U.S. Chamber of Commerce

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June 6, 2022

The Honorable Pat Toomey
United States Senate
Washington, DC 20510

Dear Senator Toomey:

The U.S. Chamber of Commerce strongly supports the "Jumpstart our Business Startups Act 4.0 of 2022." We appreciate your leadership on policies for startups and their ability to grow.

It has now been over a decade since Congress passed the initial JOBS Act, a major bipartisan achievement that has had tangible results for the initial public offering (IPO) market and aided the ability of small and startup businesses to raise capital. The original legislation allowed businesses to turn ideas into successful enterprises, benefiting their employees and communities along the way. We strongly support Congressional efforts to once again work across partisan lines to pass the JOBS Act 4.0.

In 2012, after a nearly two-decade decline in the IPO market, the original JOBS Act revived U.S. listings and encouraged more companies to enter the public markets. In the five years preceding the JOBS Act, there were roughly 121 IPOs per year in the United States; from 2013-2021, the annual average was 344 per year. Most of these companies filed as emerging growth companies (EGCs) under Title I of the JOBS Act. Last year, the IPO market in the U.S. hit an all-time high with more than 1,000 IPOs that raised a combined $316 billion. Nevertheless, current inflationary challenges, increased global competition, and geo-political instability may reverse these gains.

JOBS Act 4.0 would expand and build on the original JOBS Act, including many things the Chamber called for in a 2018 report.[1] We deeply appreciate that the JOBS 4.0 initiative incorporates many of these recommendations. In particular, the Chamber applauds you for including provisions such as:

- Expanding eligibility for EGC status from five years to 10;
- Establishing effective SEC oversight of the proxy advisory industry and reforming the shareholder proposal process under SEC Rule 14a-8;
- Permitting public companies to file semiannual rather than quarterly reports;

[1] https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/05/CCMC_IPO-Report_v17.pdf

- Expanding the number of investors that can invest in early-stage angel funds without these funds having to register with the SEC;
- Repealing harmful disclosure mandates required under the Dodd-Frank Act that are costly to shareholders and do not provide investors with material information, including the conflict minerals, pay ratio, mine safety, and resource extraction rules;
- Studying whether intelligent tick sizes for certain issuers would improve secondary trading and liquidity for small public companies;
- Establishing the legal framework for venture exchanges to trade shares of EGCs and other small issuers;
- Permitting venture capital funds to make secondary investments without running afoul of eligible portfolio company definitions;
- Exempting mergers and acquisitions (M&A) brokers from registration requirements for offering advice to small businesses;
- Exempting non-custodial broker-dealers from a mandate that they use a Public Company Accounting Oversight Board (PCAOB)-registered auditor for their annual audit;
- Allowing acquired fund fees and expenses (AFFE) disclosure to be moved to a footnote to the fee table for business development companies (BDCs) that will facilitate institutional investment in BDCs, which are a critical source of capital for middle market businesses;
- Expanding opportunities for gig workers to receive equity compensation from companies;
- Improving regulations for crowdfunding offerings and addressing conflicts with state law to expand crowdfunding as an option for startup businesses;
- Permitting individuals to self-certify as accredited to allow them to invest in certain private offerings currently only available to institutional or wealthy investors;
- Allowing respondents in SEC enforcement cases the ability to have their case heard under an Article III court rather than the SECs in-house administrative forum;
- Exempting mutual funds and other entities from the Dodd-Frank stress test requirements which are intended for banks.

In addition to this laudable bill, we hope Congress will take up legislation that addresses securities litigation reforms as well. Securities litigation reform initiatives would help to reign in the frequent filing of frivolous and questionable securities fraud claims.

In 1995, Congress moved to crack down on repeat, professional plaintiffs that filed frivolous securities fraud class actions, often for cash kickbacks, by adopting the Private Securities Litigation Reform Act (PSLRA). [2] In 1998, Congress subsequently made additional reforms in the Securities Litigation Uniform Standards Act (SLUSA).[3] Unfortunately, research

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[2] Private Securities Litigation Reform Act (PSLRA), Pub L No 104-67, 109 Stat 737 (1995), https://www.govinfo.gov/content/pkg/PLAW-104publ67/pdf/PLAW-104publ67.pdf.

