U.S. Chamber of Commerce

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May 7, 2024

The Honorable Ann Wagner
Chair
Subcommittee on Capital Markets
United States House of Representatives.
Washington, DC 20515

The Honorable Brad Sherman
Ranking Member
Subcommittee on Capital Markets
United States House of Representatives
Washington, DC 20515

Re: Hearing Entitled "SEC Enforcement: Balancing Deterrence with Due Process"

Dear Chair Wagner and Ranking Member Sherman:

The U.S. Chamber of Commerce ("Chamber") is pleased to contribute this information for the scheduled May 7th hearing of the Capital Markets Subcommittee to examine the enforcement program of the Securities and Exchange Commission ("SEC"). The Chamber remains a leading voice regarding SEC enforcement practices and has previously called on Congress and the SEC to adopt reforms that maintain the ability of the SEC to hold bad actors accountable while preserving the due process rights of respondents.

In 2015, the Chamber released a comprehensive report[1] on SEC enforcement that contained 28 recommendations for how the SEC could improve the effectiveness of its enforcement program. These recommendations were centered around the necessity of ensuring clear, predictable, and efficient practices for market participants while eliminating ambiguity or unfounded interpretations of law that weaken confidence in the U.S. capital markets and the SEC as a regulatory agency.

The Chamber has also taken great interest in the SEC's enforcement approach related to digital assets and cryptocurrencies. Pursuant to longstanding law, the SEC's regulatory and enforcement authority in the context of digital assets centers around whether a particular asset is a security. Unfortunately, the SEC has taken a heavy-handed approach toward digital assets. Some of its enforcement actions can more aptly be described as new regulations or interpretations of jurisdiction that have not gone through a public notice and comment period. The Chamber issued a report on digital assets in 2021 that outlined some of our views and concerns regarding the

[1] Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices (July 2015) Available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

regulation of digital assets and cryptocurrencies, and the need for agencies such as the SEC to operate within their existing statutory authority.[2]

Legislation

The Chamber appreciates the Subcommittee's attention and interest in these topics. We wish to provide the following views regarding several bills that will be considered:

H.R. 6695, the Due Process Restoration Act of 2023

The Chamber strongly supports this legislation. The bill would grant respondents in certain SEC administrative proceedings the right to have their case removed to an Article III court. Administrative proceedings at the SEC do not contain the same due process protections as federal courts, and because of the 2010 Dodd-Frank Act, the SEC can bring most enforcement proceedings through its in-house tribunals. The Due Process Restoration Act would permit respondents to seek the protections inherent in federal courts while still maintaining the ability of the SEC to penalize wrongdoers.

Legislation to define what constitutes a violation of the securities laws for the purpose of determining penalty amounts

The Chamber supports this bill, which would ensure that the SEC cannot impose multiple monetary penalties on a business or individual over the same violation and effectively penalize that individual or business a greater amount than the law permits. The bill would clarify that "separate acts of noncompliance" are a single violation if they have a common or substantially overlapping original course or involve the same misstatement or omission.

Legislation to establish federal court jurisdiction over alleged violations of the Securities Act

The Chamber supports this bill, which would establish that federal courts are the primary jurisdiction for contested violations of the Securities Act. Businesses have sometimes found themselves the target of multiple lawsuits – across both state and federal courts – for the same alleged omission or misstatement of fact in their securities filings which typically results in enormous costs for shareholders. Asserting that federal courts are the primary arbiter for alleged violations of the Securities Act – just as they are for the Securities Exchange Act of 1934 – is long overdue.

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[2] Digital Assets: A Framework for Regulation to Maintain the United States' Status as an Innovation Leader (Jan. 2021) Available at: https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/01/CCMC_DigitalAssets2021_v3.pdf.

Legislation to clarify the SEC's waiver policy under Regulation D and for well-known seasoned issuers ("WKSI"s)

The Chamber supports the committee's efforts to clarify the SEC's waiver policy under Regulation D and for well-known seasoned issuers (WKSIs). This legislation would codify the way the SEC provides waivers for entities that may otherwise be disqualified from participating in Reg D offerings or being classified as a WKSI. The bill maintains important provisions to ensure that sufficient investor protections remain in place. Over the last decade, uncertainty has arisen for some entities regarding their WKSI status based upon actions taken by other regulators. This legislation should clarify for regulated entities the SEC's policy towards waivers.

