Council of Institutional Investors®
The voice of corporate governance

Via Hand Delivery

May 22, 2018

The Honorable Bill Huizenga
Chairman
Subcommittee on Capital Markets, Securities, and Investment
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

The Honorable Carolyn B. Maloney
Ranking Member
Subcommittee on Capital Markets, Securities, and Investment
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

Re: May 23, 2018, hearing entitled "Legislative Proposals to Help Fuel Capital and Growth on Main Street"[1]

Dear Mr. Chairman and Ranking Member Maloney:

I am writing on behalf of the Council of Institutional Investors (CII), a nonpartisan, nonprofit association of public, corporate, and union employee benefit funds, other employee benefit plans, foundations, and endowments with combined assets under management exceeding $3.5 trillion. Our member funds include major long-term shareholders with a duty to protect the retirement savings of millions of workers and their families.

Our associate members include a range of asset managers with more than $25 trillion in assets under management, most also with long-term investment horizons. CII members share a commitment to healthy public capital markets and strong corporate governance.[2]

The purpose of this letter is to thank you for holding the above referenced hearing and to share with you some of our views on this important topic.[3] We would respectfully request that this letter be included in the hearing record.

---

[1] Financial Services Committee, Hearings, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403426.
[2] For more information about the Council of Institutional Investors (CII) and our members, please visit CII's website at http://www.cii.org/about_us.
[3] *See* Memorandum from FSC Majority Staff to Members of the Committee on Financial Services 1 (May 18, 2018), https://financialservices.house.gov/uploadedfiles/052318_cm_memo.pdf.

Status of the U.S. Public Capital Markets

We believe that the U.S. public capital markets are fundamentally healthy and remain the preferred choice for businesses to seek capital, notwithstanding more robust private markets and access to capital through non-U.S. public markets.[4] And the volume of initial public offerings is on the rise.[5]

The decline in the number of U.S. public companies since the peak of 20 years ago has not in our view significantly diminished the ability of U.S. businesses to obtain capital. We note that key factors in the decline in the number of public companies has been the corresponding growth in the private markets and the related increase in mergers and acquisitions (M&A) activity.

Growth in private markets

Compared to just 15 years ago, companies have many more ways to access significant capital without utilizing the public markets.[6] Venture capitalists, private equity firms, and sovereign funds have considerable capital to invest in private companies.

For example, between 2008 and 2014, while public capital-raising hovered around $250 billion per year, private capital-raising increased from about $700 billion in 2008 to more than $1.25 trillion in 2014.[7] Given the various choices U.S. businesses have for funding, many have chosen to remain private longer.

The U.S. Congress has incentivized businesses to remain private longer, including when it increased the accredited investor limit for registering with the U.S. Securities and Exchange Commission (SEC or Commission) from 500 to 2,000 in the Jumpstart Our Business Startups Act of 2012.[8] The result is that U.S. businesses that move to a public offering in recent years have tended to be more mature and have more solid business prospects, in contrast to the prior boom cycles.[9]

---

[4] *See, e.g.*, EY, "Looking Behind the Declining Number of Public Companies, An Analysis of Trends in US Capital Markets" 15 ("In our view, US public capital markets are fundamentally healthy and remain the preferred choice for U.S. and many foreign companies that seek to go public."), http://www.ey.com/Publication/vwLUAssets/an-analysis-of-trends-in-the-us-capital-markets/$FILE/ey-an-analysis-of-trends-in-the-us-capital-markets.pdf.

[5] Nasdaq, "Progress in Process, Update on Nasdaq's Blueprint to Revitalize Capital Markets" 3 (May 2018), http://business.nasdaq.com/media/Nasdaq_Revitalize_Progress_Report_May_2018_tcm5044-61462.pdf.

[6] EY at 8-10 ("The private capital market has grown aggressively recently, allowing emerging companies to access more capital without going public.").

[7] *See* Scott Bauguess et al., "Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offering 2009-2014," at 7 (Oct. 1, 2015), https://www.sec.gov/files/unregistered-offering10-2015.pdf.

