Testimony of

John A. Gulliver

Executive Director of the Committee on Capital Markets Regulation

Before the

Subcommittee on Capital Markets

Of the

Financial Services Committee

United States House of Representatives

Wednesday, March 20, 2024

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Thank you, Chair Wagner, Ranking Member Sherman, and members of the Subcommittee for inviting me to testify before you today on the topic of "SEC Overreach: Examining the Need for Reform." My name is John Gulliver, and I am the Executive Director of the Committee on Capital Markets Regulation. My testimony today is my own and does not necessarily reflect the views of the Committee on Capital Markets Regulation ("CCMR") or its members.

The United States more than any other nation depends on its capital markets to fuel economic growth and prosperity. Our capital markets are the largest and most efficient in the world because they are highly competitive and innovative. The Securities and Exchange Commission is tasked with the vital role of regulating approximately 3,600 public companies with a market capitalization of $47 trillion,[1] as well as the broker-dealers and investment advisers that provide 76 million U.S. households with an opportunity to invest in our markets and earn a return on their savings.[2] It is therefore critical that the SEC deliver on its mission to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[3]

Under Chair Gensler's leadership, the SEC has embarked on an unprecedented rulemaking agenda that will radically redesign the regulation of our securities markets and will have a major impact on the cost of being a public company and investing in our markets. Damage to the U.S. capital markets would also mean damage to the U.S. economy. The SEC is risking this outcome without a new statutory mandate or market crisis presenting a need for such holistic reform. Now is therefore precisely the time to consider whether reforms to the SEC's regulatory process are needed to ensure that such regulatory actions are consistent with the SEC's mission.

1. The SEC's Regulatory Agenda is Unprecedented

CCMR staff has prepared a comprehensive review of the SEC's rulemaking agenda under Chair Gensler. **Table 1** demonstrates that the SEC has proposed or finalized 48 substantive rulemakings since Chair Gensler entered office on April 17, 2021.[4] Of these rulemakings, 38 (or 79%) were *not* required by congressional statute, meaning that the overwhelming majority of the SEC's rulemaking agenda has been voluntarily undertaken.

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[1] *See, e.g.*, CENTER FOR RESEARCH IN SEC. PRICES, *CRSP Market Indexes: US Market Update* (Jan. 2024), https://www.crsp.org/wp-content/uploads/2024/03/CRSP_Market_Update_-_January_2024.pdf; WORLD FEDERATION OF EXCHANGES, *Statistics Portal* (2023 annual data), https://statistics.world-exchanges.org/.

[2] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Changes in U.S. Family Finances from 2019 to 2022: Evidence from the Survey of Consumer Finances* (Oct. 2023), https://www.federalreserve.gov/publications/files/scf23.pdf.

[3] SECURITIES & EXCHANGE COMMISSION ["SEC"], *Our Goals* (Apr. 6, 2023), https://www.sec.gov/our-goals.

[4] Substantive rulemakings exclude rulemakings that are routine, administrative and procedural, such as filing fee adjustments.

Critically, the SEC's rulemaking activity has many overlapping effects on each type of market participant, as demonstrated by **Appendix I**. For example, 14 rulemakings apply to public companies and 12 apply to investment companies. Yet, the SEC has conducted no comprehensive analysis of how those rulemakings will collectively impact public companies or investment companies. Furthermore, the SEC's economic analysis for each rule ignores any overlapping effects or conflicts with other proposed rules.

Moreover, the SEC's latest Regulatory Flexibility Agenda continues to chart an ambitious course toward additional rulemaking activity to come, including rules on corporate board diversity, human capital management disclosure, incentive-based compensation arrangements, credit rating agencies, proxy process amendments, index providers, and a host of other substantive areas.[5]

CCMR staff has also compared the overall incidence of rulemaking during Chair Gensler's term to the rulemaking agenda over the comparable time period for each of the past three chairs, i.e., Mary L. Schapiro, Mary Jo White, and Walter "Jay" Clayton. As set forth in **Table 1**, in contrast to Chair Gensler's 48 proposed and final substantive rulemakings, Schapiro, White, and Clayton issued 66, 31, and 40 proposed and final substantive rulemakings, respectively.

