

March 31, 2025

The Honorable French Hill
Chairman
Financial Services Committee
U.S. House of Representatives
Washington, DC 20515

Re: Request for Feedback on Legislative Proposals to Increase Investor Access and Facilitate Capital Formation

Dear Chairman Hill:

I am writing briefly in response to the House Financial Services Committee's general request for public feedback on legislative proposals to increase investor access and facilitate capital formation—and specifically to various questions posed to the broader public in regards to access to capital, investor access and participation, public markets and company lifecycle, and technology and AI in capital markets. I want to applaud the committee for focusing on capital formation and public markets and advancing so many ideas that could facilitate both investor protection and job creation.

Although these comments do not reflect the entirety of my thoughts in these areas, let alone my full public writings regarding these issues, I hope they can help frame some of the issues I have researched to assist the committee. I have focused my thoughts here on two of the topic areas under consideration: **investor access and participation**, and **public markets and company lifecycle**. I of course am available to committee members and staff to further explore these areas in more detail as well as any of the topics before the committee. I have also appended a selected list of my writings germane to the committee's purview and the issues under current consideration, including prior testimony, regulatory comment letters, reports, articles, and commentary.

My Background

I am a longtime senior fellow with the Manhattan Institute for Policy Research, which I have served as the director of legal policy since 2003.¹ In 2011, under my leadership, the Institute launched the Proxy Monitor website, which tracks shareholder proposals filed at large publicly traded companies under the 14a-8 process overseen by the SEC and its staff.

¹ The Manhattan Institute for Policy Research (Manhattan Institute) is a 501(c)(3) nonprofit think tank committed to developing and disseminating new ideas that foster greater economic choice and individual responsibility. Although the Institute is my employer and sponsors my research, my opinions on regulatory issues are my own and should not be imputed to the Institute as a whole.

I have testified on securities matters in front of various bodies including this committee and its subcommittees; the Senate Banking Committee; and the Organisation for Economic Co-operation and Development. I have authored or co-authored multiple comment letters on matters involving securities and other financial regulations, both to the SEC and other agencies including the Treasury Department, Department of Labor, CFTC, and FERC. I have written on securities issues in multiple Manhattan Institute reports and policy briefs; in academic and popular journals; and in my book *The Unelected: How an Unaccountable Elite is Governing America* (Encounter Books, 2020).

I regularly confer on securities matters with other think tank scholars, academics, public interest and private attorneys, trade association leaders, issuers, and investors. On multiple occasions, I have been named to the National Association of Corporate Directors’ “Directorship 100” list. Prior to joining the Manhattan Institute, I worked with McKinsey and Company, focusing on finance and clerked for then–chief judge Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. I have served as a director, trustee, or fiduciary on a variety of private, public, and non-profit boards. I received JD and MBA degrees from Yale, a master’s degree in politics of the world economy from the London School of Economics, and a bachelor’s degree in economics from the University of North Carolina at Chapel Hill.

Reactions

Investor Access & Participation

In recent years, greater availability of private capital, SEC rulemaking under Regulation D, and the heightened costs of publicly traded ownership have combined to make private placements of capital increasingly important to capital formation. While the shift away from publicly traded ownership raises its own concerns (see below), the solution is obviously not to impede private capital placements, which are an essential component of modern equity financing. That said, overly strict rules on investor accreditation threaten to create even more of a “two-tiered” capital system—in which only very wealthy individuals have access to broader and broader swathes of the American capital market. In addition to raising fundamental issues of fairness, limiting access to this vital component of modern capital markets risks undermining public confidence in free enterprise system itself.

A variety of bills under consideration by the committee promise to ameliorate the status quo. Six of these in particular deserve particular mention: the Fair Investment Opportunities for Professional Experts Act, the Accredited Investor Definition Review Act, the Equal Opportunity for All Investors Act, the Risk Disclosure and Investor Attestation Act, the Investment Opportunity Expansion Act, and the Accredited Investors Include Individuals Receiving Advice from Certain Professionals Act. The approaches here vary—from allowing various professional licenses, degrees, or job certifications to qualify for accredited investor status to allowing individuals to be accredited through passage of certain examinations; from allowing individuals

to invest a limited portion of their net assets in private offerings to allowing them to rely on professional advice; and from permitting individual self-certification processes to requiring periodic SEC review of accredited investor definitions. Each of these bills is a well-considered effort that deserves full committee review and debate.