[8] *See, e.g.*, Elisabeth De Fontenay, "The Deregulation of Private Capital and the Decline of the Public Company," 68 Hastings L.J. 445, 468-69 (Mar. 29, 2017) ("By increasing the shareholder cap from 500 to 2000, Congress enables extraordinarily large private companies whose stock is widely held by passive investors to avoid becoming public companies."), *available at* https://www.sec.gov/spotlight/investor-advisory-s-2012/elisabeth-de-fontenay-deregulation-private-capital.pdf.

[9] *See* EY at 1 ("Growth companies choosing to sell shares to the public today are typically stable and have solid prospects for growth.").

Growth in M&A activity

A second key and related factor in the decline in the number of public companies has been the increase in M&A activity. From 1997 to 2012 the percentage of public companies delisted for cause did not increase, but the percentage of firms delisted because of a merger did.[10] Moreover, since 2000, leveraged buyouts by private equity firms have surged, accounting for 9% of delistings of public companies, including almost one-quarter of all delistings in 2006.[11]

The increase in the number of leveraged buyouts in recent years is not surprising given the corresponding growth in the private equity firm industry.[12] In 1980, there were only 24 private equity firms and deal volume only modestly exceeded $1 billion.[13] Today there are more than 3,000 U.S. private equity firms and assets under management for buyout funds of roughly $825 billion, up from $80 billion in 1996 and less than $1 billion in 1976.[14]

Finally, significant U.S. private companies have been acquired before they can become public at a rapid pace in recent years, with the 2014-16 average for acquisitions in excess of $100 million exceeding any previous three-year period in recent decades.[15]

Corporate Governance

CII has long held that good corporate governance—defined to include market transparency, integrity and accountability and specific relationships between boards, management and shareowners—is in the best long-term interests of shareowners and the U.S. capital markets. [16]

We believe that shareowners, other investors and other stakeholders benefit when rules and regulations provide adequate protections to owners and ensure that important information is promptly and transparently provided to the marketplace.[17]

The value of good governance structures/practices within public companies—such as substantially independent boards, all-independent key committees and other board accountability policies/practices—is backed by commonsense and experience. Such structures and practices ensure that directors have the necessary independence from management to, among other things, monitor and assess corporate performance; select, monitor, evaluate and, when necessary, fire the chief executive and other senior managers; oversee management succession; and structure,

---

[10] Craig Doidge et al., "The U.S. Listing Gap," 123 J. Fin. Econ. 464, 465-66 (Mar. 2017), *available at* https://www.sciencedirect.com/science/article/pii/S0304405X1630232X (purchase required).
[11] Michael J. Mauboussin et al., Credit Suisse, "The Incredible Shrinking Universe of Stocks, The Causes and Consequences of Fewer U.S. Equities" 7 (Mar. 22, 2017), http://www.cmgwealth.com/wp-content/uploads/2017/03/document_1072753661.pdf.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] EY at 14.
[16] CII, Policies on Other Issues, Value of Corporate Governance, http://www.cii.org/policies_other_issues#value_corp_gov.
[17] *Id.*

monitor and approve compensation paid to the chief executive and other senior managers. They also ensure that directors are accountable to shareowners.

We are unaware of any evidence of a causal connection between federally imposed improvements to corporate governance and the decline in the number U.S. public businesses.[18] We offer the following summary discussion of CII views on specific issues addressed by three of the eleven bills and discussion drafts to be examined by the Subcommittee at the hearing. In each case, we believe the proposed legislation, if enacted, would be inconsistent with improving corporate governance in the U.S. capital markets.

1. EXtensible Business Reporting Language (XBRL)

CII has long supported expanded use of data tagging to facilitate more accurate and less costly extraction and use of data in public company filings.[19] We agree with SEC Commissioner Kara Stein that machine readable data, including data that can result from XBRL tagging requirements, allows users to select only those data elements they want and present it in a format they find useful, regardless of the particular format used by registrants.[20] Given the various audiences for disclosure and the increasing diversity of investor strategies, such customization makes disclosure documents—both individually and across registrants more usable.[21] As a result, we believe many investors place a significant value on having required SEC disclosures subject to XBRL tagging requirements.[22]

H.R. 5054[23]

H.R. 5054 would require the Commission to amend its regulations to exempt certain issuers from the requirements to format their SEC filings using machine readable XBRL. The bill would create (1) a permanent exemption for companies qualifying as "emerging growth companies,"

