June 3, 2022

Dear Ranking Member Toomey and Republican Members of the Senate Banking Committee,

Today, I write on behalf of Americans for Prosperity's (AFP) activists across all 50 states to provide comments to the JOBS Act 4.0 discussion draft. AFP led a coalition letter[1] in support of the capital formation package and would again like to thank the Ranking Member and members of the committee for proposing this important discussion draft.

Financial regulations should be crafted with the understanding that market participants are best positioned to make their own financial choices, and regulators should focus on protecting against bad actors and fraud. Creative destruction, risk-taking, potential for failure, and consumer choice are all necessary parts of an advancing economy.

The JOBS Act 4.0 would take important steps towards these ends and would make initial public offerings more attractive for companies, improve private markets, and increase investment opportunities for retail investors. AFP appreciates the opportunity to provide feedback to the Ranking Member and members of the committee and applauds the open and transparent process for this capital formation agenda.

Below are provisions of the JOBS Act 4.0 AFP strongly supports, as well as recommendations we believe will further advance capital formation as part of the JOBS Act 4.0:

**Making IPOs More Attractive:**

*Sec. 101, Middle Market IPO Cost Underwriting Act*

Timely data regarding securities offerings and markets is vital to better understand market performance and how businesses and investors respond to statutory and regulatory changes. Many federal agencies provide a wide array of data and information for public consumption, yet the Securities and Exchange Commission (SEC) has failed to consistently provide the public with up-to-date information. For example, roughly a decade ago[2] the IPO Task Force provided data regarding the average initial and ongoing compliance costs for an IPO of $2.5 million and $1.5 million, respectively, which many still rely on today. A decade later, those costs have certainly changed and likely increased. Businesses and investors are worse off because of the SEC's failure to provide useful and timely information.

The *Middle Market IPO Cost Underwriting Act* would require the SEC to conduct a study of IPO costs and Tier 2 offerings for small- and medium-sized companies (those with an initial public float

[1] https://americansforprosperity.org/wp-content/uploads/2022/04/Coalition-Letter-to-SBC-JOBS-Act-4.0-4.5.22_.pdf

[2] https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf

determination under $700 million). Having accurate and recent data on IPO costs and the impact those costs have on capital formation will help policymakers determine how to encourage more companies to go and stay public.

AFP supports this legislation. However, due to the SEC's negligent history in providing such information, AFP recommends requiring the SEC to conduct IPO cost studies on an annual basis to provide a more accurate picture of IPO costs over time.

*Sec. 102, Emerging Growth Company Extension Act*

Roughly a decade ago, Congress passed the Jumpstart Our Business Startups (JOBS) Act of 2012 that made vast improvements to capital formation mainly through deregulatory efforts. One of the most effective provisions of the JOBS Act was included in Title 1's "IPO On-Ramp," which created what are known as "emerging growth companies" (EGCs) and exempts qualifying EGCs from a number of burdensome requirements. Companies qualify as an EGC for up to 5 years unless they have more than $1.07 billion in total annual gross revenue, issued over $1 billion in non-controvertible debt over the previous 3 years, or become a large accelerated filer[3]. EGC status has been particularly effective in encouraging smaller companies to pursue IPOs and allowing them to grow without the burden of certain regulatory requirements.

The *Emerging Growth Company Extension Act* would extend EGC status from 5 years to 10 years, providing regulatory relief to companies beyond 5 years that could still benefit from EGC status. AFP supports the *Emerging Growth Company Extension Act*, however, the legislation could be improved by extending the EGC status from 5 years to indefinite.

*Sec. 103, Dodd-Frank Material Disclosure Improvement Act*

The *Dodd-Frank Material Disclosure Improvement Act* would repeal senseless provisions that require companies to make public disclosures related to conflict minerals, mine safety, payments by resource extraction issuers, and the compensation ratio between CEOs and employees. These disclosures do not help investors gauge the value of their investment and are more likely to be used to manipulate corporate behavior at the behest of activists and other interested stakeholders.