Public Markets & Company Lifecycle

As vital as private offerings are to our modern capital markets, America’s longstanding commitment to broad equity ownership in publicly traded companies has been an undeniable boon to our relative economic overperformance. Overall, U.S. capital markets continue to lead the world.² But we have seen the number of companies listed on U.S. public exchanges decline more than 50% since the mid-1980s.³ And to the extent that companies are less likely to access the public markets today due to inefficient regulatory barriers idiosyncratic to American markets, it impedes capital formation and economic efficiency, to the broader public’s detriment.

Unfortunately, there is little doubt that U.S. companies’ modern tendency to avoid public offerings has much to do with unique features of the American regulatory landscape. Almost twenty years ago, I began to explore these trends.⁴ Many of the factors that have discouraged public stock offerings remain as significant today as they were then, including heightened reporting standards under the Sarbanes-Oxley Act of 2002 and America’s singular litigation landscape that imposes a “tort tax” on public corporate offerings, mergers, and disclosures. In addition, the last twenty years have witnessed a confluence of trends in shareholder ownership and voting that have exacerbated the costs of publicly traded equities, including:

- Increasing influence by proxy advisory firms that have shown an increased tendency to support various environmental and social causes in shareholder engagement;⁵

² See, e.g., Ron Surz, *U.S. Stock Market Is Biggest & Most Expensive In World, But U.S. Economy Is Not The Most Productive*, NASDAQ.COM, Apr. 2, 2018, <https://www.nasdaq.com/articles/us-stock-market-biggest-most-expensive-world-us-economy-not-most-productive-2018-04-02>.

³ See, e.g., Nicole Goodkind, *America has lost half its public companies since the 1990s. Here’s why*, CNN BUSINESS, June 9, 2023, available at <https://www.cnn.com/2023/06/09/investing/premarket-stocks-trading/index.html> (observing decline in U.S. number of publicly listed companies on American exchanges to approximately 3,700 from peak of 8,000 in 1996).

⁴ See, e.g., James R. Copland, “The Capital Market Crackup,” *Chief Executive*, Dec. 1, 2006, available at <https://manhattan.institute/article/the-capital-market-crackup>; James R. Copland, “Are U.S. IPOs DOA?,” *WashingtonPost.com*, Apr. 12, 2007, available at <https://www.washingtonpost.com/wp-dyn/content/article/2007/04/11/AR2007041101723.html>.

⁵ See, e.g., Paul Rose, *Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting* (Manhattan Institute 2021), available at <https://manhattan.institute/article/proxy-advisors-and-market-power-a-review-of-institutional-investor-robotvoting>; James R. Copland, David F. Larcker & Brian Tayan, *Proxy Advisory Firms: Empirical Evidence and the Case for Reform* (Manhattan Institute 2018), available at <https://manhattan.institute/article/proxy-advisory-firms-empirical-evidence-and-the-case-for-reform>.

- Increasing concentration of ownership in large passive index fund families that take also take increasingly aggressive “shareholder engagement” stances, especially on environmental or social-policy issues;⁶ and
- Increasing investment flows into ESG (environmental, social, and governance) investment vehicles that exist principally to influence corporate behaviors away from a strict focus on shareholder wealth maximization.

Some of these trends are inevitable and reflect understandable investor demand. But as I noted in a report last year,⁷ proxy advisors in the last twenty years and large passive index fund families in the last eight have aggressively shifted their shareholder engagement in favor of environmental and social causes, for a variety of reasons unrelated to maximizing shareholder wealth. Until 2017, not a single environment-related shareholder proposal received majority shareholder support over board opposition at one of the 250 largest publicly traded U.S. companies (dating back to 2006, the first year tracked in the Manhattan Institute’s Proxy Monitor database⁸). Today, however, two of the three largest index-fund managers have been supporting a *majority* of ESG-related shareholder proposals:⁹

- In 2023, BlackRock supported 55% of all “key” ESG-related shareholder proposals as rated by Morningstar advisors, including 70% of civil-rights and racial-equity-related proposals, 57% of environmental proposals, and 55% of other socially related proposals.
- State Street Global Advisors supported 60% of ESG proposals, including 90% related to civil rights and racial equity, 61% related to the environment, and 60% related to other social issues.
- Vanguard supported 28% of ESG proposals, none relating to civil rights or racial equity, 30% related to the environment, and 27% related to other social issues.

The SEC has overseen and to a significant extent encouraged these trends through its oversight of shareholder proposals included on the proxy statements of U.S.–listed companies, overseen by the Securities and Exchange Commission through Rule 14a-8.¹⁰ As I noted to this committee in summer 2023:¹¹

⁶ See, e.g., James R. Copland, *Index Funds Have Too Much Voting Power: A Proposal for Reform* (Manhattan Institute 2024), available at <https://manhattan.institute/article/index-funds-have-too-much-voting-power-a-proposal-for-reform>.