---

[18] *See* Michael J. Mauboussin et al. at 20 ("the shrinkage in the population of listed companies started well before . . . [Sarbanes-Oxley Act] was implemented"); *see also* Office of Investor Advocate, U.S. Securities and Exchange Commission, Report on Objectives 6 (2018) ("recent academic studies demonstrate that it is difficult to establish any causal connection between disclosure mandates and IPO activity"), https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2018.pdf; Elisabeth De Fontenay at 448 ("even if public company disclosure requirements had remained constant over the last three decades, there would likely still be a dearth of public companies today, due to the increasing ease of raising capital privately").

[19] *See, e.g.*, Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 3 (July 8, 2016), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/07_08_16%20CII%20S-K.pdf.

[20] *See* Commissioner Kara M. Stein, "Disclosure in the Digital Age: Time for a New Revolution," speech before the 48th Annual Rocky Mountain Securities Conference 3 (May 6, 2016) (machine readability data "allows data to be pulled out of filings and presented according to the needs of consumers"), https://www.sec.gov/news/speech/speech-stein-05062016.html.

[21] Letter from Kenneth A. Bertsch at 3.

[22] Letter from Jeffrey P, Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary Securities and Exchange Commission 4 (Sept. 22, 2016), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/September%2022%202016%20comment%20letter%20(final%20with%20letterhead)%20KAB.pdf.

[23] H.R. 5054, 115th Cong. (Feb. 15, 2018), https://financialservices.house.gov/uploadedfiles/bills-115hr5054ih.pdf.

and (2) a temporary exemption for companies with less than $250 million in annual gross revenue.[24]

It is our understanding that if H.R. 5054 were enacted more than 60 percent of public companies would likely be exempt from XBRL tagging requirements.[25] We agree with the SEC's Investor Advocate Rick Fleming that exempting such a large percentage of public companies "would seriously impede the ability of the SEC to bring disclosure into the 21st Century" and, in our view, would lessen the value and usefulness to investors of the data provided in public company filings.[26] We look forward to the SEC's adoption of final rules on its "inline XBRL" proposal that is expected to further reduce company costs for XBRL tagging going forward.[27]

2. Shareholder Proposals

CII and its members have a deep interest in ensuring that Rule 14a-8,[28] the federal rule that governs shareholder proposals, is a fair and workable standard shareowners and companies.[29] The rule provides an orderly means to mediate differences between managers and owners.

We are mindful that many positive advances in U.S. corporate governance practices simply would not have occurred without a robust shareowner proposal process in place. For example:

- Shareholder proposals were the impetus behind the now practice—currently mandated by major U.S. stock exchanges' listing standards—that independent directors constitute at least a majority of the board, and that all the members of the following board committees are independent: audit, compensation, nominating and corporate governance. Similarly, the concept of independent board leadership, now prevalent at U.S. companies through independent lead directors or independent

---

[24] *Id.* at § 2.
[25] *See* Daniel Castro et al., "Congress Should Not Undo Progress on Financial Data Reform," Hill, Feb. 11, 2015, at 1 (reporting that "data reporting exemptions . . . [in predecessor bill to H.R. 5054] would apply to 61 percent of public companies, and thus a massive amount of financial data would be lost as a public resource"), http://itk.thehill.com/blogs/pundits-blog/finance/232417-congress-should-not-undo-progress-on-financial-data-reform.
[26] Rick A. Fleming, Investor Advocate, "Effective Disclosure for the 21st Century Investor" 2 (Feb. 20, 2015) (commenting on Title VII of H.R. 37, the "Promoting Job Creation and Reducing Small Business Burdens Act"), http://www.lexissecuritiesmosaic.com/gateway/sec/Speech/022015-spchraf.html.htm.
[27] Inline XBRL Filing of Tagged Data, Securities Act Release No, 10,323, Exchange Act Release No. 80,133, Investment Company Act Release No. 32,518, 82 Fed. Reg. 14,282, 14,283 (proposed rule Mar. 17, 2017) (proposed amendments intended to decrease "filing costs by decreasing XBRL preparation costs"), https://www.gpo.gov/fdsys/pkg/FR-2017-03-17/pdf/2017-04366.pdf.
[28] 17 CFR 240.14a-8 (Sept. 16, 2010), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-8.
[29] *See, e.g.,* "Examining the U.S. Proxy Voting System: Is it Working for Everyone," Corporate Governance Roundtable, Hosted by Rep. Scott Garrett, 114th Cong 7 (Nov. 16, 2015) (Statement of Amy Borrus, Interim Executive Director, Council of Institutional Investors), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/11_16_15_cii_Rep%20_Garrett_roundtable_submission_amy_borrus.pdf.