Inundating companies with burdensome and politically charged disclosure requirements makes it harder for them to grow and provide innovative services for consumers. According to estimates by the Securities and Exchange Commission (SEC), the cost of complying[4] with the mandated disclosures is in the billions of dollars. Likewise, adding to the mountains of existing paperwork investors must sort through makes it harder to determine what is actually important regarding their investment.

Yet, it remains unclear how these disclosures align with the SEC's role or what an investor would consider material in making investment decisions. The SEC's core mission is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[5]" However, the mandated disclosures discussed above fall short in furthering the SEC's mission and create more obstacles and obstruction than protection of investors and robust markets.

[3] https://www.sec.gov/education/smallbusiness/goingpublic/EGC

[4] https://www.heritage.org/government-regulation/report/how-dodd-frank-mandated-disclosures-harm-rather-protect-investors/#_ftn17

[5] https://www.sec.gov/about.shtml

This legislation comes at a welcome time as the SEC proposed its burdensome and controversial rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*.

AFP supports this legislation and urges its inclusion in the final draft.

**Improving Private Markets:**

*Sec. 204, Small Entrepreneurs' Empowerment and Development (SEED) Act of 2022*

The SEED Act would create a micro-offering exemption to help small businesses and entrepreneurs gain access to capital without having to face burdensome and costly mandated disclosures or offering filings.

AFP supports this legislation and urges its inclusion in the final draft.

*Sec. 205, Unlocking Capital for Small Businesses Act of 2022*

The *Unlocking Capital for Small Businesses Act of 2022* addresses the failure of the SEC to properly account for finders or private placement brokers. A "finder" is someone who assists small businesses in accessing much needed capital by introducing them to potential investors, and in return are paid a fee for their service.

However, the regulatory status for finders has been unclear for some time, and the SEC's criteria for what constitutes a broker goes well beyond the statutory definition included in the Securities Exchange Act. Simply making an introduction between a business and investors for a small fee based on the amount raised should not require registration as a broker.

By exempting finders from registration and rightsizing regulations for private placement brokers, the *Unlocking Capital for Small Businesses Act of 2022* would allow finders and private placement brokers to work with small businesses and entrepreneurs to access capital without having to face the same regulations as registered broker-dealers. Moreover, by exempting finders from registering as brokers they would no longer have to bear the hefty registration costs[6], which are unsurprisingly often passed on to small businesses.

This is especially helpful for small businesses looking to launch or grow in areas where few people meet SEC's accredited investor definition. As previous SEC Chairman Clayton observed, "Many small businesses face difficulties raising the capital that they need to grow and thrive, particularly when they are located in places that lack established, robust capital raising networks.[7]" The SEC's treatment of finders is unworkable and hurts small businesses across the country.

AFP supports this legislation and urges its inclusion in the final draft.

*Codify and Expand Exemption from 12(g) "held-of-record"*

In President Biden's Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, it is noted that "The Division is considering recommending that the Commission propose amendments to the "held of record" definition for purposes of section 12(g) of the Exchange Act."[8] Changes to the definition could result in significant amounts of companies having to register with the SEC. Commissioner Peirce noted that increases to the thresholds for registration under the JOBS Act have "been especially important for pre-IPO companies that use equity as part of their employee compensation arrangements and for startups

[6] https://sbecouncil.org/2018/09/09/finders-keepers-new-legislation-would-help-entrepreneurs-access-capital/
[7] https://www.sec.gov/news/press-release/2020-248
[8] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AN05

in industries with high initial capital requirements. Lowering these thresholds may both contradict the express will of Congress and potentially undermine our mission to facilitate capital formation. A likely unintended consequence of lowering thresholds will be to limit the opportunity of employees, smaller investors, and other non-institutional investors to invest in promising businesses."[9]

Additionally, there have been indications of the SEC pursuing rulemaking that would change the way shareholders are counted, potentially targeting venture capital funds, mutual funds, and private-equity firms, with the intention of forcing privately held companies to register with the SEC.[10] The Ranking Member and members of the committee should consider provisions to ensure private markets remain efficient and robust, and public markets are made more appealing through deregulatory efforts.