[3] Securities Litigation Uniform Standards Act (SLUSA), Pub L No 105-353, 112 Stat 3227 (1998), https://www.congress.gov/105/plaws/publ353/PLAW-105publ353.pdf.

shows that professional plaintiffs, both individual and institutional, are still taking advantage of loopholes in Congress' securities litigation reform regime, including the PSLRA and SLUSA.[4] This harms shareholders on both sides of the lawsuits: those that ultimately pay for the litigation costs and lawyers' fees, and those that receive little or no benefit when the lawsuit ends.

To close off these loopholes, legislation could be crafted to:

- ***Apply to individual securities cases.*** The PSLRA's current provisions meant to protect shareholders, through fee limits for attorneys and mandated judicial review of settlements, among others, only apply to class actions. Plaintiffs' attorneys are now circumventing these protections by filing numerous securities lawsuits as individual rather than class actions. The PSLRA should be amended to cover individual actions as well so shareholder protections cannot be side-stepped.
- ***Broaden limits on repeat filers.*** Much of filed securities litigation is brought by serial plaintiffs that are usually dismissed and result in no benefits to shareholders, just a payment to the plaintiff and their attorneys. The PSLRA prohibits individual shareholders from acting as lead plaintiffs in more than five class actions in a three-year period, yet this limitation is avoided when claims are settled or dismissed before appointment of a lead plaintiff or by filing as an individual action. The prohibition should instead prevent shareholders from *filing* more than five lawsuits in a three-year period. Any waivers of this limit in the class action context, such as for large institutional investors, should also be based on demonstrated results for class members in previously filed suits, rather than the *de facto* automatic waiver that typically occurs in most of these cases.
- ***Revamp standing requirements in shareholder voting cases to include a reasonable share ownership requirement.*** Evidence shows that shareholders with an adequate stake in the litigation tend to receive better results for their fellow stakeholders. A reasonable share ownership requirement for filing proxy claims would help reduce frivolous claims by serial plaintiffs while allowing legitimate cases to move forward.
- ***Correct the mechanism for determining lead plaintiffs.*** Rather than determining lead plaintiffs by largest loss, the PSLRA should be amended to presume the lead plaintiff should be the plaintiff most likely to receive large recoveries for the class, such as by looking at fee agreements with plaintiff's counsel and how much of the recovery would go to attorneys' fees.
- ***Increase Transparency.*** The PSLRA should also be improved by requiring disclosure of (1) any attorney payments to plaintiffs outside of their *pro rata* share of the recovery so any incentive payments will come to light, (2) the nature of the attorney's representation of the plaintiff outside of the current lawsuit before a court to reveal collaboration between serial filers and the law firms that enable this practice, (3) the

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[4] *See* U.S. Chamber Institute for Legal Reform, *Frequent Filers Revisited: Professional Plaintiffs in Securities Class Actions* (April 2022), available at https://instituteforlegalreform.com/research/frequent-filers-revisited-professional-plaintiffs-in-securities-class-actions/.

presence of any third party litigation funding in the case, and (4) any contributions to elected officials with authority to retain counsel in these cases.[5]

Thank you for your leadership in working to foster a strong U.S. economy. We are grateful to you for championing this important legislation and for your work to preserve strong U.S. capital markets.

Sincerely,

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

Harold Kim
President, Institute for Legal Reform
Chief Legal Officer and
Executive Vice President
U.S. Chamber of Commerce

cc: Members of the Senate Committee on Banking, Housing, and Urban Affairs

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[5] *See* Securities Litigation Attorney Accountability and Transparency Act (SLAATA), S. 652, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/senate-bill/652; Litigation Funding Transparency Act (LFTA), H.R. 2025, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/2025; Litigation Funding Transparency Act (LFTA), S. 840, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/840.