Chair Gensler's rulemaking count therefore substantially exceeds his immediate predecessors, Chair Clayton and Chair White. It is particularly instructive to compare Chair Gensler's tenure with Chair Schapiro's term, which began in the immediate aftermath of the 2008 failure of Lehman

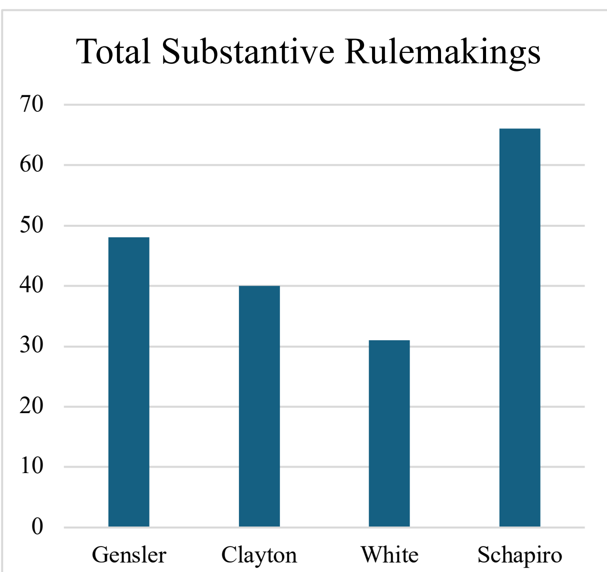
[5] *See* OFFICE OF INFORMATION & REGULATORY AFFAIRS, *Agency Rule List - Fall 2023 (Securities and Exchange Commission)*, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode&showStage=active&agencyCd=3235 (last visited Mar. 14, 2024); OFFICE OF INFORMATION & REGULATORY AFFAIRS, *Agency Rule List - Fall 2023 (Securities and Exchange Commission) for Long-Term Actions*, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=202310&showStage=longterm&agencyCd=3235 (last visited Mar. 14, 2024).

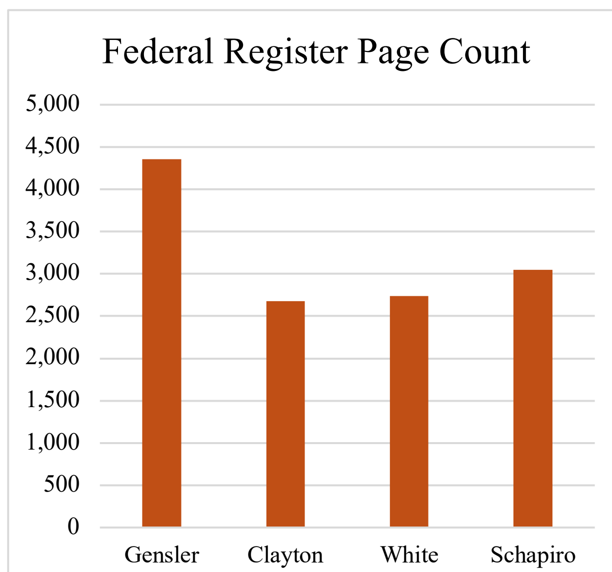
Brothers, included the ensuing global financial crisis and market crash, and culminated in the passage and implementation of the Dodd-Frank Act. Chair Schapiro's term was therefore necessarily going to involve substantial rulemaking activity. However, the Gensler chairmanship is only slightly lower in terms of total rulemaking actions than Chair Schapiro's term thus far, and, most importantly, 56% of Chair Schapiro's actions were statutorily mandated compared to only 21% of Chair Gensler's rulemakings. Moreover, Chair Gensler's rulemakings are particularly complex as demonstrated by the fact that their total regulatory page count in the *Federal Register* exceeds that of Chair Schapiro's tenure by nearly 50%.

Table 1: Substantive Proposed and Final Rulemakings by Recent SEC Chairs

(for each, the first 1,063 days of their term)

SEC Chair	Covered Dates	Proposed Rules	Final Rules	Total Substantive Rulemakings	Number of Rules Mandated by Statute	Federal Register Page Count
Gensler	April 17, 2021 to March 15, 2024	21	27	48	10 (21%)	4,357
Clayton	May 4, 2017 to April 1, 2020	25	15	40	7 (18%)	2,680
White	April 10, 2013 to March 8, 2016	21	10	31	20 (65%)	2,736
Schapiro	January 27, 2009 to December 26, 2011	40	26	66	37 (56%)	3,050





2. The SEC's Regulatory Process

The SEC's regulatory process is governed by the Administrative Procedure Act of 1946 (the "APA") which imposes a set of uniform procedural requirements on all federal agencies, requiring that: (a) agencies provide the public notice of proposed rules and an opportunity to comment on them ("notice-and-comment procedures");[6] (b) agencies publish their final rules;[7] and (c) agency actions be subject to judicial review and reversal if they fail to comply with the APA's procedural requirements or are otherwise "arbitrary and capricious."[8] The objective of the APA is to "achieve relative uniformity in the administrative machinery of the federal government,"[9] and to "ensure[] that the massive federal bureaucracy remains tethered to those it governs."[10]

The APA also requires that agencies acknowledge and account for the effects of one rulemaking on "contemporaneous and closely related rulemakings."[11] In other words, federal courts have explicitly required that an agency's "right hand take account of what its left hand is doing"[12] and have repeatedly held that an agency's failure to do so is arbitrary and capricious and invalidates the rulemaking.[13] Failing to consider the interactions and aggregate impact of interrelated proposed rules potentially subjects the public to conflicting or duplicative legal requirements and unnecessary compliance costs and contributes to an inefficient regulatory structure.