chairs, was pressed by investors in the 1990s mainly through shareholder proposals.[30]

- In 1987, an average of 16% of shareholders voted in favor of shareholder proposals to declassify boards of directors so that directors stand for election each year. In 2012, these proposals enjoyed an 81% level of support on average. Ten years ago, less than 40% of S&P 500 companies held annual director elections compared to more than two thirds of these companies today.[31]
- Electing directors in uncontested elections by majority (rather than plurality) vote was considered a radical idea a decade ago when shareholders pressed for it in proposals they filed with numerous companies. Today, 90% of large-cap U.S. companies elect directors by majority vote, largely as a result of robust shareholder support for majority voting proposals.[32]
- A proposal that built momentum even more rapidly and influenced the practices of hundreds of companies in the last few years is the request for proxy access. Resolutions filed by the New York City Comptroller to allow shareholders meeting certain eligibility requirements to nominate directors on the company's proxy ballot achieved majority votes at numerous companies. As a result, since 2015, more than 400 public companies have adopted proxy access bylaws.[33]

Benefits to Companies

The cost to companies of the existing shareholder proposal process is generally low and the process often results in benefits to companies.[34] It is important to note that most companies receive few, if any, shareholder proposals.[35]

---

[30] IRRC Corporate Governance Bulletin, "Independence of Directors Emerges as Major 1993 Issue," Investor Responsibility Research Center, November/December 1992 (on file with CII).

[31] *See* Ceres et al., "The Business Case for the Current SEC Shareholder Proposal Process" 6 (Apr. 2017), https://www.ussif.org/files/Public_Policy/Comment_Letters/Business%20Case%20for%2014a-8.pdf.

[32] *Id.*

[33] *Id.*; *see also* Letter from Thomas P. DiNapoli, State Comptroller, State of New York, Office of the State Comptroller, to the Honorable Jeb Hensarling, Chairman, Committee on Financial Services, United States House of Representatives 1 (Apr. 26, 2017) ("It has been my experience over the past ten years as Comptroller that shareholder resolutions are an effective means to voice concerns and propose changes in order to protect Fund investments and encourage sustainable, robust corporate practices at our portfolio companies."), http://www.osc.state.ny.us/press/releases/apr17/choice-act-letter.pdf; Statement of New York City Comptroller Scott M. Stringer on the April 19th Discussion Draft of the Financial CHOICE Act of 2017 (Act) 3 (Apr. 25, 2017) (describing some of the many achievements "made possible because of the NYC Pension Funds' long-standing right and ability to file shareholder proposals—a right and ability that would be pointlessly eviscerated by the passage of the Act"), https://comptroller.nyc.gov/newsroom/testimonies/statement-of-new-york-city-comptroller-scott-m-stringer-on-the-april-19th-discussion-draft-of-the-financial-choice-act-of-2017-act/.

[34] *See* Ceres et al. at 11-12 (providing an analysis of the potential range of company costs).

[35] According to the ISS Voting Analytics database of Russell 3000 companies on file with CII, shareholders submitted an average of 836 proposals at 386 companies per year between 2004 and 2017. The number of submitted proposals fluctuated between approximately 800-900 proposals per year, except for a dip to 603 proposals in 2011 and 673 proposals in 2012 after the SEC's adoption of say-on-pay vote requirements.

The average Russell 3000 company can expect to receive a proposal every 7.7 years.[36] In addition, proposals are typically filed with larger companies (i.e., S&P 500) that have the resources to address such shareholder input.[37]

For companies that receive a proposal, the median number of proposals is one per year.[38] When proposals are filed, companies often agree to act on the request made in the proposal. In this respect, an average of 37.5% of shareholder proposals broadly related to climate change during the 2012-2016 proxy seasons were withdrawn by filers in response to the company agreeing to the request in some way.[39]

The withdrawal rates for several other topics are much higher. This appears to suggest that many companies find benefits from committing to act on shareholder proposals prior to a vote.

