

RESTARTING THE GROWTH ENGINE:

A PLAN TO REFORM AMERICA'S CAPITAL MARKETS



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RESTARTING THE GROWTH ENGINE: A PLAN TO REFORM AMERICA'S CAPITAL MARKETS

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INTRODUCTION AND
PRINCIPAL RECOMMENDATIONS

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INTRODUCTION AND PRINCIPAL RECOMMENDATIONS

“All Americans have a vested interest in strengthening America’s financial services industry, and the time has come to rally support for this effort.”

Former New York Mayor Michael R. Bloomberg and U.S. Senator Charles Schumer. Sustaining New York’s and the US’ Global Financial Services Leadership, January 2007.

“U.S. capital markets are the lifeblood of our economy.”

Former U.S. Treasury Secretary Henry M. Paulson. Conference on U.S. Financial Competitiveness, March 13, 2007.

“Over the past two decades, markets have become global—corporations, accounting firms, investment banking firms, law firms and now stock exchanges—all have become internationalized. Yet, the U.S. regulatory structure is deeply rooted in the reforms put in place in the 1930s, a period that is closer in time to the Civil War than it is to today.”

Commission of the Regulation of U.S. Capital Markets in the 21st Century. U.S. Chamber of Commerce, Report and Recommendations, March 2007.

“Policymakers and thought leaders [must] address these problems now before a crisis arises. We have it within our power to take sensible, effective steps to ensure that U.S. markets are the most efficient, transparent and attractive in the world. The question is, can we find the political will to take them.”

Commission of the Regulation of U.S. Capital Markets in the 21st Century. U.S. Chamber of Commerce, Report and Recommendations, March 2007 (emphasis added).



Of course, a crisis did arise—as did a massive legislative and regulatory response—but those prescient words are truer today than they were in 2007. The challenges of 2007 still remain, but they have become more complex. New challenges have arisen as well.

Since the 2008 financial crisis erupted, the United States has seen a massive response to promote financial stability—the passage of the Emergency Economic Stabilization Act of 2008 and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”) and the development and implementation of Basel III, to name a few. A massive new layer of regulation was added in the hopes of making our financial system



more stable, but it has constrained credit and sapped liquidity from our capital markets. This has impacted the businesses that rely on our capital markets for funds. Are the generators of growth and jobs—American businesses—more empowered now? Sadly, the answer is “no.”

Regulators have more regulatory powers than ever and engage in a micromanagement-style of oversight, but they are unable—or unwilling—to consider the implications of their actions on the markets they regulate.

This has resulted in policies that have led to more inefficient markets that are a drag rather than a boost for the economy. Today, corporate treasurers must deal with less liquid and more inefficient markets. Since 1996, the number of public companies has decreased by 50%. Economists are confounded by low productivity, and while unemployment rates have dropped, labor participation has hit all-time lows. All of this is happening while economic growth seems stuck at 2%—a growth rate sufficient to stave off a recession, but not sufficient to provide Americans with the level of prosperity they expect or can pass on to the next generation.

While the responses to the financial crisis did address some of the root causes of the crisis, many were left unaddressed. The 1930s regulatory system remains in place with layers added to it. Regulators were not provided with the tools to keep up with dynamic, evolving global capital markets. New agencies and rules were created, but obsolescence was never addressed. There is a troubling pattern of systemic risk oversight and consumer protection enforcement that “end-runs” the transparency, efficiency, and quality controls of the Administrative Procedures Act (“APA”). Rulemaking, in some areas, became more opaque and disregarded the very real, adverse consequences that new rules sometimes heap upon the economy. Tools needed for smart regulation are often ignored. Rather than ensuring an even playing field that promotes competition, regulation has become a game of “gotcha” designed more to address governmental reputational risk rather than enforcing the law in a fair and balanced way.

The American economy remains the most resilient and nimble in the world and rewards prudent risk takers.

Yet the picture is not all doom and gloom.

The American economy remains the most resilient and nimble in the world and rewards prudent risk takers. We have seen new markets and companies grow and thrive even in these tough times. The American economy is still growing, while many economies around the world are in a recession. Unfortunately, the tepid growth is occurring in spite of, rather than due to, the regulatory structures currently in place.

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It is imperative that we make progress now—with an increasingly global economy, businesses must have the ability to compete and our regulators must be able to coordinate with their counterparts.

The issue facing the next administration—regardless of party affiliation—is this: how to ensure that the United States has the modern financial regulatory system needed so that fair and efficient capital markets can provide the resources for businesses to compete and for consumers to have affordable, accessible, and fair financial products that they need.

The hallmarks of the U.S. financial system have been diversity, competition, and innovation.

The hallmarks of the U.S. financial system have been diversity, competition, and innovation. This dynamic system has benefited businesses and investors alike. We need an efficient nonbank financial sector to coincide with a stable banking system. Safety and soundness must be paramount, but innovation and growth must also be encouraged.

The next administration has the opportunity to fix the mistakes of the past and address the structural shortfalls that may limit the future horizons of growth. The right solutions will allow resources to be deployed in the manner needed to achieve the rates of growth and job creation we expect.

We believe that the focus for the next administration should be on the following subject areas:

- Regulatory reform of agencies to promote efficient capital markets;
- International coordination and process;
- Systemic risk monitoring and management to fit the circumstances and business model;
- Retirement security to provide investors with transparency, options, and certainty;
- Financial reporting and corporate governance modernization to meet the needs of businesses and their investors;
- Capital formation and Financial Technology (“FinTech”), fostering innovation and growth;
- Litigation reform and restoring due process; and
- Consumer protection.



With this agenda for the next administration, we provide some answers and suggestions for the executive and legislative branches and regulatory agencies, both domestic and global. While we do not expect to have all the answers, we think it is important to have a debate of ideas, instead of competing sound bites, so we can make 2017 the year of progress rather than another year of plodding along.

PRINCIPAL RECOMMENDATIONS:

- Create a Presidential Commission on Financial Regulatory Restructuring;
- Reform and place the regulatory processes of the Federal Reserve and other banking regulators on par with other agencies;
- Reconstitute the Financial Stability Board through a treaty to create transparent and accountable regulatory and designation processes;
- Modernize rule writing through enhanced economic analysis and examination of existing regulations before creating new ones;
- Reform the Financial Stability Oversight Council and clarify use of systemic risk designations and regulation;
- Provide relief for small, medium and regional banks from enhanced regulations and systemic risk regulations and tailor systemic risk regulation to the nonbank business model;
- Conduct a study of major regulatory initiatives for cumulative impacts on all financial institutions, their customers and economic growth;
- Restructure the Consumer Financial Protection Bureau into a commission and place it under congressional oversight through appropriations;
- Congress should create a special bi-cameral committee to study the FinTech landscape and its policy recommendations;
- Repeal the Department of Labor's Fiduciary Duty Rule and replace it with a Security and Exchange Commission (SEC) uniform fiduciary standard rule;

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- Create a Financial Reporting Forum to identify and address emerging financial reporting issues;
- Reform corporate governance 14a-8 rules and modernize shareholder resubmission thresholds;
- Congress and the SEC should create fair due process by creating rights of discovery, right of removal in complex cases, and preservation of right to jury trial; and
- Congress should enhance capital formation by passing a JOBS Act 2.0 package.

STRUCTURAL
REGULATORY REFORM

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STRUCTURAL REGULATORY REFORM

Presidential Commission on Financial Regulatory Restructuring

Throughout U.S. history, the common response to a financial crisis has been the creation of new agencies to address the real or perceived underlying causes of the emergency. This has led to a patchwork regulatory system where agency jurisdictions overlap, turf battles are common, and regulatory dead-zones lead to insufficient oversight. This patchwork system was a problem before the 2007-2008 financial crisis and may have contributed to the crisis.

The response to the 2007-2008 financial crisis exacerbated these problems and led to the rise of new agencies instead of regulatory streamlining. Since 2008, we have seen the creation of the Financial Stability Board (FSB), the Financial Stability Oversight Council (FSOC), the Office of Financial Research (OFR), the Federal Insurance Office (FIO), and the Consumer Financial Protection Bureau (CFPB). Existing agencies such as the Federal Reserve Board ("Federal Reserve"), the Federal Deposit Insurance Corporation (FDIC), and the Commodities Futures and Trading Commission (CFTC) have seen an expansive increase in their powers as well.

For instance, both the CFTC and SEC regulate derivatives, and the FIO, Federal Reserve, and state regulatory bodies oversee insurance, yet no single regulator oversees FinTech.

The next administration should create a pathway to streamlining the U.S. regulatory structure to minimize conflicts and ensure appropriate oversight and regulation needed for vibrant capital markets. No regulatory issue has proved as difficult as the actual restructuring of our regulatory system. The current overlapping and redundant framework stands as testament to a history of ad hoc responses to crises dating back to the financing of the Civil War. Various efforts have been made to address our regulatory collage, to no avail. The Chamber believes that regulatory restructuring can be a truly bipartisan accomplishment if sufficient political capital is dedicated to launching an effort. Any restructuring must encourage safety and soundness of the financial system, as well as policies to foster innovation and growth. Too often, these have been treated as mutually exclusive goals, but the truth is that one cannot be achieved without the other.

The next administration should create a pathway to streamlining the U.S. regulatory structure to minimize conflicts and ensure appropriate oversight and regulation needed for vibrant capital markets.



In past administrations, the Treasury Department has prepared reports on how to restructure America's financial regulatory architecture. We believe that the incoming administration should make this policy a priority and put the clout of the Oval Office behind it.

RECOMMENDATIONS:

- **ESTABLISH A PRESIDENTIAL COMMISSION:** The incoming administration should seek legislation establishing, or create by Executive Order (“EO”), a Presidential Commission (the “Commission”) on Financial Regulatory Restructuring.
- **DEVELOP A PLAN FOR RESTRUCTURING THE FINANCIAL REGULATORY SYSTEM:** The Commission should be truly bipartisan and work toward formulating a plan for restructuring. The Commission should be made up of 10 members, evenly split between the two parties, drawn from academia, business, and former regulators. The Commission’s work should be limited solely to restructuring and should not opine on regulatory policies. If 60% of the Commission concurs, an official report embodying a formal proposal for restructuring should be issued.
- **BALANCE SAFETY AND SOUNDNESS WITH GROWTH:** In developing this plan, the Commission should demonstrate how the new financial regulatory structure will meet the policy goals of safety and soundness of the financial system and achieve balanced policies for encouraging competition and growth.

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Modern Rulemaking

The current financial services regulatory system is unwieldy and overlapping, and at times operates inconsistently with the principles of transparency, accountability, and effectiveness embodied in the APA and the bipartisan Executive Orders on regulatory reform.

What follows is not a critique of the substance of any particular regulation; rather, these proposals address unnecessary burdens that result from duplicative oversight and redundant responsibilities and rulemaking processes that are unnecessarily opaque and unaccountable. Bipartisan agreement on policy may be difficult; agreeing on processes that ensure transparent, fair, and effective rulemaking should not be.

Improve the rulemaking process to promote effective and efficient rulemaking

In 1981, President Reagan issued Executive Order no. 12291, requiring cabinet-level departments and regulatory agencies to engage in broad-based cost/benefit reviews of regulation. In 1993, President Clinton revoked EO 12291 and issued its successor, EO 12866. EO 12866, along with the supporting Office of Management and Budget (OMB) Circular A-4, remains in effect today. The logic of the reviews required by these EOs is self-evident—when regulation is necessary to address some market dysfunction, corrective actions should take the least invasive form possible. Any economic regulation entails some drag. Regulators should make sure that the regulatory objective is met with as little drag as possible. Clearly, the logic of such analyses applies to financial regulatory agencies' rulemaking no less than to Cabinet agency rules.

Unfortunately, these EOs do not apply to independent regulatory agencies, including the SEC, CFTC, or the federal banking agencies (the Office of the Comptroller of the Currency (OCC), as an office within Treasury, was subject to these orders; the Dodd-Frank Act re-designated the OCC as an independent regulatory agency in order to remove it from the review process). While financial regulatory agencies have been encouraged to undertake economic analyses like those mandated by EO 12866, they have not shown a great appetite for doing so. Nor have they directed sufficient resources toward complying with the cost/benefit analyses that are required under their organic statutes (absent compulsion by federal courts to do so).



