



NASAA

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June 15, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 1187, the Corporate Governance and Investor Protection Act of 2021

Dear Speaker Pelosi and Leader McCarthy:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing to express NASAA’s support for several provisions of H.R. 1187, the Corporate Governance and Investor Protection Act, which the House is scheduled to consider this week, as amended and favorably reported by the House Committee on Rules on June 14, 2020.² As further detailed below, NASAA also strongly supports two amendments to H.R. 1187 that were made in order by the Committee on Rules. The first such amendment addresses disclosure of information related to the diversity on the boards of directors of U.S. public companies, while the second amendment addresses disclosure of cybersecurity expertise at the leadership level of such companies. I sincerely appreciate your attention to NASAA’s views.

(1) The ESG Disclosure Simplification Act (Title I)

Increasingly, investors view a company’s environmental, social, and governance, or “ESG” practices, as a material metric for determining whether to invest.³ To date, however, there are no uniform standards for the reporting of environmental and certain other ESG factors in the United States. In the absence of such standards, public companies lack clarity when making

¹ The oldest international organization devoted to investor protection, NASAA was organized in 1919. Its membership consists of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² This letter addresses the version of H.R. 1187 that was amended to incorporate at least five distinct bills prior to being favorably reported by the House Committee on Rules on June 14, 2021. NASAA takes no position on provisions of H.R. 1187 that are not directly addressed in this letter.

³ For example, BlackRock, the world’s largest asset manager, recently announced that it would be asking companies it invests in to (1) publish disclosure in line with industry-specific Sustainability Accounting Standards Board (SASB) guidelines, or disclose a similar set of data in a way that is relevant to the particular business, and (2) disclose climate-related risks in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).” See Rick A. Fleming and Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, SEC Office of the Investor Advocate White Paper (2020) at 2, available at <https://www.sec.gov/files/making-mandatory-sustainability-disclosure-a-reality-white-paper.pdf>.

disclosures relating to ESG considerations. In some cases, they may have incentives to make selective or potentially misleading disclosures about the benefits of their practices, products, or services.⁴ Title I of H.R. 1187, the Corporate Governance and Investor Protect Act, seeks to remedy that problem.

The ESG Disclosure Simplification Act, as embodied in Title I,⁵ would require public companies to disclose in filings with the U.S. Securities and Exchange Commission (“SEC”) and any proxy or solicitation materials that describe the “views of the issuer regarding links between ESG metrics and the long-term strategy of the issuer” and any process the issuer uses to determine the long-term business strategy of the issuer. Further, the bill would express the non-binding “Sense of Congress” that “environmental, social, and governance [ESG] metrics” are “de-facto material” for the purposes of disclosure under the Securities Exchange Act of 1934.⁶ The bill would also create a new permanent “Sustainable Finance Advisory Committee” within the SEC, that would, within 18 months of its first meeting, be required to submit “recommendations about what ESG metrics” the SEC should require to be disclosed.⁷

The time has come to provide investors seeking to understand factors relating to a company’s ESG profile with the ability to accurately understand and weigh ESG risks in their investment decisions, and Congress can play an important role in this regard.⁸ NASAA has previously called for Congress to enact legislation that would direct the SEC to develop a uniform standard for ESG reporting by public companies so that investors can understand companies’ real practices and impact, and “make ‘head-to-head’ comparisons between

⁴ Oftentimes, those disclosures can make the company appear to its investors to be more environmentally friendly than it really is, a phenomenon also known as “greenwashing.” The result is investor confusion. See NASAA’s Legislative Agenda for the 117th Congress, Principle II (2021) at 8, available at <https://www.nasaa.org/wp-content/uploads/2021/03/NASAA-Legislative-Agenda-for-117th-Congress.pdf>.

⁵ Amendment in the Nature of a Substitute offered by Rep. Vargas of California. See https://financialservices.house.gov/uploadedfiles/04.20.2021_bills-117-1187-v000130-amdt-3.pdf.

⁶ NASAA takes no position on the Sense of Congress resolution. It is important to note that Sense of Congress resolution is not legally binding because it is not presented to the President for his signature. Indeed, according to the Congressional Research Service (CRS), “even if a ‘sense of’ provision is incorporated into a bill that becomes law, such provisions merely express the opinion of Congress or the relevant chamber. They have no formal effect on public policy and have no force of law.” See <https://fas.org/sgp/crs/misc/98-825.pdf>.

⁷ Additional and timely clarification regarding what ESG metrics should be disclosed to investors is necessary. Indeed, as the SEC Investor Advocate recently observed, “the case for ESG disclosure has become only stronger [in 2020],” however “adoption and implementation of prescriptive ESG-related disclosure requirements is extremely challenging when there is so much variation among the private-sector frameworks because the SEC may be reluctant to choose one model over the others in the absence of a clear consensus surrounding any particular framework. Without a critical mass of support for a particular model, it may require an act of the U.S. Congress to determine which standards should become the official metrics for ESG disclosure in the United States.” See <https://www.sec.gov/files/making-mandatory-sustainability-disclosure-a-reality-white-paper.pdf>.

⁸ As SEC Investor Advocate Rick Fleming observed last year, while “the case for ESG disclosure has become only stronger,” the actual “adoption and implementation of prescriptive ESG-related disclosure requirements is extremely challenging when there is so much variation among the private-sector frameworks because the SEC may be reluctant to choose one model over the others in the absence of a clear consensus surrounding any particular framework. Without a critical mass of support for a particular model, it may require an act of the U.S. Congress to determine which standards should become the official metric for ESG disclosure in the United States.” *Id.*

competing investments.”⁹ NASAA has also urged that Congress consider legislation that would direct the SEC to establish a task force to consolidate, to the extent possible, themes from existing reporting frameworks and standards in order to catalyze faster progress toward standardization.”¹⁰ Title I of H.R. 1187 marks an opportunity to “move the ball forward” on both of these recommendations; therefore, NASAA is pleased to support its passage.