Additionally, there is a mechanism in place that allows companies to challenge shareholder proposals. In particular, the SEC oversees a robust "no-action letter" process that allows companies to exclude proposals from the proxy ballot that do not meet certain procedural and/or substantive hurdles. This provides companies a means by which to know whether the SEC staff would recommend no enforcement action if a company excludes the proposal from the proxy. Companies have been actively utilizing this system. In fact, during the 2013-2015 proxy seasons, companies challenged nearly one-third of the shareholder proposals that were submitted and approximately half of those challenged proposals were omitted from the proxy with SEC approval.[40]

Importantly, the SEC has issued guidance that allows companies to exclude from the proxy any resolutions pertaining to a company's ordinary business, stating appropriately that resolutions need to pertain to "significant policy issues" faced by companies.[41] We believe this approach strikes the needed balance between respecting the board's role on corporate governance and management's discretion to make routine business decisions, while at the same time recognizing the existence of policy issues significant enough to necessitate a shareholder vote.

H.R. 5756[42]

H.R. 5756 would increase the regulatory hurdles for shareholder proposals.[43] Current rules permit a shareholder to re-file a proposal only if it has received at least 3% of the vote on its first submission, 6% on the second and 10% on the third.[44]

---

[36] ISS Voting Analytics database (on file with CII).
[37] *See* Ceres et al. at 12 (discussion of frequency of shareholder proposals at public companies).
[38] *Id*.
[39] Data compiled by Ceres (on file with CII).
[40] *See* Ceres et al. at 12.
[41] *See, e.g.*, Division of Corporation Finance, Securities and Exchange Commission, Shareholder Proposals, Staff Legal Bulletin No. 14E at 2 (Oct. 27, 2009), https://www.sec.gov/interps/legal/cfslb14e.htm.
[42] H.R. 5756, 115th Cong. (Mar. 14, 2018), https://financialservices.house.gov/uploadedfiles/bills-115-duffy_097.pdf.
[43] *Id*.
[44] 17 C.F.R § 240.14a-8(i)(12) (Sept. 16. 2010), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-8.

H.R. 5756 would raise those thresholds to 6%, 15% and 30%, respectively.[45] Those higher hurdles could knock out many important governance proposals that, if adopted, could enhance long-term shareowner value.

Experience indicates that it often takes several years for a proposal regarding an emerging issue to gain enough traction with investors to achieve double-digit votes. In many cases, these proposals eventually receive substantial support, leading to widespread adoption by companies.

The current thresholds provide a reasonable amount of time for emerging issues to gain support among investors while ensuring that only those proposals that garner meaningful support remain on the ballot for multiple years. Resubmission of proposals receiving less than 20% support for a third or fourth time is very rare. According to Institutional Shareholder Services data, since 2010, shareholders resubmitted environmental and social issue proposals in only 35 instances after receiving votes under 20% for two or more years. This affected only 26 companies.

Restricting the shareholder proposal process is likely to reduce corporate accountability to shareholders, and could create greater conflict between shareowners and public companies. For example, restricting shareholder proposals is likely to lead to shareowners more often availing themselves of the blunt instrument of votes against directors, and increased reliance on hedge fund activists to push for needed corporate changes.[46]

Taken together with SEC rules that preclude proposals relating to ordinary business and the SEC no-action system that prevents abuses by special interests, we believe the SEC's existing rules and thresholds related to shareholder proposals have and continue to benefit both investors and publicly traded companies.

3. Quarterly Reporting

As indicated, CII believes that investors and other stakeholders benefit when regulations "ensure that important information is promptly and transparently provided to the marketplace."[47] We agree with the SEC's Investor Advisory Committee that "the current degree, quality and frequency of disclosure for U.S. issuers overall is appropriate and a source of strength for the

---

[45] H.R. 5756 § 1.