RECOMMENDATIONS:

- **REQUIRE ALL AGENCIES TO CONDUCT ECONOMIC ANALYSES:** Congress should enact legislation requiring financial regulators to undertake economic analyses. Given the demonstrated reluctance of regulators to undertake and publish such analyses, the legislation should mandate the methodology, based largely on the principles embodied in EO 12866. Nevertheless, because the independence of these regulatory agencies is of utmost value, they should be exempt from submitting rules to the OMB for review. As part of an economic impact analysis, regulators should explicitly consider and address the following issues, as appropriate:
 - The impact that a regulatory proposal may have on availability of credit to businesses or consumers, including a discussion of alternative sources of credit that currently exist to replace any capacity lost as a result of the rulemaking;
 - The extent to which the proposed regulation would add increased costs for businesses, adversely impact capital formation for businesses, or harm investors;
 - The marginal benefit of the proposed regulation to the financial stability of the U.S. economy after taking into account the effect of existing rules;
 - The marginal benefit of the proposed regulation to the safety and soundness and resolvability of bank holding companies after taking into account the effect of existing rules;
 - Whether the proposed regulation would conflict with the objectives of any existing regulations and, if so, the need for the proposed regulation despite such conflict;
 - The impact of the proposed regulation on market liquidity; and
 - The impact of the proposed regulation on economic growth and the competitiveness of U.S. financial institutions operating in global markets.
- **AMEND THE ADMINISTRATIVE PROCEDURE ACT:** Rigorous economic analysis can be a time-consuming process that regulators might be tempted to rush. With this in mind, we recommend that the APA be amended to clearly state that a meaningful economic analysis must be undertaken if a rule is to pass muster under the

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arbitrary and capricious standard. The courts should be specifically charged with being the arbiter of whether vibrant economic analysis has occurred.

- **PERIODICALLY STUDY EXISTING REGULATIONS:** In order to ensure that the regulator considers a proposal in its real-world context and is mindful of the possibility of regulatory accretion, there should be a recurring mandatory analysis detailing existing regulatory schemes that already apply to the conduct or issue that is the subject of the proposed regulation, any gaps that exist in the current regulatory scheme, the need for additional regulation, and the cumulative impact of the overlapping regulatory schemes.
- **REQUIRE A THREE-YEAR LOOK-BACK:** Each financial services regulator shall establish an office of regulatory review that will be tasked with reviewing every economically significant rulemaking three years after its final effective date and reporting to Congress. This review will include solicitation of public comments regarding the following questions:
 - Did the rulemaking accomplish its stated goals?
 - What is the basis for this determination? Are there quantitative data that support the findings?
 - Were there any unintended consequences, either on the regulated institutions or otherwise?
 - Was the actual cost of implementation and compliance for business in line with the agency's estimates?
 - Is there a need for continued regulation in this regard? Are there alternate regulatory approaches that would have accomplished the goals of the subject regulation at a lower cost?



Consolidate data collection with other regulators

Many financial institutions are subject to examination by multiple federal and state regulators. While some of these regulators focus on different functions and their examinations look at different business lines, there is tremendous overlap of regulatory responsibility, particularly with respect to depository institutions. Regulatory overlap results in redundant, expensive, and time-consuming supervisory visits. It can also result in conflicting directions from different regulators.

The Federal Financial Institutions Council has worked to improve the coordination of on-site examinations and should be encouraged to continue to constantly improve coordination. Regulators should also be mindful of the burden imposed by data requests. Institutions receive multiple requests for data and records from multiple agencies—often the same data but in different formats.

RECOMMENDATION:

- **CONSOLIDATE DATA COLLECTION REQUESTS AND ADOPT A SINGLE FORMAT:** This will reduce duplication and potential conflict without denying regulators access to data they need. In particular, the banking regulators should work with the OFR, which was specifically created by the Dodd-Frank Act to streamline and coordinate data collection among financial regulators.

Require memorandums of understanding (MOUs) among functional regulators

Just as banks and nonbanks find themselves subject to examinations from multiple agencies, they are also subject to an increasingly complicated web of regulation across the government. Often, regulatory agencies with different goals send conflicting signals to companies, making good-faith compliance a challenge. Systematic, front-end regulatory coordination would ensure a consistent regulatory approach, help avoid conflicting regulatory mandates, and avoid unnecessary and unintended market disruption. Regulators should be mindful of the need to continue their work in this area.

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Federal Reserve Reform

The Federal Reserve has four important functions: it is the central bank of the United States charged with setting monetary policy, it is the supervisory regulator for bank holding companies and banks that are members of the Federal Reserve System, it is the supervisory and prudential regulator of systemically important banks and nonbank financial institutions, and it is one of the primary interlocutors for international financial regulatory bodies, including the FSB and the Bank for International Settlements (BIS).

The Chamber has and will continue to strongly support the Federal Reserve's independence in setting monetary policy. Current recommendations to dictate monetary policy from Capitol Hill not only are dangerous and unnecessary, but also fail to recognize how political pressure in the 1970s led to stagflation. Over the past several years, the Federal Reserve has taken steps to give the public more insight into its monetary policy decisions after the fact, but some lawmakers are proposing to go much further, by imposing front-end conditions, formulas, or limitations on the Federal Reserve's ability to manage the money supply. While it is appropriate that Congress has set the broad objectives of U.S. monetary policy—full employment and stable prices—managing to these goals requires very strong analytical expertise, a long-term view, and flexibility, all of which argue for the Fed maintaining its unique independence in this area.

The Chamber strongly believes that all regulators must be fully transparent in their deliberations and decision-making ...

However, the Federal Reserve in its role as a supervisor of the banking system, and as the systemic risk regulator, should have to abide by the same basic principles as other regulators—transparency, accountability, and due process in writing rules. The Chamber strongly believes that all regulators must be fully transparent in their deliberations and decision-making, and invite and address public input as part of the policymaking process. And the Federal Reserve should be no exception. The Federal Reserve's role as a regulator in the financial sector, both domestically and internationally, makes transparency and process important, as its rules not only affect the financial institutions it regulates, but also directly impact Main Street businesses. Those Main Street businesses have seen a reduction in access to capital and liquidity. The Federal Reserve needs to take into account factors such as competition and growth as well as financial stability when writing rules. We therefore support both structural and process changes that will make the Federal Reserve a more transparent and accountable regulator.

These reforms will ensure that the Federal Reserve can continue to identify and address systemic risk, but in a more targeted, coordinated way that more carefully considers the individual and collective impacts on Main Street companies and the economy as



a whole. Some of these recommendations will require legislation, but the Fed may unilaterally implement many of these recommendations.

These principles for reform are centered on the Federal Reserve because of the broad new powers granted under the Dodd-Frank Act and its central role in the increasingly important FSB. We believe that many of the recommendations listed below could be adopted by the FDIC and OCC as well.

RECOMMENDATIONS:

- **CREATE A TRANSPARENT STRATEGIC REGULATORY PLAN:**

- Subject the Federal Reserve to the Government Performance and Results Act, which would require the Fed to prepare a strategic plan for its regulatory programs.
- Require the Federal Reserve to submit an annual regulatory report to Congress, including the following:
 - Its plan for the upcoming year;
 - Its success in implementing its program for the past year.

- **SUBJECT REGULATION TO TRANSPARENT, ROBUST ECONOMIC ANALYSIS:**

When writing regulations, the Federal Reserve should publish an economic analysis that is subject to public scrutiny and comment. This includes the publication of consideration of alternatives, opportunity for public participation, and periodic review of their rules. As the Chamber's Center for Capital Markets Competitiveness (CCMC) has noted in a number of comment letters, under the Riegle Community Development and Regulatory Act of 1994 ("Riegle Act"), banking regulators, including the Federal Reserve, are required to consider the costs and benefits of their regulatory proposals. Courts have held that this requires the publication of an economic analysis that is subject to public commentary and scrutiny.

Given the impact that the Federal Reserve's rules can have on Main Street America, it is important that the Federal Reserve also consider the "downstream" impact of its actions. As part of its cost/benefit analysis, the Federal Reserve should assess the following:

- The impact that a regulatory proposal may have on availability of credit to businesses or consumers, including a discussion of alternative sources of credit

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that currently exist to replace any capacity lost as a result of the rulemaking;

- The marginal benefit of the proposed regulation to the financial stability of the U.S. economy after taking into account the effect of existing rules;
 - The marginal benefit of the proposed regulation to the safety and soundness and resolvability of bank holding companies and banks after taking into account the effect of existing rules;
 - Whether the proposed regulation would conflict with the objectives of any existing regulations and, if so, for what reasons the proposed regulation should move forward despite such conflict;
 - How the proposed regulation would affect market liquidity;
 - How the proposed regulation would affect the competitiveness of U.S. financial institutions or duplicate comparable regulation in a foreign bank's home country; and
 - The extent to which the proposed regulation would add increased costs for businesses, adversely impact capital formation for businesses, or harm investors.
- **TAILOR RULES FOR NONBANK SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS (SIFI):** When regulating nonbank financial institutions, as authorized under law, the Federal Reserve should tailor regulations to fit the business model of the institution. Forcing nonbanks to conform to a regulatory template designed for banks is impracticable and expensive and produces no discernible benefit. In fact, it may prove harmful to the economy. In 2014, Congress passed and the president signed a bill that clarified the Federal Reserve's flexibility to tailor capital standards to fit the business model of SIFI-designated insurance companies. The Chamber strongly supported this legislation, and the Federal Reserve should use this type of flexibility both in setting prudential regulations and in designing its supervisory frameworks for nonbank systemically important financial institutions. Where the Federal Reserve does not have the authority to act, it should clearly call upon Congress to grant this authority. The next administration should also support amending Dodd-Frank to strengthen the role of state insurance regulators in the SIFI insurance company regulatory process. State supervisors have a long history in insurance company solvency issues, and have insurance industry expertise. They should have an explicit role in fashioning rules for SIFI insurance companies.



- **SHINE MORE LIGHT ON INTERACTIONS WITH THE FSB, THE INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS (IAIS), THE BIS, AND THE BASEL COMMITTEE ON BANKING SUPERVISION (BCBS):** The Federal Reserve works through international regulatory bodies to set policies that bind member countries and require domestic implementation. Normally, a regulatory mandate comes from the U.S. Congress, but acting under the aegis of international mandate, the Federal Reserve, in effect, creates its own legal mandate for some of the rules it writes. Therefore, the Federal Reserve should be required to do the following:
 - Notify Congress and the public prior to entering international negotiations;
 - Report to Congress regarding formulation of American positions on matters before the FSB;
 - Publish the text of any completed FSB, BCBS, or IAIS agreement and provide a notice and public comment period no less than 60 days before signing it;
 - Brief members of Congress on the status of negotiations; and
 - Post summaries regarding all meetings with other FSB, BCBS, and IAIS members and their staff on the Federal Reserve’s website. Other regulators now do this regarding meetings on proposed rules.
- **HOLD PUBLIC MEETINGS TO CONSIDER REGULATIONS AND INTERNATIONAL REGULATORY AGREEMENTS:** The meeting schedule and agenda should be published in advance, subject to Government in the Sunshine Act (“Sunshine Act”) notices. Other independent regulatory agencies, including the SEC, CFTC, and FDIC, generally approve proposed and final rules in open meetings. These meetings should also give the agency’s voting members the ability to give public statements of support or opposition that become part of the regulatory record.
- **FILL THE POSITION OF VICE CHAIR OF SUPERVISION:** Dodd-Frank established a new position at the Federal Reserve—vice chair for supervision—to create more regulatory accountability in the senior leadership of the Federal Reserve. Unfortunately, more than five years later, the president has yet to even nominate someone for the Senate’s consideration.

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SEC Reform

During the past 10 years, the Chamber has undertaken a series of reports on the SEC, its regulatory policies and practices, and its relationship to capital markets and capital formation in the United States. These reports have taken a constructive approach, providing recommendations on how the SEC can better achieve its tripartite mission—protecting investors, ensuring fair and orderly markets, and facilitating capital formation. While the SEC has taken a number of steps that address specific recommendations from these reports, there is much more that could be done. Rather than restate the analysis contained in these reports, we have extracted several recommendations that we believe should be priorities for the next administration.

Revamp the diverse ways the SEC interprets and applies its rules

While rulemaking is the foundation of SEC regulatory policy, it is augmented by a wide range of other instruments used to interpret and apply statutory and regulatory policies. Policy interpretations and applications are often found in SEC interpretive releases, exemptive orders, no-action letters, frequently asked questions (“FAQs”), speeches by commissioners and senior staff, and, of course, settled enforcement orders and releases. The continued use of this disparate array of policy pronouncements, some of which are carefully negotiated by a single party or intended to apply to a single transaction, imposes a substantial burden on regulated persons.

