CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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The Honorable Rep. Brad Sherman
Chairman
Subcommittee on Investor Protection,
Entrepreneurship, and Capital Markets
U.S. House of Representatives
Washington, DC 20515

The Honorable Bill Huizenga
Ranking Member
Subcommittee on Investor Protection,
Entrepreneurship, and Capital Markets
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sherman and Ranking Member Huizenga:

The U.S. Chamber of Commerce appreciates the opportunity to share significant concerns with several bills that you have asked Securities and Exchange Commission ("SEC") Chairman Jay Clayton to address during his testimony for tomorrow's hearing, "Capital Markets and Emergency Lending in the COVID-19 Era." In particular, these bills would treat the private sector in a punitive manner and overlook the important contributions of businesses large and small to help fight the pandemic and to contribute to the economic recovery Americans expect.

H.R. ___, to establish new limits on the Primary Market Corporate Credit Facility

This legislation would subject Primary Market Corporate Credit Facility ("PMCCF") beneficiaries to CARES Act limits on stock buybacks, dividend payments, and executive compensation.

The Chamber opposes this bill to establish new limits on the PMCCF. Under the terms of the PMCCF, authorized by Congress and established by the Federal Reserve Board, the facility may purchase eligible corporate bonds or portions of syndicated loans or bonds of eligible issuers at issuance. Per the terms of the CARES Act, such purchases by the facility are not direct loans, and thus the issuers of such debt should not be subject to limits on stock buybacks, dividend payments, and executive compensation. Such restrictions could cause businesses that are both eligible for the PMCCF and require liquidity to get through these challenging times to opt out of the PMCCF to their detriment. The current crisis is inherently unique in that businesses seeking financing find themselves in such a position through no fault of their own.

A primary intent of the CARES Act was to provide income security. Many retirees and other retail investors that rely on the returns generated by dividends and share repurchases would

be harmed by a broad prohibition against such distributions.[1] A dividend is a distribution of a company's profits to shareholders, including pension plan beneficiaries, 401(k) savers, or everyday investors. Many of them, who may be retired or are no longer working, depend on dividends as a reliable, steady stream of income—an increasingly important thing during times of crisis. In these uncertain times, Americans need to be able to access every possible source of income, including dividends from businesses.

Objections to stock buybacks are misguided. Businesses make the most productive decisions they can based on the capital they have. Stock buybacks, like dividends, are a common way to distribute earnings to investors in retirement funds. Shareholders often reinvest gains from buybacks into growing new businesses and creating jobs, which ultimately help the U.S. economy by delivering cash to companies that need capital as a result of the challenges brought on by the pandemic.

H.R. ___, Rulemaking Suspension

This legislation would temporarily prohibit federal financial regulators from adopting rules not directly related to responding to the coronavirus response through the length of the crisis.

The Chamber is concerned that such legislation could hamper the ability of regulators to deal with pressing issues and enact beneficial reforms. This could harm the ability of policy makers to help speed an economic recovery. Determining whether a rule is "directly related" to COVID-19 is entirely subjective and sets a bad precedent for independent regulators. These concerns are also applicable to other independent financial regulators.

H.R. ___, Increase Penalties for COVID-related Securities Law Violations

This legislation would increase civil monetary penalties for COVID-related securities misconduct.

The Chamber is concerned about legislation that would increase civil penalties without any corresponding due process enhancements. Through various important laws, fraud is illegal, and significant tools empower regulators to address fraud or other crimes in the context of the pandemic. New legislation in this area appears unnecessary, and, regardless, this bill lacks traditional due process protections of other statutes.

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[1] https://www.uschamber.com/series/above-the-fold/why-keeping-dividends-going-tough-times-the-right-call

H.R. ___ COVID-19 Restitution Assistance Fund for Victims of Securities Violations Act

This legislation would create a fund at the SEC to provide restitution payments for individuals in connection with securities fraud related to coronavirus if they do not otherwise receive full payment of restitution.

The Chamber is highly concerned by the proposal to establish a separate restitution fund for frauds related to the COVID-19 crisis. The SEC already has in place procedures under the federal securities laws by which investors who have been defrauded for any reason may recover some of the financial losses as a result of the fraud. Indeed, the recent Supreme Court ruling strengthens the SEC's ability to provide investors with restitution making this proposal superfluous.

H.R. 6551, the CARES Act Section 4014 Technical Corrections Act

The CARES Act Section 4014 Technical Corrections Act would amend the CARES Act to ensure that the temporary relief from CECL standards does not terminate in the middle of a company's fiscal year.

Section 4014 of the CARES Act provides optional temporary relief from implementing the current expected credit losses (CECL) accounting standard. Section 4014 states no insured depository institution bank holding company, or any affiliate thereof shall be required to comply with CECL during the period beginning on the date of enactment of the CARES Act and ending the earlier of 1) the date on which the national emergency concerning Covid-19 outbreak declared by the President terminates, or 2) December 31, 2020. Section 4014 therefore creates uncertainty for when CECL must be implemented given it is unclear when the President may end the national emergency concerning Covid-19. Moreover, relatively few insured depository institutions availed themselves of the flexibility provided under Section 4014 given they would have to comply with CECL on the day the national emergency ends with relatively short notice. H.R. 6551 would eliminate some uncertainty for a compliance date by amending Section 4014 of the CARES Act by clarifying the effective date would be the fiscal year for the insured depository institution beginning immediately after the national emergency ends.