[46] *See, e.g.*, "ON**POINT**/A Legal Update from Dechert's Corporate Governance Practice, Shareholder Proposal Reform under the Financial CHOICE Act of 2017: A Welcome Development for Companies or a Trojan Horse?" 2 (May 2017) ("If that outlet for complaints is removed, aggrieved shareholders may have no choice but to resort to more direct, blunt action, such as binding bylaw proposals, withhold vote for director campaigns, or even the ouster of company directors via proxy access or in a conventional contest."), https://info.dechert.com/10/8636/may-2017/shareholder-proposal-reform-under-the-financial-choice-act-of-2017--a-welcome-development-for-companies-or-a-trojan-horse-(1).asp?sid=45fff908-ffb8-4889-9feb-0a5fb8b5eda5.

[47] CII, Policies on Other Issues, Value of Corporate Governance, https://www.cii.org/policies_other_issues#value_corp_gov.

U.S. capital markets."[48] We also generally support the SEC's outstanding proposal to delete redundant or overlapping disclosure requirements.[49]

Discussion Draft Streamlining Disclosure Options to Reduce Redundant Disclosures to Investors Act (Discussion Draft)[50]

The Discussion Draft would amend the federal securities laws to provide that publicly listed companies have the option to file Form 10-Q or file a quarterly press release that includes earnings results.[51]

We note, at the outset, the scope of the provisions of the Discussion Draft would apply more broadly than it appears the corporate special interests could agree upon.[52] In the recently issued white paper entitled "Expanding the On-Ramp, Recommendations to Help More Companies Go and Stay Public," eight corporate organizations (five of which have representatives testifying at the hearing) recommended that the option to issue a press release with earnings results in lieu of a 10-Q should be applicable *only to emerging growth companies*.[53]

In addition, we note that the provisions of the Discussion Draft would not simply "Reduce Redundant Disclosures to Investors,"[54] but would appear to eliminate the timely reporting of a significant volume of potentially critical information to investors.

For example, the provisions of the Discussion Draft would appear to eliminate quarterly required information about the:

- Income statement for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding periods of the preceding fiscal year;[55]

---

[48] Letter from SEC Investor Advisory Committee, to Division of Corporation Finance 1 (June 15, 2016) (emphasis added), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf.
[49] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, Securities and Exchange Commission 3 (Sept. 22, 2016) ("We generally support the Commission's proposals . . . that would delete or integrate certain identified topics that are "overlapping'").
[50] H.R. ____, 115th Cong. (Discussion Draft May 11, 2018) [hereinafter Discussion Draft], https://financialservices.house.gov/uploadedfiles/bills-115-rrhccia.pdf.
[51] *Id.* § 2(a).
[52] Center for Capital Markets Competitiveness et al., "Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public," 20 (Spring 2018), https://www.sifma.org/resources/submissions/expanding-the-on-ramp-recommendations-to-help-more-companies-go-and-stay-public/.
[53] *Id.* (recommending "[g]ranting EGC's the option of issuing a press release that includes earnings results every quarter - as opposed to a full 10-Q").
[54] Discussion Draft § 2.
[55] 17 C.F.R § 210.10-101(c)(2) (Aug. 12, 2011), *available at* https://www.law.cornell.edu/cfr/text/17/210.10-01; *see* EY, SEC Financial Reporting Series, 2018 SEC Quarterly Reports – Form 10-Q at 14 (2017). http://www.ey.com/Publication/vwLUAssetsAL/SECQuarterlyFinancialReporting10Q_06547-171US_21November2017/$FILE/SECQuarterlyFinancialReporting10Q_06547-171US_21November2017.pdf (registration required).

- Statements of cash flows for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding period of the preceding fiscal year;[56]
- Changes to quantitative and qualitative information about market risks;[57]
- Material developments relating to legal proceedings;[58]
- Material changes in risk factors;[59]
- Sales during the quarter of unregistered securities and use of proceeds that have not been previously reported;[60] and
- Conclusions of the registrant regarding the effectiveness of the registrant's disclosure controls and procedures as of the end of the period and any change in internal control over financial reporting that occurred during the quarter.[61]

In addition, the provisions of the Discussion Draft would appear to potentially reduce the quality of the quarterly financial information reported and weaken the discipline and accountability of the company's reporting practices as a result of two consequences of filing the proposed press release in lieu of a Form 10-Q.