The Chamber studies have proposed several recommendations on how the SEC could regularize these policy statements and provide clear guidance to the financial industry, financial markets, and investors.

RECOMMENDATIONS:

- **INCREASE THE ROLE OF COMMISSIONERS:** Too often, staff interpretations carry the weight of a rule, but have no input from commissioners. The five-member commission should play a greater ongoing role in the interpretation and application of regulatory policy. This may require Congressional action to amend the Sunshine Act.
- **UTILIZE EXEMPTIVE RULES:** Expanding the use of exemptive rules could substantially reduce the number of routine applications. Rule-writing authority for exemptive rules should be reassigned to the same staff that acts on exemptive applications.



- **REFORM THE USE OF NO-ACTION LETTERS:** A no-action letter should be viewed as informal guidance rather than a method of setting regulatory policy. Because it is often difficult to distinguish interpretation from policy on a prospective basis, the SEC should annually issue interpretive statements that review, adopt, and codify significant staff positions contained in no-action letters. These releases could also be used to withdraw or revise a no-action position previously taken, based upon new facts or an analysis of how it has been interpreted. In its deliberations on potential further action, the SEC should consider the particular circumstances around the no-action letters and the potential for further engagement. The SEC should issue these interpretive statements following an opportunity for public notice and comment. The original recipient of a no-action letter could continue to rely upon the assurances provided in the letter. Any revisions or changes reflected in the SEC's interpretive release would apply prospectively to third parties.
- **CONDUCT RULEMAKING ON BEST PRACTICES:** While industry best practices may be effective techniques to promote regulatory compliance, the failure to adopt these practices should not be viewed as a regulatory deficiency. To the extent best practices should be codified, the SEC should do so through the rulemaking process.
- **AVOID REGULATION BY ENFORCEMENT, EXAMINATION, AND SPEECH:** The SEC should periodically alert those subject to its regulations about emerging trends. New standards, or new interpretations of existing standards, should be addressed through agency rulemaking or formal interpretive guidance, not through negotiated settled enforcement proceedings, examinations, or speeches outlining policies.

Refocus the SEC's role in promoting capital formation, innovation, and market efficiency

The U.S. capital markets and America's investors reap substantial benefits when new investment products and services are developed. The days when an individual saved through a savings account, invested by buying individual stocks from a broker, and retired with a defined benefit pension offered by an employer are largely over. Today, the typical American often saves in a money market fund, invests in mutual funds, and prepares for retirement by investing in an individual retirement account, a 401(k) plan, or an employer-sponsored defined contribution program.

Investment vehicles such as money market funds and exchange-traded funds are examples of beneficial innovation that rely on SEC regulatory relief. Because of the

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substantial benefits that result from these innovations, an effective regulatory process that fulfills its legal obligations and applies sound and prudent judgment in exercising discretion should also appreciate and reflect the substantial benefits of timely action to promote responsible innovation.

The SEC possesses broad statutory authority under the Investment Company Act of 1940 to exempt specified collective investment products from specific requirements of the act. This authority has been the vehicle for profound changes in the mutual fund industry. Because of the progressive use of this authority, investors have been provided with a wide range of highly successful investment products, such as variable annuities, money market funds, multiple classes of mutual funds, funds of funds, and exchange-traded funds. Notwithstanding the successful creation of these new products, the exemptive application process for a new product can be expensive and time-consuming. For example, SEC approval of the first exchange-traded fund took more than four years.

The Chamber has in the past recommended the creation of an optional alternative process that would provide expedited approval of a new investment company product or a new exchange-traded product on a conditional or time-limited basis. A conditional order would have to be structured to provide the applicant with sufficient time so that it could justify the time and expense required to develop a new product, market it, and operate it profitably. Furthermore, the conditionality of the order would have to be structured and limited sufficiently so that an applicant could assess realistically the likelihood of permanent approval and the requirements that would have to be met to obtain final approval. Conversely, the SEC would have to be comfortable that it retains sufficient authority under the order to take necessary regulatory action in the event that the product or service fails to provide the necessary investor protections required by the law.

RECOMMENDATION:

- **REVAMP THE APPROVAL PROCESS:** The SEC should create an accelerated conditional approval process for new investment products or services.



Reorganize the SEC and its management structure

During the past decade, the breadth and complexity of the capital markets regulatory landscape has grown. The SEC's legal authority has expanded substantially. The size of the SEC staff has grown by roughly 33% since the turn of the century, and the agency strongly believes that it is still understaffed. The agency has also begun to recognize that to be effective it requires a staff that is composed of more than just lawyers. Today, the development of effective regulatory policy requires staff with firsthand knowledge of the markets, economics, financial risk calculation and management, and accounting.

The SEC is long overdue for a careful reorganization. Its current structure is complicated, confusing, and inefficient. Even after the reconsolidation of the Executive Director and Chief Operating Officer's offices into a single unit that oversees the five administrative support offices, there are still nearly two dozen divisions and offices that report directly to the chairman and an additional 11 regional offices that report to the chairman for certain purposes and jointly to the directors of enforcement and the Office of Compliance, Inspections, and Examinations for other purposes. No organization's chief executive should be burdened with so many direct reports.

The SEC is long overdue for a careful reorganization.

The chairman of the SEC has too many demands on his or her time. One person cannot be responsible for supervising an agency of 4,000 with a budget of more than \$1 billion and simultaneously vote as one member of a collegial body on every enforcement action, rule proposal and rule adoption, and disciplinary opinion—while also serving as the public face of the agency, giving numerous public speeches, testifying before Congress, and, post Dodd-Frank, participating as a voting member of the FSOC.

The organizational structure of the SEC is not just confusing. It is also antiquated, built on a functional regulation model that was created to mirror the clear separations in the capital markets of the 1970s. These clear separations are now a relic of the past. The dual problems of a convoluted reporting structure and a functional regulation model that no longer comports with the regulated industries have directly contributed to the SEC's operational challenge. Frequently, new products and new business models do not easily fit into the old regulatory structures. When the divisions compete to protect their turf, decisions are delayed and innovation is stifled.

The reorganization of the SEC is decades overdue.

RESTARTING THE GROWTH ENGINE: A PLAN TO REFORM AMERICA'S CAPITAL MARKETS

RECOMMENDATIONS:

- **HIRE OFFICERS FOR FIVE-YEAR TERMS:** Senior officers should be hired for renewable five-year term appointments. A public personnel recruitment competition for the position should be a mandatory component of the renewal process.
- **CREATE AN EXECUTIVE DEVELOPMENT PROGRAM:** The SEC should develop a comprehensive executive development program for its most promising staff who are interested in staying at the agency.
- **REALIGN DIVISIONS:** The Division of Trading and Markets and the Division of Investment Management should be realigned into a Division of Financial Intermediary Oversight and a Division of Market Oversight and Operations. The Examination Programs of the Office of Compliance, Inspections, and Examinations should be assigned to these new divisions.

INTERNATIONAL COORDINATION
AND PROCESS

RESTARTING THE GROWTH ENGINE: A PLAN TO REFORM AMERICA'S CAPITAL MARKETS

INTERNATIONAL COORDINATION AND PROCESS

One of the major difficulties of the financial crisis was the failure of adequate cross-border cooperation. Perhaps the biggest change in capital markets regulation since the crisis was the enhanced Group of Twenty (G20) consultation and the rise of the FSB. The FSB has taken a lead role in developing policies, based upon G20 communiqués, for domestic regulators to implement. The FSB is not a treaty organization, and the FSB's pronouncements are not legally binding on the United States or any other member state. The track record of the G20 members in implementing FSB proposals varies wildly and, as result, we continue to see discordant regulation. This dynamic is not confined to the FSB. For instance, European banking regulators view the Basel III capital rules as a ceiling, while U.S. regulators view them as a floor.

When policy can be formulated behind closed doors, and without public input that regulators are obligated to address, the end result will be rules that the public will view with suspicion

No one denies the need for international dialogue and coordination. However, international directives can be used for back-door regulation; that is, to formulate policy (behind closed doors) that U.S. regulators then are “compelled” to implement. The Federal Reserve has a central role in the FSB, BIS, and BCBS. Through these organizations, the Federal Reserve creates its own legal rationale for some of the rules it writes, without the procedural safeguards or quality controls built into the APA. These shortcomings are akin to the shortcomings surrounding the FSOC and its processes.

When policy can be formulated behind closed doors, and without public input that regulators are obligated to address, the end result will be rules that the public will view with suspicion, and that may be unnecessarily complex, burdensome, or unfeasible.

Financial Stability Board

The G20 established the FSB at its 2009 summit, to succeed the Financial Stability Forum. According to its website, the FSB:

(W)orking through its members, seeks to strengthen financial systems and increase the stability of international financial markets. The policies developed in the pursuit of this agenda are implemented by jurisdictions and national authorities.

The FSB was established to assess potential sources of systemic risk, make proposals as to how to best address these risks, and encourage coordinated responses to such threats and member country implementation of proposed regulatory schemes to address identified risks.



The FSB has been a driver of global regulatory policy. However, Congress has not authorized U.S. participation in the FSB by treaty (which requires approval by a two-thirds vote of the Senate) or by Congressional-Executive agreement (which requires a majority vote of both the House and the Senate). This has been done for major trade agreements, such as the North American Free Trade Agreement. FSB pronouncements do not have the force of law. This is why, unlike the United States, some other G20 members have declined to vigorously implement these pronouncements, resulting in a lack of global coordination and competitive disadvantage to U.S. firms. Again, the FSB is not a treaty organization and lacks the power to ensure uniform implementation of its directives.

To the extent that U.S. regulators treat FSB pronouncements as legally binding, it raises separation-of-powers concerns, and heightens concerns regarding the opaque process that the FSB uses to formulate policy.

In 2012, the G20 formalized the FSB structure on what the FSB describes as “an enduring organisational [sic] basis.” Unfortunately, the G20 established the FSB with a governance structure that puts a low priority on transparency. Article 3 of the FSB Charter states that the “FSB *should* have a structured process for public consultation on policy proposals” [emphasis added]. Nevertheless, the FSB Procedural Guidelines put a priority on confidentiality and provide complete discretion regarding public consultations.

As its name indicates, the focus of FSB directives has been global financial stability. While financial stability is a goal we all share, it should not be forgotten that stability comes at a price, and regulatory efforts in this regard need to be fine-tuned through a strong, inclusive regulatory review process. It should be recognized that the FSB has the ability to initiate regulation that could severely constrict economic growth. This is why the FSB’s opaque deliberations are so problematic.

But how can we be certain that the FSB considers alternative approaches, or adopts the best possible approach to ensure stability? In the United States we have dealt with this dilemma through transparency, encouraging public input and holding regulators accountable. Because of its important mission and its ramifications on growth, the FSB’s proposals should always be tested through public comment. Passing this test will help to ward off detractors when the proposals are implemented at the national level, and help to support the final implementing rules.

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RECOMMENDATIONS:

- **MAKE THE FSB MORE TRANSPARENT AND ACCOUNTABLE:** The Chamber recommends that the FSB be reconstituted through a treaty negotiated among its member countries, and the enabling treaty could be subject to congressional approval. The approval process would permit Congress to ensure that the FSB was transparent and that its directives were subject to APA-styled procedural safeguards. These procedures should be subject to public comment, including a published economic analysis. Given that the FSB designates particular institutions as systemically significant, without deference to U.S. treatment of those same institutions, the FSB should be reconstituted by treaty, with an appeals process. Further, a reconstituted FSB must have the means to ensure that all members implement its directives in substantially similar ways.
- **SUBJECT THE U.S. REPRESENTATIVE TO PRESIDENTIAL APPROVAL AND SENATE CONFIRMATION:** We further recommend that the U.S. representative of the FSB be a presidential appointee, subject to the advice and consent of the Senate. U.S. regulators have used the FSB to drive domestic regulation. Regulators should not treat the FSB as being legally binding on the United States without explicit congressional authorization to do so. Given the central role of the United States in the FSB, and the organization's reach, it is proper that the Senate be able to review the credentials of our representative, and get necessary and appropriate commitments regarding his or her service at the FSB.



International Policy Organizations

The Chamber believes domestic regulators should provide Congress and the public at large more meaningful notice and disclosure regarding international regulatory negotiations. This will provide for a better understanding of U.S. positions and provide for more meaningful input when domestic implementing rules are developed. Regulators will also benefit from more informed commentary providing for better rules and more efficient oversight.

