Swagel, *CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, Congressional Budget Office, Apr. 24, 2020, available at <https://www.cbo.gov/publication/56335>; see also Jacob Leibenluft and Andres Vinelli, "The Trump Administration's Handling of Coronavirus Threatens a Long Unemployment Crisis," Center for American Progress, May 7, 2020, available at <https://www.americanprogress.org/issues/economy/news/2020/05/07/484795/trump-administrations-handling-coronavirus-threatens-long-unemployment-crisis/>.

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

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

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

To achieve these objectives, the Commission should:

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

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

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

Background and the Importance of Disclosure and Accountability in the Public Markets

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

Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.

The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy.⁶

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

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

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

⁶ U.S. Securities & Exchange Commission, *What We Do*, available at <https://www.sec.gov/Article/whatwedo.html>.

⁷ See, e.g., Letter from Tyler Gellach, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2019, available at <https://healthymarkets.org/wp-content/uploads/2019/09/SEC-Concept-Release-9-30-19-1.pdf>; see also Andy Green, *Opinion: Could the SEC secretly abolish investors' right to sue?*, MarketWatch, Mar. 2, 2019, available at <https://www.marketwatch.com/story/could-the-sec-secretly-abolish-investors-right-to-sue-2018-03-02#false>.

⁸ H. Rep. 73-85 (1933), at 2-3.

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

To the contrary, along with unprecedented volumes of exempt offerings, we’ve seen a slew of “private” trading venues emerge,¹⁰ some of which extract enormous costs from investors¹¹ and provide exceedingly little information to them. “Private” securities offerings and any subsequent trading in these increasingly large and numerous companies lack much of the essential information and many of the investor protections that have been hallmarks of U.S. capital markets since the 1930s.¹² Without robust information and accountability, companies have engaged in a myriad of troubling practices, ranging from taking dubious financial risks, to inappropriately compensating senior executives, to putting workers at risk.¹³ Just about every aspect of the market is less efficient too, featuring exacerbated agency costs, elevated risks (including trading costs, valuation risks, and market risks),¹⁴ and more fertile ground for fraud

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

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

¹¹ See, e.g., EquityZen, *Frequently Asked Question*, *available at* https://equityzen.com/faq/?utm_source=google&utm_medium=ad&utm_campaign=888752132&utm_term=siteli nk&utm_content=none&gclid=EAlalQobChMlyfLlqf296QIVFaSzCh3h_w4ZEAYASACEgLFvD_BwE (reflecting five percent transaction fees per side per trade, plus potential ongoing fees).

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

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

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

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

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

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

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

¹⁵ Verity Winship, *Private Company Fraud*, University of Illinois College of Law, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538499. See also Elizabeth Pollman, *Private Company Lies*,

109 Geo. L.J. __ (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551565.

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

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

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

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

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

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

The SEC Is Moving In the Wrong Direction

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

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

Eroding the Public Company Regulatory Framework

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

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

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

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

Release,²² as well as subsequent rulemaking proposals in December 2019²³ and March²⁴ of this year are breathtaking both in scope and impact. By expanding the scope of persons outside the protections of the public company regulatory framework and further loosening important limitations on offerings outside of that framework, these “private markets” proposals together represent aggressive deregulation of the capital markets.

Together, these proposals aggravate an initial public offering (IPO) off-ramp that enables large companies to avoid disclosure requirements and effective corporate governance features. Moreover, these proposals drain liquidity from the public markets—liquidity that protects investors and also drives economic growth. Although ostensibly about adding investment choice, these policies actually reduce information and choice by encouraging current public companies to go dark and other companies to not pursue the IPO route. What is perhaps most disappointing, the Commission has been repeatedly marketing these proposals in the name of investors, yet, as shown in letter²⁵ after letter, real investors and their advocates—unlike the troubling astroturfing campaign orchestrated to fool the Commission²⁶—overwhelmingly oppose them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ultimately, the Commission's efforts to turbocharge the growth of private markets comes at the expense of the public markets³⁴ that are vital to recapitalizing American businesses and making our economy more resilient to upcoming threats, such as climate change.³⁵ Indeed, public companies appear, initially, to be faring somewhat better than private companies during the pandemic, with even some of the more troubled larger companies able to raise money in the public markets while a number of prominent private companies have entered bankruptcy.³⁶ Even before the pandemic, private equity (one corner of the private markets) was no longer

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

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

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

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

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

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

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

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

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

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

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

³⁹ Letter from Tyler Gellach, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2019, available at <https://www.sec.gov/comments/s7-08-19/s70819-6233891-192709.pdf>.