⁷ See *id.* (citing Theo Andrew, “Vanguard Lags BlackRock and State Street in Support of ESG Issues,” *EFT Stream* (blog), June 15, 2023).

⁸ See Proxy Monitor, <https://www.proxymonitor.org/>.

⁹ See Theo Andrew, “Vanguard Lags BlackRock and State Street in Support of ESG Issues,” *EFT Stream* (blog), June 15, 2023.

¹⁰ See 17 C.F.R. § 240.14a-8.

¹¹ Statement of James R. Copland, “The Rise of ESG Investing and the Appropriate Regulatory Responses,” Hearing before the House Committee on Financial Services: Protecting Investor Interests: Examining Environmental and Social Policy in Financial Regulation, July 12, 2023, available at <https://media4.manhattan-institute.org/wp-content/uploads/Copland-Testimony-House-Financial-Services-7-12-2023-fin-rev.pdf>.

The entire legal foundation of the SEC’s shareholder-proposal rule is suspect. The SEC’s role as shareholder-proposal gatekeeper goes beyond the Commission’s proper role, which should be to facilitate disclosure rules necessary to the functioning of national securities markets—not to intervene in corporations’ annual-meeting process in substantive matters reserved to state law.

Under its statutory mandate, the SEC is empowered to promulgate rules and regulations to dictate *disclosure* rules, while *substantive* matters related to the distribution of authority between shareholders and corporate boards are left to state law.¹² As the Supreme Court has long observed, “Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”¹³

Recent statutory changes have somewhat interfered with the distribution of authority between federal and state securities and corporation law—particularly the Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002¹⁴ and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹⁵. But in general, that states rather than the federal government have the “authority to regulate domestic corporations, including the authority to define the voting rights of shareholders” remains what the Supreme Court has called the most “firmly established” principle of American corporation law.¹⁶

It is unnecessary for me to reframe the entirety of my argument here on how and why the SEC’s arrogation to itself of substantive shareholder proposals through its proxy statement oversight exceeds its statutory reference, since I presented it to this committee just under two years ago. But my conclusion there still holds: “the SEC’s shareholder-proposal rule exceeds Congress’s statutory mandate to the agency, tramples on state corporate law without Congressional authorization, and impedes the efficiency and capital formation that Congress has insisted the agency prioritize.”¹⁷ Ideally, Congress should act to clarify that shareholder-

¹² See, e.g., *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987) (“No principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.”); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977).

¹³ *Santa Fe v. Green*, 430 U.S. at 479.

¹⁴ Pub. L. No. 107-204, 116 Stat. 745 (2002). For a substantive critique of the Sarbanes-Oxley law, in the context of traditional American securities and corporate law, see generally Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *YALE L.J.* 1521 (2005).

¹⁵ Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Dodd-Frank law interjects a federal role into the allocation of shareholder-board authority through, *inter alia*, requiring publicly traded companies to hold shareholder “advisory votes” on executive compensation annually, biennially, or triennially. See *id.* at § 951.

¹⁶ *CTS Corp. v. Dynamics Corp.*, 481 U.S. at 89.

¹⁷ Beyond these statutory, federalist, and efficiency concerns, the shareholder proposal rule, at least in its current form, also likely violates the First Amendment. The First Amendment’s protections clearly apply to corporate speech. Cf. *Citizens United v. FEC*, 558 U.S. 310 (2010). That said, the First Amendment’s reach with regard to commercial speech is more “limited” than in other contexts. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771–72 (1976). A form of “intermediate scrutiny” applies to restraints on commercial speech. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY*, 447 U.S. 557 (1980). A lesser standard yet applies to compelled government speech in the professional or corporate context. See *Zauderer v.*

board interactions remains an issue of state law—and remind the SEC that its purview lies in facilitating disclosure, not the substance of corporate governance.

Even were the shareholder-proposal process properly returned to the states, however, the concentration of shareholder voting power in a small number of intermediaries who have agency costs that dwarf those of public companies themselves remains a major issue for the committee to consider.¹⁸ Two bills introduced in previous sessions of Congress wrestle with these issues: the Putting Investors First Act (H.R. 448, 118th Congress) and the INDEX Act (S. 4241, 117th Congress). I commented in more depth on the latter in my 2023 testimony before this committee and in my Manhattan Institute paper last year, in which I suggested a slight variant.¹⁹ I also wrote extensively on possible reform of the proxy advisory industry in a 2018 paper co-authored with Stanford researchers.²⁰ I would urge the committee not to neglect these critical issues, and these earlier bills may be good starting points for discussing reforms.