RECOMMENDATIONS:

- **NOTIFY CONGRESS:** Regulators should notify Congress and the public prior to entering international negotiations.
- **REPORT TO CONGRESS:** Report to Congress regarding formulation of American positions on matters before the FSB and other international regulatory bodies.
- **PUBLISH THE TEXT OF AGREEMENTS:** Publish the text of any completed FSB, BCBS, International Organization of Securities Commissions (IOSCO), or IAIS agreement and provide a notice and public comment period no less than 60 days before signing it.
- **PROVIDE UPDATES REGARDING STATUS OF NEGOTIATIONS:** Brief members of Congress on the status of negotiations.
- **PROVIDE PUBLIC SUMMARIES OF MEETINGS:** Post summaries regarding all meetings with other FSB, BCBS, IOSCO, and IAIS members and their staff on federal agency websites. Other regulators now do this regarding meetings on proposed rules.

SYSTEMIC RISK

RESTARTING THE GROWTH ENGINE: A PLAN TO REFORM AMERICA'S CAPITAL MARKETS

SYSTEMIC RISK

The 2007-2008 financial crisis exposed the inability of financial regulators to identify, regulate, and mitigate systemic risk. Cross-border coordination among regulators was also difficult at best. Domestically and globally, regulators were granted new powers to monitor and handle systemic risk. Despite these efforts, problems remain and the tools to regulate systemic risk are primarily bank-centric and are not tailored to the varying business models of nonbank financial companies. The rule-writing apparatus for systemic risk regulation is opaque, and the rules are, at times, cumbersome. We believe that cross-border issues and systemic risk can be handled in an open and flexible manner to allow for reasonable risk-taking and oversight to provide businesses and their investors with certainty. This agenda provides reforms to these systems to increase transparency and effectiveness through a balanced approach of stability and pro-growth policies.

Financial Stability Oversight Council

The Dodd-Frank Act has fundamentally changed the regulatory landscape. Clearly, regulators did not appreciate the confluence of events that caused the financial crisis, nor did they take action to prevent it. Dodd-Frank tried to create an early warning system for detecting sources of systemic risk, as well as a means of regulating firms or activities that could be a source of systemic risk. This was done by creating yet another regulatory layer in the form of the FSOC and the OFR. Unfortunately, the FSOC has relied on the same regulatory platform that failed to foresee the last financial crisis, while it is unclear how the OFR, which was established to assist the FSOC in its effort to “look over the horizon” for systemic risk, has performed. Much of the OFR’s work, however, has been done through a bank-centric lens, for which it was roundly criticized in its asset management study.

This new system has serious deficiencies.

First, the FSOC is not transparent or accountable for its actions and lacks procedural protections associated with APA rulemakings.

Second, the FSOC is flawed in its design. In the case of regulators with a board structure, the FSOC member is the head of the agency rather than the board, thereby preventing the articulation of diverse viewpoints. The FSOC’s makeup includes many regulators with no institutional expertise with systemically significant institutions or activities. The FSOC’s member voting powers ensure that the Treasury Department controls the apparatus while the Federal Reserve controls its workflows.



The FSOC makes determinations, but does not have the legal authority to promulgate rules. It is tasked with a forward-looking mandate intended to prevent future financial crises. It selects individual companies for special, onerous Federal Reserve oversight, even though the Federal Reserve has experience only with banking regulation. The FSOC also can change the landscape of financial services by recommending that certain activities receive special oversight. The FSOC can order highly disruptive regulation that impacts the provision of financial services and the businesses that depend on those services. Yet the FSOC's decision-making is opaque, and public comment is not sought. More transparency would help the FSOC avoid the pitfalls of “groupthink” and policy tunnel vision to which any organization can fall victim.

Companies that are designated for systemic risk regulation are not given an opportunity to engage the FSOC until the decision to designate is, as a practical matter, made. A designee has scant opportunity to argue its case before the FSOC, and the grounds for an appeal of the designation are very limited. Given the compliance expense associated with designation and the resulting competitive impact, this is fundamentally unfair and also unnecessary. Some companies would willingly divest of risky assets or withdraw from certain business lines to avoid designation. The FSOC process does not afford a designee this opportunity until the decision has been made to move forward with a designation. The FSOC needs to establish a formal “off-ramp” process for designated companies that restructure to have their designation removed. Moreover, giving companies an opportunity to “de-risk” would further the FSOC goal of mitigating potential systemic risk.

RECOMMENDATIONS:

- **ENCOURAGE TRANSPARENCY:** The FSOC should make all memoranda, analysis, work papers, and emails that agency staff produces in support of FSOC publicly available.
- **ALLOW FOR DIVERSE AGENCY PERSPECTIVES:** FSOC meetings should be open to all members of agency boards or commission and not just the chair of an agency. The vote of an agency should be determined through majority vote of the board or commission.
- **ASSIGN RULEMAKING TO FUNCTIONAL REGULATOR:** Rulemaking for, and regulation of, designated companies should be the responsibility of the agency responsible for functional regulation of the conduct under scrutiny.

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- **REFORM THE DESIGNATION PROCESS:** The process for designating financial institutions for systemic risk regulation should provide potential designees with an opportunity to address FSOC concerns and, if appropriate, decide to take steps to de-risk.
- **EMBRACE DUE PROCESS:** Designee targets should be provided with an opportunity to review the record for the determination recommendation and an opportunity to rebut the record. Designee targets should have an opportunity for a hearing prior to an FSOC determination, with the opportunity to compel the production of records and call witnesses.
- **IMPLEMENT AN EFFECTIVE VOTING STRUCTURE:** Any action taken by the FSOC should require the affirmative vote of at least three-quarters of the council to ensure that a diverse set of views is representative. In the case of a designation vote, the primary regulator or independent council member must vote in the affirmative along with the Secretary of the Treasury for the designation to be effective.
- **EXPAND THE GROUNDS FOR APPEAL:** The grounds for appeal of an FSOC decision should be expanded to provide a designee with the same grounds for appeal as anyone subject to an administrative tribunal.
- **ESTABLISH A DESIGNATION OFF-RAMP:** A strong “off-ramp” process must be put in place for designated companies that wish to be considered for de-designation. This off-ramp should clearly lay out each individual step a company must take in order to clear itself of SIFI designation.
- **LIMIT INTERNATIONAL DESIGNATION POWERS:** The FSB and other interested international entities cannot designate a firm for enhanced systemic risk regulations if the home domestic regulator has not designated said firm as a systemically important financial institution.



Systemic Risk Considerations

Dodd-Frank extended the Federal Reserve’s regulatory reach to certain FSOC-designated nonbank financial companies. To be designated, the statute requires that a company be “*predominantly engaged in financial activities.*” Congress did not want to cast the net too wide—they realized that an expansive reading of this term would open the door to regulate just about any company. With this in mind, the Senate adopted, and the conference committee endorsed, language in paragraph 102(a)(6) of Dodd-Frank that tightly defined “predominantly engaged in financial activities.” Only activities that are “financial in nature” as such term is defined in subsection 4(k) of the Bank Holding Company Act constitute financial activities for the purpose of paragraph 102(a)(6). Despite this, the Federal Reserve in its implementing regulations used the clear statutory limitations of Dodd-Frank as little more than rough guideposts, and expanded the universe of financial activities that could determine that the predominance test had been met. This is willful avoidance of a clear statutory mandate.

For example, under a plain reading of Dodd-Frank, certain asset managers, such as mutual funds, would not be subject to the designation process. However, the FSOC and FSB have moved forward with the consideration of such entities for potential SIFI designation even though their activities do not fall within the parameters of the predominantly engaged test.

RECOMMENDATION:

- **CONFORM NONBANK SYSTEMIC CONSIDERATIONS WITH REGULATION Y:** The next administration should commit the Secretary of the Treasury, as Chair of the FSOC, to work with the Fed to ensure that its definition of “predominantly engaged in financial activities” conforms with the requirements of Dodd-Frank, and employs the precise language of Regulation Y, thereby implementing the precise requirements of 4(k) of the Bank Holding Company Act. Accordingly, the regulatory powers would conform to congressional intent and only consider those firms or activities for designation as enumerated under Dodd-Frank and those provisions incorporated by reference.

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Tailored Regulation

A common complaint regarding Dodd-Frank and other initiatives is that they take a one-size-fits-all approach to financial institutions of differing sizes. This creates regulatory mismatches and regressive compliance costs. While regulators often have discretion to tailor certain mandates, regulators have resisted using such authority. This reluctance is unfortunate since the law uses asset size as an imprecise proxy for complexity or systemic significance. Because of this, many banks that are not systemically significant are required to comply with regulations intended for institutions that are. And compliance is not cheap—for instance, the Federal Reserve's 2015 proposal to require banks over \$50 billion to maintain a minimum amount of unsecured long-term debt comes with a \$1.5 billion price tag. Other provisions, like the Volcker rule, prohibit activities that are so hard to delineate, banks are forced to demonstrate that their trading activities are not “proprietary trading”; in other words, they must prove a negative. Furthermore, the application of bank-centric tools upon nonbank financial models ignores stark differences in business models that grew out of different solvency regimes.

In short, regulatory oversight must be nuanced and appropriate to the risk profile of a given industry, activity, or firm. Additionally, a balance must be struck between stability and economic growth in rulemaking; when rules are applied in a manner that does not promote stability, there is nothing but unnecessary drag on economic growth.

RECOMMENDATIONS:

- **REGULATIONS MUST “FIT” THE INDUSTRY:** Regulators must identify where they need discretion to tailor rules to fit nonbank financial institutions, and Congress should enact those reforms.
- **TAILOR REGULATIONS TO RISK:** The next administration should propose amending Dodd-Frank to mandate that regulators review all rules applicable to depository institutions and bank holding companies and tailor them to ease regulatory burden associated with compliance and to accurately reflect the risks that different types of institutions pose. The regulators should be required to seek public input regarding this effort and report to Congress on how they addressed the comments received.
- **ASSESS THE COSTS:** The Government Accountability Office (GAO) should examine the true costs of Dodd-Frank implementation, including the cost of establishing and maintaining compliance regimes and the impact of the law on the ability of financial institutions to support economic growth and job creation.



Small Bank Relief

The Dodd-Frank Act creates rigid thresholds that, once crossed, place a bank under enhanced regulations. Many of those banks are regional or even large community banks, and enhanced regulations harm their ability to execute their unique role in the American economy—providing liquidity and financing to Main Street businesses. Because of their smaller geographic footprint, lack of interconnectedness, and business models, these banks are not systemically risky. Accordingly, many smaller banks are swept up in a costly, burdensome systemic risk regulatory regime, while the smaller businesses that create jobs and growth are starved for capital.

RECOMMENDATION:

- **REFORM THE ENHANCED REGULATORY RISK MODEL:** Develop a new means of determining risk and tests to exempt smaller banks from enhanced regulations.

Cumulative Impact Study

Many of the major policy initiatives, undertaken under the auspices of Dodd-Frank, Basel III, or money market fund reforms, have had a dramatic impact for nonfinancial business treasurers. This has impacted businesses' ability to attract liquidity, manage cash, and raise capital. However, many of those regulations were done without any economic analysis. Yet, we have seen the cost of capital increase and strains and inefficiencies rising in the capital markets. We believe that the regulatory agencies must understand the individual and cumulative impacts of these regulations and include public commentary in the process. Based upon those studies, regulators must address unforeseen and adverse consequences and fix any damage to the capital markets.

RECOMMENDATION:

- **UNDERTAKE A CUMULATIVE IMPACT STUDY:** The Federal Reserve, FDIC, OCC, SEC, and CFTC should undertake a cumulative impact of regulations impacting the capital markets including but not limited to: liquidity coverage ratio, net stable funding ratio, the Volcker rule, and money market fund reforms.

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Living Wills

The living will requirement in section 165 of Dodd-Frank is intended to provide a guide for the resolution of a financial institution pursuant to Title II of the act. While the efficacy of the living will exercise will hopefully never be tested, it has clearly been among the most expensive of the Dodd-Frank mandates. According to an April 2016 GAO report on resolution plans (GAO-16-341), the cost of preparing resolution plans from 2012 through 2015 has in some cases exceeded \$100 million. Given the expense, it is reasonable to ask whether the process is as effective and efficient as possible. According to the GAO, there is broad agreement that the Federal Reserve and the FDIC need to be more transparent about their assessment framework. The GAO found that:

Disclosing the assessment framework, at least in an abbreviated form, would provide companies with a more comprehensive understanding of the principal factors that the regulators use to identify plan deficiencies. (p. 28)

Because of the secrecy surrounding the assessment frameworks, the public cannot properly judge the regulators' assessments, which can only damage the faith that the public has that these institutions can be resolved fairly seamlessly. Transparency would help filing companies to revise their plans in order to have them deemed credible and improve performance in the future. It would also permit academics and professionals with expertise in financial institution resolution to more accurately assess whether this exercise, and the resolutions it envisions, could, in fact, result in a successful resolution.