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

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

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

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

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

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

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

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

Eroding the Value of Existing Public Company Disclosures

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

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

As various experts,⁴⁹ including Commissioners Robert Jackson and Allison Lee⁵⁰ have noted, a more principles-based approach to disclosures gives companies more discretion over what kind of information they share with investors. This would reduce the quality and comparability of

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

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

⁴⁹ Letter from Dennis Kelleher, Stephen Hall, Lev Bagramian, Better Markets to Vanessa Countryman, Oct. 22, 2019, available at https://bettermarkets.com/sites/default/files/CL_SEC_Modernization_of_Reg_S-K_10-16-19_0.pdf.

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

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

The materiality standard is too often misunderstood and misapplied. Too many securities professionals forget that the legal lodestone is whether information is material *to investors*, and not how executives of the company might perceive it impacts the company's finances.⁵⁴ Although the addition of "human capital" as one of the topics to be disclosed is one of the few bright spots in the SEC's recent agenda,⁵⁵ the proposed rule⁵⁶ fails to include information around climate change as a required topic for disclosure. This failure is glaring given how many investors now view climate change as a critically important factor in making decisions—a point made by thousands of comments to the Commission over the years, and with distinct clarity by Commissioner Lee in recent months.⁵⁷

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

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

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

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

⁵⁴ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

Giving investors the chance to understand management's perceptions is what the Management's Discussion and Analysis section of the SEC's reporting is supposed to provide. See Sondra L. Stokes, *Remarks Before the 2006 AICPA National Conference on Current SEC and PCAOB Developments*, SEC, Dec. 13, 2006, available at <https://www.sec.gov/news/speech/2006/spch121306sls.htm>.

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

⁵⁶ S-K Modernization Proposal.

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

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

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

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

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

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

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

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

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

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

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

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

Additionally, the Commission's proposed changes to weaken internal controls⁶⁶ and auditor independence⁶⁷ further place the disclosure regime at risk. As the CFA Institute explained, expanded exemptions from internal control findings will not achieve the goal of capital formation but will weaken investor protections.⁶⁸ The CFA Institute noted that "the industry deriving the most benefiting from this Proposed Rule change – the banking industry – is subject to current concerns regarding its ability to adopt a new critical audit matter that requires strong internal controls."⁶⁹ Similarly, the Consumer Federation of America has noted that a lack of quality independent financial reporting leads to financial scandal and investor abuses, with Enron, WorldCom, and the Dot Com crash leading Congress to enshrine auditor independence in the law.⁷⁰ Indeed, the U.S. Senate just this week voted 100-0 in support of ensuring that companies listing in U.S. public markets are subject to robust audit quality inspections.⁷¹

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

Eroding Shareholder Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Towards a transparency and accountable corporate governance agenda for COVID-19

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

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

Second, the Commission should require additional disclosures, effective as soon as possible, to ensure investors and the public have essential information throughout the crisis. A comprehensive, detailed, investor and public policy-driven disclosure mandate should be implemented, and not just for public companies⁹² but so-called private companies as well.⁹³ Investors and taxpayers alike deserve to know how their money is being spent.

For existing reporting companies, the Commission could adopt an interim final rule that would build upon the joint-statement released recently⁹⁴ to cover information related to worker rights, healthcare, reliance on direct and indirect federal, state, or other governmental funding or support, and more. The Commission should also urge the Public Company Accounting Oversight

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

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

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

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

⁹⁴ Clayton/Hinman Statement.

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

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

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

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

Conclusion

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

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

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

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

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

Thank you for your consideration.

Sincerely,

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Appendix

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

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