Finally, I would like to emphasize to the committee that the SEC in recent years has badly twisted its disclosure mandate and acted as if it is not constrained by traditional notions of materiality. Indeed, in May 2021, then-Commissioner Allison Lee argued that the SEC has broad authority to require any disclosures “in the public interest,” whether or not material. As Bernard Sharfman and I discussed in our comment letter on the SEC’s subsequently proposed climate-disclosure rule,²¹ Commissioner Lee used an “overly cramped” reading; she purported to infer a lack of required materiality in the statute, despite consistent longstanding usage, from

Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652-53 (1985); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

Critically, however, the Supreme Court’s precedents limiting the First Amendment’s reach in the context of government-compelled commercial and professional disclosures hinge on the government disclosure rules involving “purely factual and uncontroversial information.” *Zauderer*, 471 U.S. at 642 (permitting regulation of commercial advertising requiring disclosure of “purely factual and uncontroversial information”); *Becerra*, 138 S. Ct. at 2372 (finding Free Speech violation when regulation required disclosure of “information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic”).

Applying this principle to securities regulation, the D.C. Circuit struck down as unconstitutional the SEC’s “conflict minerals” rule, *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); see *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b)—notwithstanding Congress’s express authorization to craft one, see 15 U.S.C. § 78(m).

¹⁸ For a fuller discussion of the agency costs inherent in both the proxy advisory and passive investing industries, see Statement of James R. Copland, “Who’s Monitoring the Monitors? The Rise of Intermediaries and the Threat to Capital Markets,” Hearing before the Senate Committee on Banking, Housing, and Urban Affairs: The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, Apr. 2, 2019, available at <https://www.banking.senate.gov/imo/media/doc/Copland%20Testimony%204-2-191.pdf>; Copland, *Index Funds Have Too Much Voting Power*, *supra* note 6.

¹⁹ See *id.*

²⁰ See James R. Copland, David F. Larcker & Brian Tayan, *Proxy Advisory Firms: Empirical Evidence and the Case for Reform* (Manhattan Institute 2018), available at <https://manhattan.institute/article/proxy-advisory-firms-empirical-evidence-and-the-case-for-reform>.

²¹ See Bernard S. Sharfman & James R. Copland, Comment, File No. S7-10-22, Release Nos. 33-11042; 34-94478, “The Enhancement and Standardization of Climate-Related Disclosures for Investors,” June 16, 2022, available at <https://www.sec.gov/comments/s7-10-22/s71022-20131661-302049.pdf>.

the fact that Congress did not append the word “material” to various prefatory grants of rulemaking authority in the enacted statute. As we explained:

Congress’s delineation of the information required in annual and quarterly reports in 15 U.S.C. § 78m(b)(1) clearly lists items required for a reasonable investor to make financial decisions regarding an investment in an issuer’s securities—precisely the sort of disclosures the Supreme Court has pointed to repeatedly in defining materiality under the securities laws. Similar abutting textual constraints exist in the other chapters, once a reader gets beyond the prefatory language. Moreover, Commissioner Lee’s speech fails to grapple with the express, clarifying definitional command Congress added to the securities laws in 1996, which universally requires the Commission to consider in its rulemaking, “in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” This Congressional addition of a prophylactic definition limiting SEC rulemaking was notably after—and implicitly incorporates—the Supreme Court’s 1977 and 1988 decisions in *TSC Industries* and *Basic*, which articulated a materiality constraint in the federal securities laws.²²

Another bill previously introduced in an earlier session of Congress, the Mandatory Materiality Act (H.R. 4168, 118th Congress), would helpfully clarify to the SEC that it should refrain from adventurous rulemaking requiring disclosures that do not meet traditional notions of materiality for investors.

I hope these brief comments help the committee as it considers its vitally important work. I have appended a selection of my and my colleagues’ earlier writings in the area that add further detail, and I remain very open to discussing these issues in as much depth as the committee and staff find useful. I can be reached at jcopland@manhattan.institute or through the Institute’s main line, (212) 599-7000, through our external affairs division.

Sincerely,

James R. Copland

Senior Fellow & Director, Legal Policy

Manhattan Institute for Policy Research

²² See *id.* at 3–4 (citations omitted). See also *NAACP v. FPC*, 425 U.S. 662, 669 (1976) (noting that the Supreme Court’s “cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.”).

Selected Writings

Congressional Testimony

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