RECOMMENDATIONS:

- **PROVIDE GREATER TRANSPARENCY:** The Federal Reserve and the FDIC should provide greater transparency regarding their assessment frameworks. Given regulatory recalcitrance on this topic, legislation may be necessary.
- **ADJUST THE ASSESSMENT SCHEDULE:** Given the time that regulators require to fully assess these plans, it would make sense to move from an annual assessment schedule to a biannual schedule. This additional time would permit filers more time to come to grips with an assessment that their plan was not credible, and address any shortcomings.
- **TAILOR FOR WAVE 3 FILERS:** Recognizing the burden and cost that plan preparation imposes on smaller institutions, the Federal Reserve and the FDIC have already permitted a majority of Wave 3 filers to submit tailored plans. We recommend that all Wave 3 filers be accorded this treatment.

RETIREMENT SAVINGS

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RETIREMENT SAVINGS

A voluntary, private retirement system provides individuals with a secure financial future and strengthens U.S. capital markets by markedly increasing investment funds flowing into these markets. Accordingly, Congress and the new administration should encourage employment-based retirement savings plans and investment in individual retirement accounts. The current regulatory focus—shoehorning all retirement plans into the constraints of the Employee Retirement Income Security Act (ERISA)—will likely decrease retirement savings and result in conflicting regulatory mandates.

Private-sector retirement plays a larger role in ensuring the economic well-being of Americans during retirement. Over the past four decades, more retirees have received income from private retirement plans, and the amount of income generated from those plans has also increased—as evidenced by the more than \$24 trillion in retirement plan assets. Nonetheless, a number of current issues must be addressed to strengthen and expand the success of the private retirement system for generations to come. Moreover, people are living longer, retirements last longer, and, as a result, many Americans outlive their retirement savings. As America has grown older as a nation, the ratio of Social Security beneficiaries to Social Security contributors is moving in the wrong direction. According to the Social Security Administration 2015 *Trustees Report*, beginning in 2019, Treasury will begin to deplete trust fund reserves to meet Social Security obligations until total trust fund reserves are depleted in 2034. After 2034, tax income is projected to be sufficient to pay about three-quarters of scheduled benefits.

Clearly something needs to be done, and in a defined contribution world, a market-based component has to be part of the picture. How do we make sure that as many workers and individuals as possible are saving toward retirement? How do we optimize the growth of those retirement savings?

The Chamber believes that retirement savers with a long view are best served by investing with the guidance of investment professionals. The key is to incentivize future retirees to begin saving earlier and saving more. With this in mind, the Chamber proposes the following steps.

Small Business Retirement Plans

Small businesses represent over 97% of all employers in America. Many small businesses do not offer retirement plans for employees because of the complexity of the current system, onerous reporting requirements, increased liability, and attendant costs. In 2007, the Chamber organized a bipartisan Commission on the Regulation of U.S. Capital Markets in the 21st Century. One of the primary thrusts of the Commission's report is a series of recommendations designed to encourage small businesses to



provide retirement benefits. These included creating a simplified structure for small business retirement accounts and encouraging multiple employer plans (MEPs). All of these ideas are worth revisiting and deserve serious consideration by policymakers.

RECOMMENDATIONS:

- **REPEAL THE DEPARTMENT OF LABOR (DOL) FIDUCIARY DUTY RULE AND REPLACE IT WITH THE SEC UNIFORM FIDUCIARY STANDARD RULE:** The DOL's effort to impose the ERISA structure on market-based plans designed for small businesses is misguided and counterproductive. All available evidence indicates that it will lead to fewer small businesses offering retirement benefits to their employees, with the net result being fewer retirement savers. A similar initiative in the United Kingdom compelled many financial professionals to stop serving savers with limited resources because doing so became cost-prohibitive. Everyone agrees that financial professionals owe a duty of care to their clientele. However, this regulatory initiative should be led by the SEC, the agency with market expertise and whose statutory framework appropriately balances flexibility and choice with robust investor safeguards.
- **FACILITATE THE EXPANSION AND USE OF MEP DESIGNS:** A multiple employer plan is a single plan that is maintained by an MEP sponsor and one or more unrelated employers ("adopting employers"). MEPs allow for the pooling of resources to give small businesses the opportunity to tailor plan provisions. They offer an attractive and cost-efficient alternative for small businesses where a stand-alone 401(k) plan is not feasible. However, the disadvantage to participating in an MEP is that every employer is jointly liable for the qualification failures of every other employer in the MEP. This liability can be a daunting hurdle for many employers. In addition, some employers may be discouraged by the inability to find an MEP sponsor or by the notice and disclosure requirements that are not assumed by the plan administrator. Amending several of the rules regarding MEPs could significantly expand their use. Accordingly, the Chamber recommends the following changes:
 - Implement safe harbors for MEP sponsors and adopting employers to immunize them from noncompliant adopting employers.
 - Simplify MEP reporting and disclosure obligations under ERISA. Particularly, reconsider the annual audit requirements and consolidate Form 5500 filings and Summary Plan Description notices.

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- Issue Internal Revenue Service (IRS) and the DOL guidance that states “employer commonality” is not required to establish an MEP. While the Chamber believes that there is no basis to apply this requirement to MEPs, there is sufficient ambiguity to create reluctance on the part of employers who may otherwise consider participation in an MEP.

State-Sponsored Retirement Accounts

A growing number of states have enacted or are considering enacting laws to require employers, including small businesses, to automatically enroll employees in a state-sponsored retirement savings plan if the employer doesn't offer a plan. President Obama directed the Labor Department to clear federal obstacles to such plans. The DOL has provided interpretive relief and finalized an ERISA safe harbor regulation clearing the path for state plans for non-governmental employees. The Chamber believes that this is a step in the wrong direction. States have a less-than-enviable track record as stewards of public employee pension funds. Even the states themselves acknowledge that state retirement plans are underfunded by as much as \$1 trillion (based on the states' extremely optimistic projections regarding investment returns). Pension obligations are currently close to 130% of state and local government annual budgets. While it is true that the state plans under current consideration would operate somewhat differently, they would result in millions and ultimately billions of dollars withheld from employees' paychecks being put into investment programs controlled by state bureaucrats who will decide what investments are available at what price. Further, unlike the single set of rules under federal law, employers would have to comply with potentially 50 different state rules about when the state plan has to be used and how it works. An expansion of the states' role into retirement savings without the protections of ERISA is anti-competitive and could jeopardize the retirement security of countless private-sector employees.

RECOMMENDATION:

- **MAINTAIN ERISA PREEMPTION OR IMPOSE ERISA REQUIREMENTS ON STATE-MANAGED FUNDS:** For over 40 years, employers have depended on ERISA to ensure that they can offer plans on a nationwide basis, providing fairness to all employees regardless of where they live or work. State actions establishing



and regulating private employer-provided plans will create complexity in the system. Layering a state-imposed retirement regime on top of ERISA will cause unnecessary burdens, particularly for small businesses, a result counter to the very purpose of ERISA. It could also create unfair competition between the government and the private sector. Therefore, maintaining ERISA’s preemption of all state laws that “relate to” employee benefit plans covered by ERISA is appropriate. Furthermore, creating different retirement plans in different states will create significant compliance challenges for employers. Even a small business can have operations, employees, or facilities in more than one state and therefore could have difficulty complying with differing state requirements. A key purpose of ERISA’s preemption provision was to avoid this situation. If state-sponsored plans are not preempted by ERISA, they should—at the very least—be compelled to operate under the same ERISA obligations and subject to the same personal liability as their private-sector counterparts. Private-sector employees participating in state-sponsored plans should be afforded the same ERISA protections they enjoy under federal law.

Economically Targeted Investment Bulletins for ERISA

A contributing factor to public pension performance is the penchant of certain systems for environmental, social, and governance investing and related shareholder activism. While many of the goals espoused by these investors may be worthy, the use of retirement funds of thousands of Americans to try to push forward a policy wish list is irresponsible arrogance. People cannot retire on good karma. The basic premise underlying ERISA is that a fiduciary should act solely in the interest of the plan participant, so while social causes may be a good alternative, investments without regard to social causes may yield a higher return that would better secure the retirement of a participant. Therefore, economic return should be the primary consideration for an ERISA fiduciary.

RECOMMENDATION:

- **REINSTITUTE THE ECONOMICALLY TARGETED INVESTMENT BULLETIN:** The next administration should reinstitute the 2008 Bulletins on Economically Targeted Investment regarding the obligations of benefit plan fiduciaries in this regard.

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Financial Transaction Tax

In the past, some policymakers have called for the imposition of a financial transaction tax (“FTT”) on stock trades and similar transactions in order to pay for various unrelated initiatives, such as infrastructure spending. These proposals miss the fact that a FTT will hurt average investors, reduce savings, and make it harder for America’s job creators to contribute to economic growth. In fact, FTTs have been tried in the past, both in the U.S. and abroad, and have failed to either raise revenue or curb undesired financial behavior. In fact, such taxes have created havoc in the markets where they have been imposed. In short, an FTT will hurt the liquidity of the U.S. capital markets and dramatically increase the cost of trading, further restricting retail investors from accessing markets, reducing retirement saving balances, and damaging the American economy.

RECOMMENDATION:

- **OPPOSE A FINANCIAL TRANSACTION TAX:** The next administration should not endorse any proposal to impose a FTT on financial transactions, including stocks and other financial instruments purchased on behalf of investors or future retirees and taxes on institutions that support market liquidity.

Post Offices as Banks

Recently, there have been calls to transform the U.S. Post Office into a financial institution, expanding its services into new offerings well beyond delivering and receiving mail. However, the U.S. Postal Service (USPS) has no experience in the banking business and would be taking on a substantial new role while struggling to meet its current mission. Consequently, these proposals would steer consumers into a potentially unsafe and unsound banking alternative at their own risk.

RECOMMENDATION:

- **OPPOSE EFFORTS TO TRANSFORM THE USPS INTO A BANK:** The next administration should oppose proposals to expand the role of the USPS to include banking. Such proposals would dramatically increase the role of the USPS when it has no experience in the business of banking, increasing its costs, risks, and regulatory burdens. This would ultimately hurt depositors, borrowers, and savers that used banking services at a post office.

FINANCIAL REPORTING,
CORPORATE GOVERNANCE, AND
DISCLOSURE EFFECTIVENESS

RESTARTING THE GROWTH ENGINE: A PLAN TO REFORM AMERICA'S CAPITAL MARKETS

FINANCIAL REPORTING, CORPORATE GOVERNANCE, AND DISCLOSURE EFFECTIVENESS

Different forms of business ownership have provided the American economy with a unique diversity that is a source of strength and resilience for entrepreneurial initiatives. For generations, the public company model has been the predominant business structure used to access capital for expansion, job growth, and the creation of shareholder value.

The systems of public company financial reporting and corporate governance provide investors with the information, transparency, and confidence necessary to deploy capital and for businesses to access the resources needed to grow. Over the past 10 years, the state of financial reporting and corporate governance has improved. Yet, at the same time, fewer businesses are going public and fewer businesses are staying public. It is clear that a 1930s-based disclosure system cannot keep up with the needs of 21st century investors, businesses, or markets. A challenge for the next administration and Congress will be to modernize these policies to keep pace with the changes in the marketplace and to help ensure that regulators can promote investor protection, capital formation, and competition.

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Financial Reporting

In the wake of the Enron and WorldCom scandals and the subsequent passage of the Sarbanes-Oxley Act ("SOX") in 2002, the preparation and audit of financial reports has undergone significant changes. Policymakers realized that financial reporting must keep pace with those changes. Consequently, then SEC Chairman Chris Cox formed the Advisory Committee on Improvements to Financial Reporting (CIFiR), which in August 2008 released its report and recommendations to improve financial reporting. Unfortunately, the demands of the financial crisis diverted the time and attention of the SEC from its ongoing agenda of modernizing financial reporting. We believe that the implementation of these recommendations remains an urgent item on the SEC's agenda.

