



April 20, 2021

The Honorable Maxine Waters  
Chairwoman  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Patrick McHenry  
Ranking Member  
Committee on Financial Services  
U.S. House of Representatives  
Washington, DC 20515

**Re: April 20, 2021 Committee Markup**

Dear Chairwoman Waters and Ranking Member McHenry:

The American Securities Association (ASA)<sup>1</sup> wishes to provide comments on legislation the House Financial Services Committee is expected to consider at markup on April 20<sup>th</sup>.

America's capital markets have a well-deserved reputation as the most transparent, liquid, and reliable of any country in the world. This is largely due to a "trust but verify" regulatory system administered by the Securities and Exchange Commission (SEC) that promotes transparent corporate disclosure, allows investors to freely allocate their capital, and provides legal remedies to investors who are harmed. The Committee should make certain it adopts policies that incentivize capital to stay in and flow to U.S. companies.

As the Committee considers these bills, we are concerned that foreign companies, especially those in Communist China, would be exempt from any new disclosure mandates. The ASA believes it is imperative that any policy Congress or the SEC adopts maintains a level playing field among American and foreign companies. Exempting Chinese companies would give them an unfair cost advantage over American businesses competing for the same capital on American soil. As a result, we think that mandating costly disclosures for U.S. companies alone – while companies in Communist China are exempt from similar mandates – would be the ultimate self-inflicted wound for every American investor in our capital markets.

Our concern about exemptions is well-founded because we have seen recent diversity initiatives give special treatment to companies from Communist China.<sup>2</sup> If Congress and the SEC truly believe that ESG or other disclosure mandates are good for *all* companies, then they must be applied to *all* companies that choose to access the U.S. capital markets. Whether a foreign

<sup>1</sup> The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership of almost one hundred members that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

<sup>2</sup> <https://www.nationalreview.com/news/goldman-sachs-exempts-all-asian-companies-from-new-ipo-diversity-pledge/>;  
<https://www.nasdaq.com/articles/nasdaq-proposes-board-diversity-requirement-for-listed-companies-2020-12-01>





company accesses our markets directly on an exchange or indirectly through an index fund, it must be subject to all applicable securities laws and rules. Disclosure carveouts for companies from Communist China would be a special brand of absurdity, which if permitted would disadvantage American businesses and completely undermine the important goal of providing disclosure to American investors.<sup>3</sup>

With this in mind, the ASA offers the following perspectives on bills to be considered during the April 20<sup>th</sup> markup:

### **H.R. 1277, the “Improving Corporate Governance Through Diversity Act of 2021”**

The ASA appreciates that the Committee is once again considering this bipartisan legislation to inform investors about the diversity of directors of public companies. ASA members have long recognized the benefits of workforce inclusion and have taken actionable steps to hire and train individuals of all backgrounds. The boards and workforce of ASA members reflect this view. We believe the best way to build a sustainable economy is to ensure that *all* Americans have an opportunity to prosper, regardless of their race, creed, color, ethnicity, religion, gender, sexual orientation, or political views.

We support the *Improving Corporate Governance Through Diversity Act*. However, we believe the legislation could be strengthened. The diversity criteria should be expanded to include individuals of diverse viewpoints and diverse professional/educational backgrounds.

As this Committee has recognized, diversity can benefit board decision-making. Therefore, we believe that the inclusion of individuals of different genders, races, ethnicities, viewpoints, and experiences is necessary to achieve the policy goals this Committee rightly seeks to achieve.

The Committee should refrain from adopting policies that would promote boards composed of a club of individuals whose experience tracks a certain managerial/educational path or requires adherence to a particular point of view. Today, more than ever, public companies need the benefit of hearing from individuals with different experiences who will question and engage with executives about the appropriate direction and decision-making of public companies.

### **H.R.1087, the “Shareholder Political Transparency Act”**

The ASA strongly opposes this legislation.

Given that companies are already required to disclose their political contributions and lobbying activity, we fail to see what value duplicative regulation in this instance would add. We also question how the information required by this bill could possibly meet the test of “materiality”

<sup>3</sup> <https://www.americansecurities.org/post/asa-sends-letter-to-sec-highlighting-risks-to-investors-from-chinese-companies>





when comparing the actual dollar amounts associated with a public company's political activities to the total revenue of the company.