(2) The Cybersecurity Disclosure Act (Amendment #1)

The Cybersecurity Disclosure Act, as filed as an amendment to H.R. 1187, is identical to stand-alone legislation recently introduced in the Senate as S. 808.¹¹ NASAA was pleased to support this important legislation at the time of its introduction, and we are pleased to support its inclusion in H.R. 1187.¹²

The Cybersecurity Disclosure Act would require publicly traded companies to include in their annual disclosure filings with the SEC information detailing whether any member of their governing body, such as their board of directors or general partner, possesses expertise or experience in cybersecurity. If no member has such expertise or experience, companies would be required to detail what, if any, other cybersecurity considerations were considered by the persons responsible for identifying and evaluating nominees for the governing body.

For nearly a decade, the list of public companies and financial institutions targeted by organized cyber-attacks has continued to grow with ever-increasing frequency. Over the past year, moreover, this threat has accelerated further due in part to the COVID-19 pandemic. Because many millions of Americans are conducting much or most of their lives online – and because an unprecedented number of U.S. employees are working remotely – cybercriminals and scammers have an abundance of opportunities to infiltrate business security networks to install malware, steal personally identifiable information (“PII”) of customers and clients, and create other problems.

Incentivizing publicly traded companies to consider whether they have appropriate cybersecurity expertise on their governing body is a common-sense way to promote greater attention to cybersecurity risk by public corporations. Investors and customers are well-served by policies that encourage companies to consider such risks proactively, as opposed to after a data breach has already occurred when investors and customers have already been harmed. Importantly, the Cybersecurity Disclosure Act does not require companies to do anything beyond disclosing information; the bill encourages companies to act in their own best interests by creating an incentive for them to prioritize cybersecurity expertise at the senior levels of leadership.

⁹ See NASAA’s Legislative Agenda for the 117th Congress, Principle II (2021) at 9, *available at* <https://www.nasaa.org/wp-content/uploads/2021/03/NASAA-Legislative-Agenda-for-117th-Congress.pdf>.

¹⁰ *Ibid.*

¹¹ <https://www.congress.gov/bill/117th-congress/senate-bill/808/text>.

¹² <https://www.nasaa.org/wp-content/uploads/2021/03/NASAA-Letter-Re-Cybersecurity-Disclosure-Act-of-2021-3.22.2021-Final-PDF.pdf>.

NASAA shares Congress's interest in addressing the threat cybersecurity risk has on public companies and investors. We are pleased to support Amendment #1, and we urge its passage.

(3) The Improving Corporate Governance Through Diversity Act (Amendment #11)

The Improving Corporate Governance Through Diversity Act, as filed as an amendment to H.R. 1187,¹³ is identical to stand-alone legislation entitled H.R. 1277, the Improving Corporate Governance Through Diversity Act. NASAA was pleased to support H.R. 1277 was it was considered and approved by the House Financial Services Committee in April 2020 and is pleased to again support the bill as an amendment to H.R. 1187.

The Improving Corporate Governance Through Diversity Act would require public companies to disclose annual information on the voluntary self-identified racial, ethnic, gender, and veteran composition of their boards of directors and executive officers.¹⁴ The bill would also require that such companies disclose whether their boards of directors have adopted any "policy, plan or strategy" to promote diversity among these bodies, and would instruct the SEC's Office of Minority and Women Inclusion to develop and publish "best practices," in order to help public companies comply with the new diversity reporting requirements. In addition, the Act would establish a new "Diversity Advisory Group" within the SEC, which would be exempt from the Federal Advisory Committee Act, and be comprised of representatives from the Federal government, state and local governments, academia, and the private sector. Under the Act, the Advisory Group would be tasked with identifying strategies to "increase gender, racial and ethnic diversity among members of the board of directors of the issuer," and be required to report periodically to Congress and the public.

NASAA has repeatedly called for Congress to examine the current state of corporate board composition with an eye toward encouraging greater diversity. In doing so, NASAA has noted that leading research indicates that greater board diversity correlates with sound corporate governance and enhances the performance of public companies. We have also noted evidence that shows that investors themselves increasingly regard corporate board diversity to be an indication of good governance, which improves both corporate performance and investor relations. Most recently, in NASAA's Legislative Agenda for the 117th Congress, state securities regulators called for Congress to pass legislation "to require public companies to disclose information that demonstrates the diversity on their boards, or the lack thereof, as well as information regarding the diversity of their corporate operations."¹⁵

¹³ Amendment #11 offered Rep. Meeks of New York, Rep. Torres of New York, and Rep. Maloney of New York. See https://amendments-rules.house.gov/amendments/MEEKS_028_xml210610120958010.pdf.

¹⁴ The information that would be disclosed would be based on "voluntary self identification."

¹⁵ See NASAA's Legislative Agenda for the 117th Congress, Principle III (2021) at 10, available at <https://www.nasaa.org/wp-content/uploads/2021/03/NASAA-Legislative-Agenda-for-117th-Congress.pdf>.

NASAA congratulates the House for its decision to consider including the Improving Corporate Governance Through Diversity Act as an amendment to H.R. 1187, and we urge its passage.

Thank you for your consideration of NASAA's views. If we may be of further assistance, please do not hesitate to contact me or Michael Canning, NASAA's Director of Policy and Government Affairs, at (202) 737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Hopkins". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Lisa Hopkins
NASAA President
General Counsel and Senior Deputy Commissioner of Securities, West Virginia

CC: The Honorable Maxine Waters
The Honorable Patrick McHenry