Adding to the urgency of these recommendations is the pace of change in financial reporting that has taken place since the financial crisis. Among the many new legislative, regulatory, and standard-setting requirements that have influenced financial reporting in the past few years is the Jumpstart Our Business Startups Act ("JOBS Act"). Similarly, Dodd-Frank has profoundly impacted and exacerbated many of the issues identified in the CIFiR report.



For these reasons, it is important for the SEC to adopt a comprehensive approach to modernizing financial reporting policies that includes, in addition to stepped-up enforcement, increased communication and cooperation among regulators, standard-setters, and stakeholders. This will reinforce the SEC's efforts to drive bad actors out of the marketplace, by eliminating the complexity and ambiguity on which they thrive. In fact, the CIFI report found that financial reporting complexity is a key driver in the disconnection between current financial reporting and the information necessary to make sound investment decisions. Because keeping a clear focus on the SEC's mission to ensure that investors receive relevant decision-useful information and to promote capital formation will maximize the agency's chances of success in stamping out accounting fraud and financial disclosure irregularities, we view this as a win-win for the SEC and its stakeholders.

RECOMMENDATIONS:

- **MAKE DEFINITIONS OF MATERIALITY CONSISTENT:** The SEC should supplement existing guidance to ensure that the SEC, Financial Accounting Standards Board (FASB), and Public Company Accounting Oversight Board (PCAOB) use a common definition of materiality. The FASB has defined materiality for U.S. Generally Accepted Accounting Principles ("U.S. GAAP") differently than securities laws have, while the PCAOB is using the definition from the federal securities laws.
- **DEVELOP A DISCLOSURE FRAMEWORK:** Investors face information overload from multiple overlapping and sometimes contradictory reporting and disclosure standards. A disclosure framework would also address issues of placement of information within audited U.S. GAAP financial statements versus management discussion and analysis ("MD&A"), which is unaudited, has safe harbors, and provides forward-looking information.
- **ISSUE A POLICY STATEMENT ARTICULATING HOW THE SEC AND PCAOB EVALUATE THE REASONABLENESS OF ACCOUNTING AND AUDITING JUDGMENTS:** In developing new standards, the FASB and PCAOB continue including the recognition, measurement, and disclosure of more fair value and accounting estimates that require judgment. Investors must be made aware that there may not be a single "right answer" in accounting and auditing matters. Investors need clear, specific guidance on the framework that will be used to evaluate these judgments in order to evaluate them.

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- **HAVE THE SEC WORK WITH THE FASB AND PCAOB TO CONSIDER THE AUDITABILITY OF U.S. GAAP WHEN DEVELOPING ACCOUNTING STANDARDS AND DISCLOSURE REQUIREMENTS:** A formal, ongoing, and transparent dialogue should be created to consider the auditability of accounting standards. This would allow for the auditing of accounting standards to work in conjunction with standards development. It would also provide for the identification and resolution of issues that arise in practice. A similar process should be created to ensure that regulators have an understanding of standards and that different entities are not working at cross purposes.
- **ESTABLISH A FINANCIAL REPORTING FORUM (“FRF”):** While there have been recent efforts to reverse the trend, historically there has been a lack of transparent communication and coordination among regulators, standard-setters, and market participants. An FRF should be created with the mission to identify and propose solutions to problems before they reach the crisis stage. It should be composed of the SEC, FASB, PCAOB, investors (broadly defined), and businesses. An FRF will also provide a mechanism to allow for appropriate coordination among regulators and input from investors and businesses.
- **THE PCAOB SHOULD CREATE NEW BUSINESS AND AUDITOR ADVISORY GROUPS:** Too often, there has been a disconnect between the PCAOB and other stakeholders to appropriately identify and address issues. This has led to unintended consequences that may have misapplied solutions or misidentified problems. The PCAOB and SEC have, over the past 18 months, taken great strides to address these issues. However, a more formalized dialogue can prevent problems from occurring while assisting the PCAOB in providing better oversight of audits.
- **EMPOWER THE PRIVATE COMPANY COUNCIL TO ADDRESS THE NEEDS OF PRIVATE COMPANY USERS:** Any modernization of financial reporting policies requires that the differing needs of users of financial statements be considered and addressed. In particular, private company users do not require the same information as public investors. Accordingly, we believe the SEC, FRF, and Financial Accounting Foundation should closely monitor the activities of the Private Company Council to ensure the needs of private company users are met and that the congressional intent of the JOBS Act is fulfilled.



- **ENCOURAGE THE FASB, PCAOB, AND THEIR ADVISORY GROUPS TO FOLLOW THE SAME RULES OF PROCEDURE AS THE SEC:** FASB and PCAOB standards carry the weight of regulations, and at times their processes can be opaque. Both the FASB and PCAOB and their attendant advisory groups should abide by the same rules of procedures required of regulatory agencies by the Administrative Procedures Act and Federal Advisory Committee Act, including the rule that any advisory groups should be balanced in presentation and open in process. During standard-setting or rule-writing, the FASB and PCAOB should also publish an economic analysis that is subject to public comment.

Corporate Governance

Effective corporate governance is essential to the long-term vitality of public companies. Governance that is mindful of long-term growth is needed to provide investors with appropriate returns, in turn providing businesses with the capital needed to grow and operate. Traditionally, corporate governance is a triad among management, directors, and shareholders. Since its beginnings, corporate governance, like all corporate law in the United States, has been a matter of state law. While certain states like Delaware have been leaders in the development of corporate law, the competition among the states has resulted in a vibrant and nimble corporate law environment. Those relationships have evolved over decades, aided by enlightened state corporate laws and expert courts. This system, built upon the foundation of the Business Judgment Rule, has created an environment conducive to the growth of public companies. Unfortunately, this system has been increasingly infringed upon by federal actions in recent years.

The federal government has increased its role in establishing governance standards. This is a troubling trend because the imposition of unitary, one-size-fits-all rules only acts to supplant the judgment of shareholders and directors. Policymakers in the past have not adequately taken into account the unintended consequences of reform. One unfortunate consequence has been the marked decrease in the number of public companies over the past 20 years.

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As a result, the number of public companies in the United States has fallen in 19 of the past 20 years, leaving the country with less than half of the public companies it had in 1996. The recommendations provided here are designed to reverse these trends and make the public company model attractive again and regain its place in spurring economic growth and wealth creation.

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RECOMMENDATIONS:

- **DEVELOP 14A-8 REFORMS:** The SEC should reinstitute its policies to act as a gatekeeper for shareholder proposals. Accordingly, the “Whole Foods” and “Trinity” decisions should be reversed. If the SEC refuses to do so, Congress should pass legislation devolving these powers back to the states. The SEC has abdicated its duty to determine if shareholder proposals will interfere with company ordinary business operations and if shareholder proposals on similar topics conflict with one another. This has led to inconsistent and unnecessary proposals on the ballot and unreliable rules that have confused all stakeholders.
- **REVISIT RESUBMISSION THRESHOLDS:** The SEC should revisit the thresholds on repetitive shareholder proposals that have low or declining support. Those proposals with low or declining support drive up costs for businesses and investors and prevent a meaningful dialogue between the two groups. Failure to address these issues harms the rights of majority shareholders and makes the public company model less attractive. The SEC should adopt the 2014 rulemaking petition.
- **PROVIDE ADDITIONAL PROXY ADVISORY FIRM OVERSIGHT:** The SEC should expand the 2014 guidance and require more oversight over proxy advisory firms by requiring transparent processes and communication around voting policies and recommendations. Vote recommendations must correlate to the fiduciary duty of the proxy advisory firm client. Disclosures around conflicts of interest should also be enhanced. If the SEC does not act, Congress should pass the “Corporate Governance Reform and Transparency Act” (H.R. 5311).
- **REPEAL RULES UNRELATED TO THE SEC'S MISSION:** Corporate disclosures have increasingly been used to promote social or political agendas unrelated to the growth of shareholder value. This has forced the growth of disclosures, made the proxy uncommunicative for investors, and often made the social or political problems worse. Congress should repeal the Conflict Minerals Rule, Resource Extraction Rule, and Pay Ratio Rule.
- **RE-PROPOSE PAY-FOR-PERFORMANCE AND CLAW-BACK PROPOSALS:** While these proposed tools can provide useful information for investors, the current proposals fall short of the mark. The SEC should re-propose these rules so that they meet their intended purpose. These proposals incentivize short-termism, and a better balance must be struck or the requirements repealed.



- **REPEAL INCENTIVE COMPENSATION RULE:** Government should not decide compensation, which is a matter between employer and employee. The proposed rules under section 956 of Dodd-Frank insert regulators into this process and go well beyond the intent of Congress by including information of all employees of some firms. Congress should repeal this requirement.
- **EXAMINE STATE AND MUNICIPAL PUBLIC PENSION PLANS:** Congress and the SEC should investigate the role of public pension plans in corporate governance, along with the return these plans make for their participants and the exposure created for taxpayers. Recent studies have shown the most active public pension plans to have inadequate rates of return while pushing political agendas.

Disclosure Effectiveness

Disclosure is the foundation of the federal securities laws. The purpose of disclosure is to provide investors with the material information they need to make informed investment and voting decisions. It is crucial that investors have access to information that will permit them to make fully informed decisions regarding when to invest, hold, or divest a financial asset. Disclosure effectiveness, accordingly, should be measured by the degree to which the disclosure regime helps investors understand and evaluate a business when making these decisions. An effective disclosure regime provides investors the material information they need to make objective decisions regarding the value of an investment, but does not overwhelm them with extraneous information that can obscure what is material and distract investors from what really matters about a company.

... “information overload” has been identified as a leading concern with the current disclosure regime.

Over the decades since the securities laws were enacted, and especially in more recent years, the disclosure documents companies file with the SEC have continued to expand and today go on at great length. More information is disclosed than ever before, as reflected, for example, by the lengthy Forms 10-K and proxy statements provided to investors. It should come as no surprise then, that “information overload” has been identified as a leading concern with the current disclosure regime.

In rethinking the disclosure regime, the guiding principle of disclosure reform should be materiality. As investors become inundated with information, they struggle to identify what is material. In some instances, investors simply ignore long, dense documents as too challenging or time-consuming to struggle through.

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Materiality has long been the touchstone for determining the line between what should be disclosed (material information) and what should not have to be disclosed (immaterial information) under the federal securities laws.

Considering materiality through the eyes of a reasonable shareholder is significant. Judging materiality from a reasonable shareholder's perspective reduces the risk that disclosure documents will balloon even more based on the idiosyncratic interests of a particular investor in issues that have no bearing on the financial soundness of an investment. Furthermore, a focus on the reasonable shareholder helps ensure that what is disclosed is tied to advancing the goals of the federal securities laws, as reflected in the SEC's mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. We should seek to put an end to using SEC disclosure documents to advance policy goals that are unrelated to the policy objectives of the federal securities laws.

A more focused disclosure regime, focused on delivering actionable information that any investors trying to maximize the value of their investment would want, will yield immediate benefits. Capital should be allocated more efficiently, market discipline and corporate governance should improve, and the costs and burdens companies incur when raising capital should ease. Emerging growth companies—those newer and smaller entrepreneurial businesses that are a vital source of innovation and job creation in the United States—stand to benefit along with the individuals and institutions investing in them.

RECOMMENDATIONS:

- **REMOVE OBSOLETE DISCLOSURES:** It is worth noting that much of what needs to be done is simply a matter of eliminating disclosure requirements that are no longer needed. Some items are relics of the paper-based disclosure system of the past, when reliable information took hours, days, or weeks to deliver and there was no immediate access to free analytical tools. Other once-meaningful disclosures have been superseded by subsequent disclosure requirements, or are premised on a presumptive materiality that may not result in decision useful information.
- **PRIORITIZE MATERIALITY:** Our securities disclosure regime has been inundated with disclosure mandates that are unnecessary and frequently duplicative and result in disclosures that are almost undecipherable to ordinary investors. The end result is that vital disclosure documents go unread, or essential information is lost in the minutiae. Materiality (i.e., what would a reasonable, ordinary investor consider



important information for a decision regarding a financial investment) needs to become the touchstone of our disclosure regime again. The next chair of the SEC should make a review of the existing disclosure regime premised on materiality as a top priority. The chair should report to Congress regarding legislative changes needed to accomplish this effort. In the short term, all redundant and antiquated disclosures should be modified or repealed.