Legislation to repeal the SEC's no admit/no deny policy, commonly referred to as "gag" orders

The Chamber supports the committee's efforts regarding the SEC's no admit/no deny policy. This legislation would repeal SEC policy dating back to 1972 that prohibits parties to SEC settlement agreements from making public statements "denying the allegations in the [SEC's] complaint or order for proceedings." This SEC policy has been the subject of substantial controversy and litigation in recent years as it raises fundamental First Amendment issues and is viewed by many as prohibiting American citizens from criticizing or questioning their government. The Chamber agrees that the 1972 policy – which was adopted with little public attention – should be revisited and that the SEC should not summarily dismiss the constitutional questions created by its gag orders.

Resolutions

Additionally, the Chamber supports the following resolutions introduced pursuant to the Congressional Review Act ("CRA") that would disapprove of certain rules recently adopted by the SEC:

CRA Disapproval of SEC Rule "Form PF: Reporting Requirements for all Filers and Large Hedge Fund Advisers"

The SEC's Form PF rule will impose new and substantial reporting requirements on private funds will not meet its stated goal of enhancing stability in the financial system. The rule also inappropriately expands both the SEC's role in overseeing private funds and the scope of the SEC's mission to include monitoring of systemic risk. The Chamber supports Congressional disapproval of this rule.

CRA Disapproval of SEC Rule: "Reporting of Securities Loans"

The rule will mandate that parties to securities loans provide prescriptive and confidential information to a central repository. The rulemaking process leading up to the final rule on reporting of securities loans followed a familiar pattern employed by the SEC in recent years: a truncated public comment period and a failure to consider how a rule might interact with other recently adopted or proposed rulemakings. The Chamber supports Congressional disapproval of this rule.

Securities Litigation

In addition to establishing exclusive federal court jurisdiction over '33 Act litigation as discussed above, the Chamber also urges Congress to take up long overdue reforms to securities litigation. The frequent filing of frivolous and questionable securities fraud claims harms investors and undermines the integrity and reliability of the U.S. capital markets. In 1995, Congress moved to crack down on repeat, professional plaintiffs that filed frivolous securities fraud class actions, often for cash kickbacks, by adopting the Private Securities Litigation Reform Act ("PSLRA").

In 1998, Congress subsequently made additional reforms in the Securities Litigation Uniform Standards Act ("SLUSA"). Unfortunately, research has shown that professional plaintiffs, both individual and institutional, are still taking advantage of loopholes in Congress' securities litigation reform regime, including the PSLRA and SLUSA.

This harms shareholders on both sides of the lawsuits: those that ultimately pay for the litigation costs and lawyers' fees, and those that receive little or no benefit when the lawsuit ends. Congress should craft legislation to:

- **Broaden limits on repeat filers.** Much filed securities litigation is brought by serial plaintiffs that are usually dismissed and result in no benefits to shareholders, just a payment to the plaintiff and their attorneys. The PSLRA prohibits individual shareholders from acting as lead plaintiffs in more than five class actions in a three-year period, yet this limitation is avoided when claims are settled or dismissed before appointment of a lead plaintiff or by filing as an individual action. The prohibition should instead prevent shareholders from filing more than five lawsuits in a three-year period. Any waivers of this limit in the class action context, such as for large institutional investors, should also be based on demonstrated results for class members in previously filed suits, rather than the de facto automatic waiver that typically occurs in most of these cases.

- **Correct the mechanism for determining lead plaintiffs and determining attorney's fees.** Rather than allowing lawyers to control cases at the expense of class members, courts should be required to disqualify lawyers who provide payments or legal services that would give the lawyers leverage over their clients. Furthermore, courts should look at fee agreements with plaintiff's counsel and how much of the recovery would go to attorneys' fees and then making clear that unjustified or excessive fee requests should be rejected.

- **Increase Transparency.** The PSLRA should also be improved by requiring disclosure of (1) any attorney payments to plaintiffs outside of their pro rata share of the recovery so any incentive payments will come to light, (2) the nature of the attorney's representation of the plaintiff outside of the current lawsuit before a court to reveal collaboration between serial filers and the law firms that enable this practice, (3) the presence of any third party litigation funding in the case, and (4) any contributions to elected officials with authority to retain counsel in these cases.

The Chamber commends the Subcommittee for holding a hearing on these critical issues and looks forward to serving as a resource as these bills advance through the legislative process.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: Members of the House Subcommittee on Capital Markets