The Chamber, which supports the independence of FASB and the process for setting accounting standards, believes a long-term solution for addressing concerns that some have raised with CECL regarding the availability of credit should be addressed via a permanent capital offset. In the FY 2020 Omnibus Appropriations Act, Congress mandated Treasury, in consultation with federal banking regulations, complete a study on the need for changes to regulatory capital requirements necessitated by CECL.

H.R. 6375, to require disclosures related to supply chain disruption risk and for other purposes; and H.R. 6371, the Pandemic Disclosure Act

H.R. 6375 would amend the Securities Exchange Act of 1934 to require issuers to make disclosures related to supply chain disruption risk. H.R. 6371 would require that in the event of a World Health Organization declaration of a pandemic, public companies file supplementary disclosures regarding any material impacts that the pandemic is expected to have on its business, including impacts on its workforce.

The Chamber believes that disclosure under the federal securities laws should be tied to the longstanding definition of materiality that focuses on the financial and operating performance of the company. The SEC has encouraged public companies to be transparent about the impact of the COVID-19 crisis on their current financial and operating status and their future operational and financial planning. Public companies are already tasked with disclosing to investors material issues affecting their business, including the recent impacts of the pandemic. The current definition of materiality would capture information that is critical for investors to make informed investment and voting decisions. Broad, one-size-fits-all disclosure mandates are unnecessary and would only create unnecessary costs for issuers and investors.

H.R. 6790, the Business Borrowers Protection Act

The Business Borrowers Protection Act would prevent private creditors from enforcing loan covenants that require an accelerated repayment of existing private loans in the event a business borrower obtains a COVID-19 government relief loan.

The Chamber strongly opposes the abrogation of contracts by Congress and is very concerned that this bill would do so. This bill represents a sweeping intrusion of government into private contracting that would be disruptive to lending and the capital markets. Among the many unintended consequences from changing the borrowing terms on existing contracts, this legislation would add uncertainty to future lending because it would signal a willingness of Congress to intrude and change the terms and conditions of extant lending agreements after the fact. In addition, we are concerned that lenders would bear greater risk of default. It is important to ensure that the interest of lenders is given appropriate consideration so that they do not find themselves accepting undue risk. These issues should be resolved through workouts by lenders and borrowers and the recent TDR guidance by banking regulators is an important tool to accomplish that goal.

H.R.6934, for uniform treatment of NRSROs

This legislation would amend the CARES Act to require the uniform treatment of nationally recognized statistical rating organizations ("NRSROs") under certain programs carried out in response to the COVID-19 emergency.

During a June 2, 2020 hearing of the Senate Committee on Banking, Housing, and Urban Affairs, the U.S. Chamber's Center for Capital Markets Competitiveness raised a concern that the Primary and Secondary Market Corporate Credit Facilities ("PMCCF" and "SMCCF") would lose their effectiveness through its reliance on ratings from the three major NRSROs: Fitch Ratings, Inc., Moody's Investors Service, Inc., and S&P Global Ratings. In the case of the PMCCF and SMCCF, which may be a critical source of support to larger enterprises that are ineligible for other programs, we encouraged the Federal Reserve at that time to consider including all SEC-registered NRSROs.[2]

Ratings for eligible issuers will also be accepted from NRSROs DBRS, Inc., Kroll Bond Rating Agency, Inc., and A.M. Best Rating Services, Inc. (the last of which only with respect to insurance companies), *provided* that the issuer seeking support from the PMCCF and SMCCF also has a rating from the major three NRSROs. Such policies would continue to exclude those issuers who require liquidity in these challenging times who do not also have qualifying rating from the major three major NRSROs.

H.R. 7000, the Holding Foreign Companies Accountable Act

The Holding Foreign Companies Accountable Act would suspend trading in the stock of a foreign company listed on a U.S. exchange if the independent auditor of that company is not subject to full PCAOB oversight for three consecutive years.

Transparency and disclosure are fundamental pillars of the American economy. Any company, domestic or foreign, that cannot abide by U.S. securities laws or regulations or exchange listing standards should not be listed on American stock exchanges. The SEC has been able to negotiate reciprocal inspection agreements with other nations to deal with cross border issues, despite cultural or economic differences. The U.S. and China need to reach such an agreement. In 2013 testimony before the U.S.-China Economic Security Review Commission[3], the Chamber discussed the challenges and risks associated with a failure to audit Chinese companies.

We are concerned that the legislation, as written, could have unintended consequences for multinational companies headquartered in the U.S. with subsidiaries and affiliates located in a foreign jurisdiction that are not complying with U.S. securities laws or exchange listing standards. We encourage the Subcommittee to evaluate the extent to which U.S. subsidiaries and affiliates that operate in China could be impacted through this legislation, and to modify the bill to mitigate such unintended consequences.

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[2] https://www.banking.senate.gov/imo/media/doc/Quaadman%20Testimony%206-2-203.pdf

[3] https://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/US-China-Economic-Security-Review-Commission1.pdf

SEC Response to COVID-19

Finally, the U.S. Chamber of Commerce would like to acknowledge the timely and impactful actions taken by the SEC in response to the COVID-19 crisis. The SEC has responded quickly to the COVID-19 crisis by engaging in operational initiatives, market-focused actions, guidance and targeted assistance and relief, and investor protection efforts. In particular, we commend the SEC for encouraging public companies to disclose to investors the impact of the COVID-19 crisis on their current financial and operating status and their future operational and financial planning when they issue earnings releases and conduct analyst and investor calls.[4] Given the challenge of providing forward-looking disclosures, we agree with the SEC's encouragement to companies to avail themselves of safe-harbors for such statements.

Sincerely,

Neil L. Bradley

cc: Members of the Committee on Financial Services

[4] https://www.sec.gov/news/public-statement/statement-clayton-hinman