CAPITAL FORMATION
AND FINTECH

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CAPITAL FORMATION AND FINTECH

Capital formation is critical for the American economy to grow, create jobs, and provide its citizens with a prosperous future. Policymakers, entrepreneurs, and executives must be cognizant of and receptive to market innovations and allow for new industries. This will enable both the nonfinancial and financial private sectors to remain diverse and vibrant. Federal regulators must allow market-based innovation to continue and allow new business lines, such as FinTech, to develop and exist with established industries. This will allow for the American financial system to keep its traditional diversity that allows businesses of differing models and maturity to access varied forms of capital.

Capital Formation

The foundation of economic growth is access to capital. In recent years, and especially since the enactment and implementation of the Dodd-Frank Act, regulatory burdens—such as those placed on financial institutions, private funds, and existing public companies—have made it harder for businesses to access the capital they need to innovate, grow, and create jobs. It is critically important that lawmakers and regulators understand the importance of maintaining an economy that features a diversity of capital sources offered on market-competitive terms.

The foundation of economic growth is access to capital.

RECOMMENDATIONS:

- **INCREASE SMALL BUSINESS ACCESS TO CAPITAL:** Congress acknowledged the need to preserve and encourage the ability of Main Street businesses, which did not contribute to the financial crash of 2007-2008, to access capital from investors when it passed the JOBS Act. Today, we see the benefits the JOBS Act has wrought: the tailoring of regulatory burdens on small and emerging growth companies has permitted them to divert more capital to production, innovation, and job creation and away from compliance with regulations that do not meaningfully contribute to investor protection. The result of the JOBS Act is more efficient investment by smaller companies. Congress should build on the work begun in the JOBS Act by passing bills that promote capital formation like: the Helping Angels Lead Our Startups (HALOS) Act, the Expanding Proven Financing for American Employers Act, the Fair Access to Investor Research Act, the Encouraging Employee Ownership Act, the SEC Small Business Advocate Act, and the Small Business Capital Formation Enhancement Act.



FinTech

With the growth of regulatory burdens on (and their associated costs to) traditional capital sources, financial companies and even new market participants have increasingly invested in, developed, and deployed technology to automate historically manual processes and meet market demand. Thus it is often said that technology-driven innovations have “disrupted” the financial services industry, just as they have in past decades. One thing is clear: new technologies are here to stay and that has the potential to fundamentally impact the delivery of financial services as diverse as payments and clearing, small business lending, consumer credit, and factoring. How FinTech is regulated in the coming years will have significant effects on an already struggling credit market. But first, policymakers and regulators should commit themselves to understanding the new roles technology is playing in financial services. Then, with a clear picture of the FinTech landscape, regulators can cooperate with the entire financial services industry—traditional players and new entrants—to develop a sensible regulatory scheme, developed in coordination with all appropriate regulators, that does not forsake growth in the name of financial stability.

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RECOMMENDATIONS:

- **CREATE A CONGRESSIONAL BICAMERAL SPECIAL COMMITTEE TO UNDERTAKE AN IN-DEPTH STUDY OF THE FINTECH LANDSCAPE AND THE POLICY IMPLICATIONS OF DISRUPTIVE TECHNOLOGY.** This is an approach that Congress has used in the past to grapple with the policy implications of technological innovation (for instance, the relevant committees of the House and Senate undertook special studies of the implications that data processing and telecommunications were having on the securities markets in the early 1970s). This special committee, which could be comprised of members of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs, should be charged with completing a report to both Houses of Congress with policy alternatives and legislative recommendations, as appropriate.

LITIGATION REFORM AND
RESTORING DUE PROCESS

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LITIGATION REFORM AND RESTORING DUE PROCESS

When an event of the enormity of the financial crisis takes place, it is easy to lose sight of urgent issues that faced our capital markets prior to that event. While Dodd-Frank focused on a set of problems facing our markets, it completely ignored other problems that predated the crisis. In some instances, Dodd-Frank has actually compounded these problems. One such area is the seemingly endless growth of spurious litigation, particularly class actions against financial intermediaries and public companies. Securities class action litigation, and the settlements that defendants feel compelled to enter into to avoid prolonged and expensive litigation, is too frequently without merit, providing a windfall to a cadre of trial attorneys, and only nominal payments to the putative victims who are members of the class. This is not to say that all litigation is without merit; but a decline in a stock's price in and of itself is no grounds for litigation. The United States' unpredictable litigation quagmire discourages foreign investment and listings of public companies in the country.

The competitive implications of our ongoing litigation explosion was one of the focal points of Mayor Michael Bloomberg and Sen. Chuck Schumer's report titled *Sustaining New York's and the US' Global Financial Services Leadership*. This detailed survey of the competitive challenges facing our financial services markets documented the dramatic and ongoing growth in litigation costs. The report noted that in 2004 the cost of the U.S. tort system was \$260 billion, a figure that represented a 100% increase over 1990 levels. At that time these costs were increasing by an annualized rate of 10%. This bipartisan report makes a compelling case for litigation reform, both to abate unnecessary costs and to help America's competitive position. A survey of senior executives that was incorporated in the report was particularly telling on this point. The survey found that after the quality of the professional workforce, a fair and predictable legal environment was the most important factor determining a financial center's competitiveness, followed by an attractive regulatory environment.

Since the time of the Bloomberg/Schumer study, the litigation environment in this country has only become worse. Dodd-Frank and other administration priorities have created a maze of confusing and highly technical regulations that are fertile ground for minor violations. For instance, the CFPB's mandatory arbitration rulemaking threatens a system of speedy alternative dispute resolution that has benefited aggrieved consumers. Outside of Dodd-Frank, the DOL fiduciary rule creates a new cause of action under state law against financial advisers trying to assist people saving for retirement. The plaintiff's bar is aggressive and creative; therefore, litigation reform will be an ongoing battle. But it is a battle that must be fought. The cost to our economy far exceeds the dollar amount of settlements. There is a tremendous incidental cost to our economy



when directors, management, advisers, and intermediaries have to make decisions through the prism of harassment litigation avoidance. This is a cost ultimately borne by shareholders, consumers, and retirement savers.

Regulators and law enforcement must also be mindful of the incidental costs of their actions. Legal, regulatory, and enforcement processes in the United States must be fair, balanced, and predictable. Regulators and law enforcement agencies should vigorously enforce the laws to drive out bad actors and provide stakeholders with an even playing field. At the same time, it is incumbent on the government to protect the constitutional and due process rights of individuals and businesses.

Legal, regulatory, and enforcement processes in the United States must be fair, balanced, and predictable.

Shortcuts that deny the right to a jury trial in serious cases, or subject a defendant to multiple enforcement actions based on the same events, can run counter to the principles of fairness and due process enshrined in the Constitution. We must have strong cops on the beat to put away bad actors, but enforcement must be fair and predicated on clear rules of the road.

In certain instances, the intersection of regulation and law enforcement can be made fairer simply if all stakeholders work together toward smarter solutions. Even the most laudable policy goals can result in a quagmire of expensive, burdensome regulatory paperwork that provides little or no meaningful benefit. Bank Secrecy Act compliance is one such area. This law was intended to make financial intermediaries the first line of defense in detecting money laundering. What it ultimately spawned was a time-consuming, incredibly expensive paperwork exercise that requires the collection and reporting of data, most of which has no law enforcement value. In fact, the sheer volume of data that must be manipulated may be counterproductive to law enforcement.

Money laundering detection is clearly a law enforcement priority, but the system must be improved.

The Chamber recommends that the next administration support a few targeted revisions (some specific recommendations regarding the SEC enforcement program are separately enumerated in the section that follows).

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RECOMMENDATIONS:

- **ELIMINATE DUPLICATIVE ENFORCEMENT:** The government should eliminate duplicative and overlapping enforcement responses by multiple enforcement authorities against the same party for the same conduct. The expense associated with defending multiple actions can compel defendants to settle solely to avoid the expense associated with prolonged litigation. The federal government should take a leadership role among regulatory bodies at the federal and state levels, to reduce or eliminate duplicative and overlapping investigations and duplicative enforcement actions for the same conduct.
- **REMOVE INCENTIVES FOR CRIMINAL BEHAVIOR:** Section 922 of the Dodd-Frank Act provides for the payment of awards to whistleblowers in an SEC enforcement action. While individuals who have been convicted of crimes related to the subject of the SEC action cannot collect award money, it does not preclude the payment of awards to culpable parties who have not been convicted. There is a difference between a whistleblower and a co-conspirator. While cooperation should be a mitigating factor in SEC action, the co-conspirator should not be rewarded for misconduct.

SEC ENFORCEMENT REFORM

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SEC ENFORCEMENT REFORM

SEC enforcement proceedings should be conducted in a manner that ensures fairness and in a forum in which the rights of defendants are preserved. The purpose of these recommendations is to ensure that the process is fair and that all stakeholders can benefit from the SEC enforcement activities that will engender efficient capital markets.

RECOMMENDATIONS:

- **DEVELOP POLICY ON ADMINISTRATIVE PROCEEDINGS:** The SEC should formally adopt, and uniformly apply, a policy that it will use administrative proceedings to adjudicate contested matters if
 - The proceeding is based upon well-established legal principles that have been established in Article III courts;
 - The factual predicate for the alleged violations are substantially equivalent to those asserted and upheld in past enforcement actions; and
 - The matter does not entail an extensive investigative record such that considerations of fairness warrant providing the respondent/defendant with adequate opportunity for pretrial discovery and time within which to fully review the investigative record; or
 - The staff is alleging a cause of action that may be brought only in an administrative proceeding, such as a stop order proceeding, a section 12(j) revocation proceeding, a license revocation or bar proceeding, or a rule 102(e) proceeding, or proceedings based upon a failure to reasonably supervise or causing a violation.
- **ENABLE CHALLENGES OF FORUM:** The SEC should create a procedure to enable respondents to challenge the choice of forum by filing a motion for change of forum with the SEC prior to institution of the proceeding.
- **REVIEW RULES OF PRACTICE:** The SEC should review its Rules of Practice to give effect to its changed authority and increased experience with the broader utilization of administrative proceedings, to recognize the substantial increase in the volume of investigation materials, and to ensure that the SEC's administrative forum is a fundamentally fair and impartial venue, especially for persons and entities not directly regulated by the SEC. Among other things, its rules should be revised to provide adequate opportunities for



pretrial discovery and depositions. SEC rules on completion of the initial decision should be amended to provide sufficient time for the expansion of pre-hearing process.

- **REFORM THE WELLS PROCESS:** The SEC Enforcement Division (“Division”) should adopt a uniform policy that all Wells submissions will be provided to the Commission at the same time and in the same format (electronic or paper) used to submit the Action Memorandum containing the recommendation for enforcement action. The Division should consistently provide access to its investigative files with adequate time to permit a meaningful response to a staff Wells Notice or request for a white paper, by establishing a presumption in favor of granting access and requiring that a senior-level official review preliminary decisions to deny such access. The Division should formally adopt and uniformly apply a “reverse proffer” policy and provide potential defendants/respondents with a full presentation of the nature of its proposed case and the supporting evidence before commencing the Wells submission or white paper process. The Division should formally adopt a policy that any party that has made a Wells submission or requested advance notice should be provided reasonable advance notice, such as three business days that the staff will file an enforcement action.
- **CLARIFY THE ADMISSIONS POLICY:** The SEC should reexamine its policy on requiring admissions in some enforcement actions, to reflect its experience to date. As part of this undertaking, the SEC should consider of the policies of other government agencies. Following a careful examination, if the SEC determines that the admissions policy should be continued, a clear statement of the policy should be added to the SEC’s Informal and Other Procedures. The codified guidance should articulate meaningful standards that provide guidance on when admissions will be required, promoting consistency in the exercise of its broad discretion. The policy should describe the level of detail used for admissions, including the description of the misconduct and the articulation of the statutory provisions or regulations that were violated, to promote consistency within the Division. The purpose of these admissions statements should be to provide normative guidance to other persons or entities similarly situated. The SEC should publish guidance on how the issue of requiring admissions will be incorporated into settlement negotiations.
- **INCORPORATE ALTERNATIVE CASE RESOLUTIONS:** The SEC should incorporate the use of alternative case resolution methods to rapidly resolve minor, technical infractions, and to encourage and reward effective internal compliance and systems of internal controls. Creative use of informal remedial actions, such as

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deficiency letters, desk injunctions, reports of investigations, and voluntary disclosure of internal investigations and remediation actions, will enable the SEC to devote its limited resources to major instances of misconduct.