We note that a study found the market's perception of a company's value based on its stock prices is not related to a corporation's decision to either engage in or refrain from corporate political speech.<sup>4</sup> Shareholders of public companies also seem to understand this as large majorities have *consistently* rejected activist shareholder proposals in this area.<sup>5</sup> In short, the owners of the company do not believe management's political spending impacts a company's value or its financial performance. While these facts may be inconvenient, they should not be dismissed lightly.

As important, this bill seems to run afoul of the First Amendment because some provisions could have a chilling effect on free speech. Certain politicians have already made it clear that this disclosure will be used to "shame" companies who engage in the political process or choose to support certain organizations. This would allow the securities laws to be used as a public relations tool to silence political opposition.<sup>6</sup> The Committee should respect the First Amendment rights of all Americans and vote this bill down.

### **H.R. 1187, the "ESG Disclosure Simplification Act of 2021"**

A primary concern regarding ESG disclosure mandates is that they would create an unlevel playing field for American businesses. The 'double materiality' concept used by European regulators – which some have called for the SEC to adopt – has no corollary in the United States.<sup>7</sup> Businesses would spend an enormous amount of time and resources reorienting their compliance systems at a time when policymakers should want companies to be focused on hiring to help the American economy recover.

We also believe company management should be permitted to determine what is 'material' to its business using its own business judgment – just as management is now permitted to do for other risks that companies face.<sup>8</sup> We question the one-size-fits-all nature of disclosure, and request that any mandate adopted by this body not be prescriptive. Instead, any disclosure mandate should set forth general principles for management to follow. Judgements about material disclosure can be challenged by investors or the SEC in court, which provides an important check that incentivizes companies to provide accurate and full disclosure. This process has always worked, and we see no reason to change it in this instance.

<sup>4</sup> Roger Coffin, A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks, 8 HASTINGS BUS.L.J. 103, 150 (2012).

<sup>5</sup> <https://www.gibsondunn.com/wp-content/uploads/2020/08/shareholder-proposal-developments-during-the-2020-proxy-season.pdf>

<sup>6</sup> <https://www.sec.gov/comments/4-637/4637-1198.pdf>

<sup>7</sup> <https://www.irmagazine.com/esg/sasb-backs-european-plan-boost-esg-reporting>

<sup>8</sup> <https://www.sec.gov/interps/account/sab99.htm> "A matter is 'material' if there is a substantial likelihood that a reasonable person would consider it important."





Congress should also consider who benefits from creating a complex and prescriptive ESG disclosure framework. It appears that an entrenched professional class on Wall Street consisting of ESG standard-setters and ratings firms, well-heeled corporate attorneys and auditors, investment banks, asset managers, proxy advisors, and index providers will reap the benefits. This begs the question: why is Congress using ESG disclosure as a reason to adopt policies that will transfer money from the public companies owned by America's mom-and-pop investors directly to the Wall Street-industrial-complex? Retirees, working families, and those investing for a better future should have an answer to that question before the bill moves forward.

Finally, we would note that the bill allows the SEC to delay disclosure for small issuers. The inclusion of this provision acknowledges that the disclosures will impose significant cost burdens on public companies. Imposing such costs on small, emerging growth, and mid-sized companies will only serve to further entrench the large and mega-cap companies in our markets who can easily absorb them. Again, we question why the Committee would adopt policies that tip the scales in favor of the same companies that many in Congress believe are using their market power to harm consumers and distort our political economy.

### Conclusion

Communist China is the world's largest emitter of greenhouse gases, pays lip service to the Paris Agreement, and commits egregious "crimes against humanity" and genocide against its own people.<sup>9</sup> Companies from this country should not be able to access our capital markets through indexes or otherwise unless they comply with all of our securities laws. Therefore, we implore this Committee to make certain that every issuer, both foreign or domestic, and every foreign company included in an index offered by a fund issuer (i.e. ETF or otherwise) be explicitly subject to all of the U.S. disclosure mandates you will vote on today. Without your attention to this critical detail, **an unintended loophole will be created** that unfairly disadvantages American companies and deprives mom-and-pop investors of the disclosure that this body deems necessary for them to smartly allocate their capital.

The ASA appreciates this opportunity to comment on these bills and looks forward to working with all members of the Committee on these important issues.

Sincerely,

*Christopher A. Iacovella*

Christopher A. Iacovella  
Chief Executive Officer  
American Securities Association

<sup>9</sup> <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions>; <https://www.nytimes.com/2021/03/16/world/asia/china-coal-politics.html>; <https://www.justsecurity.org/74388/genocide-against-the-uyghurs-legal-grounds-for-the-united-states-bipartisan-genocide-determination/>.

