February 25, 2022

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader
United States Senate
Washington, DC 20510

Dear Speaker Pelosi, Leader McCarthy, Leader Schumer, and Leader McConnell:

We the undersigned organizations represent the entrepreneurial ecosystem in the United States. We write to share our concerns about a provision in the *America COMPETES Act* that would unnecessarily burden innovative entrepreneurs and their investors in the U.S. The provision was amendment #218 by Representative Brad Sherman and included as part of a bloc of amendments and incorporated as section 61301[1].

Sec. 61301 was submitted late in the process, not considered under regular order by the House Financial Services Committee, and was included in the underlying bill as part of an amendment bloc and therefore not subject to the debate it deserved. Key stakeholders, such as startups and investors that provide capital to these companies, did not have the opportunity to provide input. As a result, the language is overly broad, and the unintended consequences will bring significantly negative impacts to the innovation ecosystem in the United States.

Sec. 61301 would direct the Securities and Exchange Commission (SEC) to require new disclosures when a company raises over $25 million in a transaction or $50 million in a 12-month period through the following exemptions: Rule 506(b) of Regulation D; Regulation S; or Rule 144A. These following disclosures would be required:

- Identity of issuer;
- Place of incorporation;
- Amount of the issuance and the net proceeds to the issuer;
- Principal beneficial owners;
- Intended use, including each country and industry in which the issuer plans to invest the proceeds; and
- The exemption the issuer relies on with respect to the exempted transaction.

These new requirements constitute significant changes to the disclosures required of private companies and their investors. Unfortunately, little justification has been provided for expanding the private company and investor disclosure requirements. We believe Sec. 61301 will harm

[1] *See* Amendment #218 from Representative Brad Sherman to the *America COMPETES Act*, available at https://amendments-rules.house.gov/amendments/COMPETES_Mgrs_Exempt_xml220201114928419.pdf.

some of the United States's most innovative companies that are in pursuit of scientific and technological advancement and are therefore sensitive to sharing certain information, do not expose public market investors to risk (e.g. retail investors), and are resource constrained as compared to larger, public companies. The amendment's harm to small businesses and the innovation ecosystem is incongruent with the larger bill's goal of increasing U.S. competitiveness with China and other countries.

Specific concerns with the Sec. 61301:

- **Impacts U.S. companies, including those not operating solely in China**: The purported justification for Sec. 61301 is the need for additional information about capital deployed in China. But Sec. 61301 is significantly more far reaching and, in fact, applies even when a company or fund raises capital that has no business whatsoever with China. For example, due to Sec. 61301, a U.S. company that raises more than $25 million would still be subject to *all* of the requirements of the provision even if it intends to deploy the entirety of that capital completely outside of China, including in the U.S. Therefore, Sec. 61301is drafted in an overly broad manner that would have severe unintended consequences. Furthermore, Sec. 61301 is likely ineffective given the SEC has acknowledged it has significant challenges in gathering data about Chinese companies.[2]

- **Private market disclosure**: Due to Sec. 61301, for the first time many young companies will be required to share information that has to date remained private. American financial regulation has long struck a balance whereby public companies gain access to the public capital markets and in return are subjected to increased regulatory efforts to protect public market investors. At the same time, this balance recognizes that the private markets are attractive for companies that are often smaller and younger and are not prepared for the many challenges of being a public company, such as increased regulatory requirements. Companies in the private markets do not pose a risk to the vast majority of investors because private companies may only raise capital from "accredited investors" that are understood to be sophisticated investors. Sec. 61301 adds additional requirements to private companies without any clear harm having been demonstrated. Congress should not act in this space until further evidence is developed that a harm is present that must be addressed.

- **Disclosure of sensitive and confidential information to public**: Sec. 61301 requires disclosure of the "intended use" of capital raised, including the country and sector in which the capital will be deployed. The language puts no guardrails around the level of detail the SEC may require and therefore this information could include sensitive or confidential business information. This poses an existential threat to companies and funds that do not want to announce to the world their future business strategy. For example, one could easily imagine an innovative healthcare company that plans to dedicate resources to R&D in search of a rare disease cure. That company could quite reasonably not want its

[2] *See Emerging Market Investments Entrail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited,* U.S. Securities and Exchange Commission (April 21, 2020), available at https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting.

competitors to understand the capital allocations or even the existence of these projects. Sec. 61301 threatens to upend this dynamic.

Disturbingly, Sec. 61301 does *not* require the SEC to keep confidential the information provided, and therefore the information could be shared on a public facing website. This is deeply troubling because private companies could be harmed by their competitors, including large incumbents with vastly more resources, if certain information is disclosed.

- **No limitation on disclosure timing**: Sec. 61301 requires that disclosures be made "at such time and in such manner as the [SEC] may prescribe." We are concerned this language provides no limitation on the timing of such disclosures. Specifically, we are concerned such disclosures may be required *before* a financing event, as was contemplated in the *Private Securities Transparency and Reform Act of 2019*, a discussion draft considered by the Financial Services Committee. Requiring disclosure of financing events before their consummation provides an opportunity for incumbents and other competitors to interfere with the growth efforts of challengers seeking to challenge their dominance. After all, fundraising events are particularly vulnerable times in a company's lifecycle, as capital is generally running short, thus causing the need for raising capital in the first place. This concept could encourage the rise of manipulative efforts, similar to so-called "short and distort" schemes that are wielded against companies in the public markets today.

- **Beneficial ownership information**: Sec. 61301 requires beneficial ownership information of the issuer be provided. Congress recently overhauled beneficial ownership requirements as part of the bipartisan *Corporate Transparency Act (CTA)*, which passed as part of the National Defense Authorization Act in 2020. CTA imposes new beneficial ownership requirements that will provide the government with additional information. These changes are so recent that the CTA final rules have not even been finalized by the Treasury Department's FinCEN. Additional beneficial ownership information should not be required.

- **Excessive penalty:** Sec. 61301 requires the SEC to "issue rules to set conditions for future use of the exemptions for those issuers who do not comply with the disclosure requirements of this section." Most companies rely on multiple fundraising rounds to finance operation and growth activities, namely hiring and research and development. The need to raise capital is existential to their ability to remain ongoing. By threatening the exemption from registration, Sec. 61301 therefore proposes to penalize a failure to file error with the potential destruction of the company, an outcome which hurts far more than just company management and may be without precedent in terms of proportion to the error.

- **Regulatory burden on resource constrained small businesses**: Sec. 61301 would place a new reporting burden on private companies that are often smaller and resource constrained. Congress has long recognized that small businesses have difficulty navigating SEC requirements, which is why the SEC's Office of the Advocate for Small

Business Capital Formation was created in 2019. Sec. 61301 would add additional complexity for many small businesses and do so at a time when policymakers on a bipartisan basis have focused on assisting U.S. small businesses during the ongoing pandemic.

We appreciate your consideration of our views.

Sincerely,

National Venture Capital Association

U.S. Chamber of Commerce

American Investment Council

The Real Estate Roundtable

Center for American Entrepreneurship

TechNet

Small Business Investor Alliance

Angel Capital Association

Engine

Carta

CC:

Chairman Sherrod Brown
Committee on Banking, Housing, and Urban Affairs
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Chairwoman Maxine Waters
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