AFP supports codifying the exemption from section 12(g) holder-of-record and broadening the exemption to include all Regulation A offerings.

*Eliminate Investor Limitations Under Regulation A*

Regulation A Tier 2 offerings are subject to investor limits that squeeze out opportunities for investors and keep them from controlling their own financial choices. Tier 2 offerings limitations require that investors must meet the accredited investor definition or be limited to investing 10 percent of the greater of their income or net worth for non-accredited investors[11].

AFP supports eliminating income and net worth limits under Regulation A.

*Codify "Test-the-Waters" Accommodation for All Issuers*

Under Chairman Clayton the SEC extended the "test-the-waters" accommodation to all issuers[12], which was previously available only to emerging growth companies. This allows all issuers to communicate and understand investor interest before pursuing an IPO. Representative Budd's *Encouraging Public Offerings Act of 2021* (H.R. 294) would codify this commonsense rule.

AFP supports codifying the "test-the-waters" accommodation for all issuers and urges its inclusion in the final draft.

**Increasing Access for Retail Investors:**

*Sec. 305, Improving Crowdfunding Opportunities Act*

The Improving Crowdfunding Opportunities Act would make capital formation through crowdfunding more viable, benefiting issuers, investors, and funding portals.

AFP supports this legislation and urges its inclusion in the final draft.

*Sec. 306, Equal Opportunity for all Investors Act*

In President Biden's Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, it is noted that the SEC may consider updating the financial thresholds in the accredited investor definition.[13] Increasing the financial thresholds would narrow the number of households that qualify as accredited investors even

[9] https://www.sec.gov/news/statement/peirce-roisman-falling-further-back-121321
[10] https://www.wsj.com/articles/sec-pushes-for-more-transparency-from-private-companies-11641752489
[11] 17 CFR § 230.251 (d)(2)(i)(C)
[12] https://www.sec.gov/news/press-release/2019-188
[13] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM85

further, which currently stands at just 13 percent[14], barring them from investing in Regulation D securities. It is important for Congress to ensure the accredited investor definition is as inclusive as possible, and not reserved exclusively to wealthy households or institutions. The government should not be in the business of dictating who gets to invest and how they choose to do so.

Additionally, allowing investors to self-certify as accredited investors under Rule 506(c) will increase use of the exemption, which raised just $211 billion of the roughly $1.7 trillion raised through Regulation D in 2018[15]. More investors will likely utilize Rule 506(c) without having to hand over intrusive information regarding their finances.

The *Equal Opportunity for all Investors Act* would significantly increase access to Regulation D securities by expanding the accredited investor definition and allowing self-certification under Rule 506(c).

AFP supports self-certification under Rule 506(c) and broadening the accredited investor definition to be as inclusive as possible.

*Sec. 307, Facilitating Main Street Offerings Act*

Currently, preemption of state blue sky laws for Regulation A Tier 2 offerings apply only to primary offerings. Because Regulation A Tier 2 secondary offerings remain subject to state blue sky laws, secondary markets for Regulation A are less appealing for investors. Preempting blue sky laws would allow for more efficient and robust secondary markets, making secondary market transactions more valuable for investors and thus increasing the ability for companies to raise funds through Regulation A.

AFP supports this legislation and urges its inclusion in the final draft.

AFP appreciates the opportunity to provide feedback on the JOBS Act 4.0 discussion draft. If there are any questions or concerns regarding the comments, please contact Gary Haglund (ghaglund@afphq.org) and Matthew Silver (msilver@afphq.org).

Sincerely,

Gary Haglund

Senior Policy Analyst, Economic Policy

[14] https://www.sec.gov/rules/concept/2019/33-10649.pdf
[15] https://www.sec.gov/rules/concept/2019/33-10649.pdf