First, the provisions would appear to eliminate the required independent auditor's review and report on the company's quarterly financial information.[62] The review provides the accountant with a basis for communicating whether he or she is aware of any material modifications that should be made to the quarterly financial information for it to conform to with generally accepted accounting principles.[63]

Second, the provisions would appear to reduce the potential civil liability of the company's management for false or misleading statements contained in the quarterly reports. More

---

[56] 17 C.F.R § 210.10-101(c)(3); *see* EY, SEC Financial Reporting Series, 2018 SEC Quarterly Reports – Form 10-Q at 14-15.
[57] 17 C.F.R. § 229.305 (Aug. 12, 2011), *available at* https://www.law.cornell.edu/cfr/text/17/229.305; *see* EY, SEC Financial Reporting Series at 33-34.
[58] 17 C.F.R. § 229.103, *available at* https://www.law.cornell.edu/cfr/text/17/229.103; *see* EY, SEC Financial Reporting Series at 76-77; *see generally* Letter from Jeffrey P. Mahoney, General Counsel, to Brent J. Fields, Secretary, Securities and Exchange Commission 6 (Sept. 22, 2016) (commenting on the need to improve rather than eliminate disclosures relating to legal proceedings).
[59] 17 C.F.R. § 229.503(c) (Aug. 12, 2011), *available at* https://www.law.cornell.edu/cfr/text/17/229.503; *see* EY, SEC Financial Reporting Series at 77; *see generally* Letter from Jeffrey P. Mahoney, General Counsel, to Brent J. Fields, Secretary, Securities and Exchange Commission 2-3 (Dec. 20, 2017) (commenting on the Securities and Exchange Commission outstanding proposal to amend the risk factor disclosure), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/December%2020,%202017%20SEC%20FAST%20Act%20letter%20(final)%20.pdf.
[60] 17 C.F.R. § 229.701 (Jan. 4, 2008), *available at* https://www.law.cornell.edu/cfr/text/17/229.701; *see* EY, SEC Financial Reporting Series at 77.
[61] 17 C.F.R. § 229.307 (June 18, 2003), *available at* https://www.law.cornell.edu/cfr/text/17/229.307; 17 C.F.R. § 229.308(b) (Apr. 12, 2017), *available at* https://www.law.cornell.edu/cfr/text/17/229.308; *see* EY, SEC Financial Reporting Series at 34-36.
[62] 17 C.F.R. § 210.8-03 (Apr. 23, 2009), *available at* https://www.law.cornell.edu/cfr/text/17/210.8-03; 17 C.F.R. § 210.10-01(d) (Aug. 12, 2011), *available at* https://www.law.cornell.edu/cfr/text/17/210.10-01; *see* EY, SEC Financial Reporting Series at 59.
[63] *See* EY, SEC Financial Reporting Series at 60.

specifically, the Discussion Draft's proposed press release, unlike a Form 10-Q, would likely be considered "furnished" versus "filed' with the SEC.[64] As a result, the proposed press release would not be subject to liability under Section 18 of the Exchange Act.[65] The proposed press release would, however, appear to continue to be subject to the anti-fraud provisions of "Exchange Act Rule 10b-5."[66]

Finally, the Discussion Draft provisions would appear to potentially reduce the value and usefulness of the quarterly financial statements contained in the proposed press release because the information would presumably not be subject to XBRL data tagging generally required "for all primary financial statements, notes, and financial statement schedules filed with the SEC."[67]

For all these reasons, CII believes that the long-standing requirement to file a Form 10-Q with the SEC provides investors with more timely, higher quality and more useful disclosures, and instills more disciple and accountability in reporting practices than would likely be achieved by that the proposed press release contemplated by the Discussion Draft.

We commend you for holding this hearing and for your efforts to help fuel capital and growth on Main Street. We stand ready to work with you and other interested parties in support of those efforts. Thank you for considering our views. We would be very happy to discuss our perspective on these and other issues with you or your staff at your convenience. I am available at jeff@cii.org or by telephone at (202) 822-0800.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel

---

[64] *Cf. id.* at 53 (Explaining that a quarterly earnings release exhibit to a Form 8-K is considered "furnished" versus filed with the Securities and Exchange Commission).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 8.