- **IMPROVE COMMISSION OVERSIGHT OF ENFORCEMENT:** The Division of Enforcement should submit a quarterly management report to the Commission containing productivity and efficiency metrics developed by the Department of Economic and Risk Analysis. The Commission should receive quarterly oversight briefings on the enforcement program. The briefings should focus on investigations in the following areas:
 - Significant “National Priority” investigations,
 - Investigations raising novel or complex legal questions,
 - Oldest active investigations,
 - Post-mortem analysis of litigated decisions not in favor of the SEC, and
 - New or emerging areas warranting investigation.
- **INCREASE TRANSPARENCY AND DIALOGUE:** The SEC should periodically alert those subject to its regulations of emerging trends. New standards, or new interpretations of existing standards, should be addressed through agency rulemaking or formal interpretive guidance, not through negotiated settlements of enforcement proceedings. The Commission should publish annually a report on its enforcement program, provide a public comment period on relevant issues, and conduct an annual public roundtable to discuss the report and the operations of its enforcement program. There should also be transparency around credit given for cooperation.
- **IMPROVE ACCURACY AND PROMOTE FAIRNESS:** In the interest of maintaining the highest levels of integrity and fairness, SEC staff should adhere to the American Bar Association Code of Professional Conduct Rules on Trial Publicity (rules 3.6 and 3.8) when drafting litigation and press releases. To ensure conformity with these standards and consistency within the Division, all litigation-related press releases should be reviewed pre-release by personnel outside the Division of Enforcement. Releases concerning litigated actions should state explicitly that the description of events represents allegations that must be proven. In settled cases, the Division



should provide counsel for giving settling parties an advance opportunity to review the proposed Litigation Release or press release solely for accuracy and fairness.

- **ENSURE DOCUMENT PRESERVATION AND DISCOVERY:** At the earliest stage of an investigation—whether formal or informal—the Division should notify companies, individuals, and their counsel, to the extent appropriate, that it has an investigative interest in a matter (or matters), and request that companies and individuals immediately institute “information preservation measures” to prevent the destruction (automatic or otherwise) or alteration of any documents, data, or other information that may be relevant to the investigation. The Division should require and receive satisfactory assurances regarding the continuing preservation of all documents, data, and information relevant to the investigation and the understanding that no change in this status will occur without advance communications with the Division.
- **IDENTIFY THE SCOPE OF SUBPOENAS:** To expedite and focus an investigation, the Division should, at an early stage of its investigative efforts, engage in dialogue with counsel for persons and entities receiving subpoenas to identify the scope of the inquiry, and promote an efficient production of materials. In this dialogue, recipients of subpoenas should be encouraged to provide the following information:
 - A description of the categories of documents deemed by the company or individual involved to be most relevant to the matter(s) under review; and
 - An identification of individuals and entities deemed by the company or individual to have relevant information or knowledge about the circumstances relating to the matter(s) under review.
- **BALANCE APPROACH TO DOCUMENT PRODUCTION:** Following the exchange of initial documents and information described above, Division staff and defense counsel should discuss document production, balancing the Division’s need for relevant information with the need of those involved to control costs of document production. Among other things, the Division should
 - Implement concepts of access to information, as an alternative to actual production of information, wherever that approach can be implemented feasibly, and without adding unnecessary time to the investigative process;

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- Utilize rolling productions of documents, rather than requiring all potentially relevant documents to be produced at the same time;
 - Negotiate document demands or subpoenas that take into account the actual costs associated with production of certain data, especially where information preservation measures have been implemented;
 - Jointly identify aspects of the request that may impose disproportionate costs and time burdens; and
 - Memorialize written agreements with defense counsel regarding document requests and subpoenas, to avoid any future misunderstandings, and to provide new or future investigators with an understanding of production obligations.
- **PROVIDE NOTICE OF A CLOSED INVESTIGATION:** Written notification that a formal or informal investigation has been closed should be sent promptly to persons and entities whose conduct was under investigation, within two weeks of closure.
 - **PUBLISH AN ENFORCEMENT PLAN:** The SEC should publish annually a report on its Enforcement Program, provide a public comment period on relevant issues, and conduct an annual public roundtable to discuss the report and the operations of its Enforcement Program.
 - **INTEGRATE TRIAL AND INVESTIGATIVE TRIAL UNITS:** The SEC should have the Division integrate its trial attorneys into the investigative process to ensure that investigative records collect all evidence necessary for successful litigation and are based upon appropriate legal theories. Trial attorneys should actively participate in Division training programs.

CONSUMER PROTECTION

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CONSUMER PROTECTION

It is important for individuals to have the reliable access to credit needed for purchasing goods and services, while having means of redress in the event of problems. Consumer protection and good business practices are not mutually exclusive. Our markets cannot operate without consumers, and consumers would not have the choice of products, services, and innovation if not for businesses. Consumer protection should not be an overtly adversarial exercise from the outset. Our recommendations seek to strike this balance between consumer protection, on the one hand, and vibrant markets that are responsive to customers' needs, and to ensure that the CFPB meets the same minimum levels of accountability and transparency required of any other government agency.

Strong, clear, and predictable consumer protection policy is an important and necessary component of efficient capital markets.

Strong, clear, and predictable consumer protection policy is an important and necessary component of efficient capital markets. The Chamber believes that clear rules of the road given prospectively are important for both businesses and their customers. While these precepts seem incontrovertible, perhaps no title of the Dodd-Frank Act was (and remains) as controversial as the title that created the CFPB. Those who opposed the manner in which Congress insulated the bureau from meaningful oversight—such as its single-director structure and “ask and you shall receive” funding mechanism from the Federal Reserve—have been justified by the bureau’s continuous overreaching during its short five-year existence. The CFPB is sorely in need of substantial structural reforms to make it more accountable to the American people whose congressional representatives created it.

RECOMMENDATIONS:

- **INSTITUTE STRUCTURAL REFORM:** The Chamber recommends that the next administration support legislation to replace the single-director governance of the CFPB with a bipartisan board. By doing so, the bureau will benefit from a diversity of viewpoints that go into its decision-making, as other regulators, such as the SEC, CFTC, and Federal Reserve, already do. Legislation should also be enacted to subject the bureau to the appropriations process.
- **REVIEW THE IMPACT OF RULES:** The next administration should also encourage CFPB leadership to reevaluate the bureau’s most significant final rules, to examine whether they are benefiting or hurting the consumers the bureau is charged



with protecting, and to apply the same cost/benefit test to rules that have been proposed but not finalized. These rules include the bureau’s arbitration rule (discussed below), which would replace consumer-friendly dispute resolution with a broken class action litigation system; its debt collection rule, which would increase transaction and other costs associated with selling and collecting debt that will get passed on to the customer; a rule that could threaten the viability of overdraft products used by millions of consumers; the CFPB’s one-size-fits-all approach to small-dollar lending; and its upcoming rules on data collection under Dodd-Frank Act section 1071.

- **PRESERVE ARBITRATION:** In May 2016, the CFPB proposed a rule to prohibit consumer financial services providers from requiring consumers to pursue their disputes in arbitration rather than in class action. This rule would have the practical impact of eliminating consumer arbitration, which the bureau’s own 2015 Arbitration Study and Report to Congress expressly found to be generally more consumer-friendly than class action. If the rule is finalized, the next administration should nullify the rule so that consumers—particularly those with individualized claims that are not classable—may once again have access to an economically rational forum to vindicate their claims.
- **STOP REGULATION BY ENFORCEMENT:** One of the CFPB’s most destructive practices has been the use of its enforcement authority to impose the functional equivalent of regulation without any of the transparency hallmarks required under the Administrative Procedure Act. The bureau, quite intentionally and programmatically, uses its seemingly boundless authority to prohibit “unfair, deceptive, or abusive acts or practices” to compel administrative consent orders with one private party, and then demands faithful adherence to the terms of that order by everyone else in the marketplace. Failure to do so, in the words of the current director, is tantamount to “regulatory malpractice.” Regulation by enforcement also introduces government-sponsored, anti-competitive forces in the market. The bureau’s next leadership should continue a robust enforcement program to deter fraud and predation but immediately cease using enforcement as a regulatory substitute for the formal rulemaking process, which permits notice and comment.
- **TAILOR SMALL BUSINESS LENDING DATA COLLECTION:** This autumn, the CFPB will begin to develop criteria, rules, and policies governing its collection of small business lending data pursuant to section 1071 of the Dodd-Frank Act. These new requirements have the potential to add to the regulatory and compliance burdens already crushing small financial services providers. If not collected carefully, the data may also present a skewed picture of small business lending in America.

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The next administration should work collaboratively with the business community to ensure that this data collection is tailored for small institutions and undertaken in a manner that yields accurate data. The next administration should, however, reject the use of the disparate impact theory of discrimination under the Equal Credit Opportunity Act, which underpins the entire section 1071 data collection project.

- **SAFEGUARD APA PROTECTIONS:** Regulation by enforcement presents tremendous practical impediments for compliance systems because it assumes that fact pattern and remedial undertakings of a particular enforcement action are easily imposed on an entire industry. It assumes that companies are simply fungible “boxes” in a flowchart. The financial services industry in American is incredibly diverse. Participants in the same industry can have radically different business models offering distinct products marketed in different ways to different customer bases. This is exactly why notice and comment are so important to our regulatory process. They provide a forum for instructive input by all stakeholders so that regulators can tailor broad legislative directives to industry practices. This is not possible through an ad hoc, bilateral negotiation between two parties.
- **RECOGNIZE COMPETITIVE CONCERNS:** While the CFPB clearly retains the upper hand in enforcement actions, it is still vesting a lot of power in the defendant to negotiate on behalf of an entire industry, many of whom may compete with the defendant. While this may not be unconstitutional delegation to a private party, it is arbitrary, is unfair, and could be anti-competitive.
- **FACILITATE COMPLIANCE:** The CFPB is not the first agency to engage in regulation by enforcement; however, the CFPB uses this technique as its primary form of rulemaking. The CFPB's reliance on this technique is even more disturbing given its extreme reluctance to issue interpretation, guidance, or no-action letters to assist companies in their compliance efforts.
- **PROVIDE MEANINGFUL UDAAP GUIDANCE:** The CFPB director's complete lack of accountability has permitted the bureau to test the limits of its jurisdiction without providing any clarity around its preferred means of imposing its will—enforcement actions for “Unfair, Deceptive or Abusive Acts and Practices,” or UDAAP. The CFPB has failed to provide any meaningful guidance through rulemaking. In this regard, the CFPB would be well-advised to consider the admonition of the Second Circuit to the Federal Trade Commission in its handling of similar regulatory authority.



- **DEVELOP A FINANCIAL LITERACY PROGRAM:** To date, the CFPB has focused its substantial resources on ex post facto enforcement efforts. As discussed above, the CFPB has used its enforcement program to establish standards for expected behavior for entire industries. This confrontational approach to regulation may be unnecessary. Many of the goals that the CFPB hopes to accomplish could be achieved by arming consumers with knowledge necessary to make deliberate informed decisions. The key to this is financial literacy. The CFPB is the logical site to house a financial literacy program. The CFPB could draw on resources throughout the United States to develop financial literacy tools and act as a clearinghouse for information on this topic. We recommend that the next administration work to enact legislation to apportion 10% of the CFPB's current budget to the establishment of a best-in-class financial literacy program.

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CONCLUSION

Since the financial crisis of 2007-2008, policymakers and regulators have been solely focused on financial stability; however, as is evident through the economic stagnation of the past decade, stability is impossible without growth. Current policies that stifle growth and job creation have left us with a system that is not able to support sustained growth and innovative business models. The next administration must strike a critical balance and pursue a pro-growth agenda to stimulate much-needed job creation. A vibrant, diverse, and innovative financial system is critical to ensuring continued economic growth.

What is proposed in this agenda are reforms designed not to stand in the way of vigorous, ongoing efforts to stop genuine fraud or criminal conduct in the financial system; rather, these policies are designed to root out bad actions and strengthen our regulatory system, creating clear and fair rules of the road that promote the efficient capital markets necessary for investors to rationally deploy capital and for business to access the resources needed to expand.

The U.S. Chamber of Commerce is ready to work in partnership with all agencies, policymakers, and market participants to move forward with proper fixes, working toward reforming the financial system to support a goal of increased growth and stability. A modern and efficient regulatory system is unquestionably the foundation of the efficient capital markets necessary for a continuously thriving, growing economy. We must break through the political and regulatory standstill to make progress on all the issues outlined above to elevate job and economic growth past the stagnant 2% barrier.



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