Courts have also held that the APA requires that any changes that a final rule makes to a proposed rule must be a "logical outgrowth" of the original proposal.[14] This principle is intended to

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[6] 5 U.S.C. § 553 (2023).
[7] *Id.* § 552(a)(1)(D).
[8] *Id.* § 706(2).
[9] U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947).
[10] *Riverbed Farms, Inc. v Madigan*, 958 F.2d 1479, 1483-1484 (9th Cir. 1992).
[11] *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011).
[12] *Id.* at 187.
[13] *Id.*; *see also*, *Off. of Commc'n of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).
[14] *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974).

recognize the need for agencies to adjust proposals to respond to public comments without repeating the entire notice-and-comment process, which would be inefficient, while ensuring that a final rule does not depart so widely from the proposal so as to deprive the public of a meaningful opportunity to comment on the rule.[15]

Economic Analysis

Under the National Securities Markets Improvement Act of 1996, Congress amended federal securities law requiring that "[w]henever . . . the [SEC] is engaged in rulemaking . . . the [SEC] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[16] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") and Fifth Circuit have held that the statutory language imposes an obligation on the SEC to weigh the costs and benefits of proposed regulation.[17]

In 2012, the SEC promulgated guidelines for its economic analyses (the "Current Guidance") establishing "high-quality economic analysis [as] an essential part of SEC rulemaking."[18] The Current Guidance recommends that economic analysis: clearly identify the justification for the proposed rule, including any market failures; define the baseline against which to measure the proposed rule's economic impact; identify and discuss reasonable alternatives to the proposed rule; and quantify the benefits and costs of the rule to the extent feasible, including addressing any data provided by commenters that is contrary to the SEC's assessment.[19]

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[15] Henry L. Lifton, *Defining Fair Notice: Logical Outgrowth Doctrine Applied to the Waters of the United States* 92 NOTRE DAME L. REV. 943 (2016), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4697&context=ndlr.
[16] 15 U.S.C. § 77b(b), 78c(f), 80a-2(c).
[17] *See, e.g.*, *Chamber of Commerce v. SEC*, 85 F.4th 760, 779 (5th Cir. 2023); *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).
[18] Division of Risk, Strategy, and Financial Innovation & Office of the General Counsel, SEC, *Memorandum Re: Current Guidance on Economic Analysis in SEC Rulemakings*(Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.
[19] *Id.* at 5-15.

3. Shortcomings with the SEC's Regulatory Process and Economic Analyses

Recent SEC rulemakings and associated economic analyses have unfortunately often failed to adhere to the legal standards and policies described above.

Insufficient comment periods

The comment periods for several recent SEC rulemakings have failed to reflect the proposals' significance, complexity, and interconnectedness. This has made it difficult if not impossible for commenters to fully analyze and respond to the proposals.

Courts have held that 30 days is the bare minimum comment period for an agency rulemaking proposal under the APA.[20] But the norms that have traditionally guided agency rulemakings provide that comment periods should typically be significantly longer than 30 days and reflect the complexity of the proposal. For example, the executive order that prescribes general principles for agency rulemaking indicates that comment periods should normally be at least 60 days.[21] The Office of the Federal Register's Guide to the Rulemaking Process, which describes the principles that govern rulemaking by federal agencies, such as the SEC, suggests complex proposals should have comment periods of 180 days or more.[22]

By contrast, the average comment period for the rule proposals on the SEC's docket as of November 1, 2023, was just 47 days.[23] At least seven of these proposals had 30-day comment periods.[24] And while certain proposals purported to provide 60 days for comment, the timeframe

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[20] *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019).
[21] Executive Order 12866 of Sept. 30, 1993, Fed. Reg. Vol. 58 No. 190 (Oct. 4, 1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.
[22] OFFICE OF THE FEDERAL REGISTER, *A Guide to the Rulemaking Process*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
[23] Written Testimony of Kenneth E. Bentsen, Jr. President and CEO of SIFMA Before the U.S. House of Representatives Financial Services Committee Subcommittee on Capital Markets Hearing Entitled: "Examining the SEC's Agenda: Unintended Consequences for U.S. Capital Markets and Investors (Nov. 2., 2023), https://docs.house.gov/meetings/BA/BA16/20231102/116527/HHRG-118-BA16-Wstate-BentsenK-20231102.pdf.
[24] JENNIFER J. SCHLUP & NICHOLAS ANTHONY, CATO INSTITUTE, THE SEC SHORT-CHANGES PUBLIC COMMENT

was formulated so that the comment period would potentially run only 30 days following the proposal's official publication in the Federal Register.[25] Comment periods of 30 to 60 days should normally only accompany rulemakings of minimal volume and complexity. But the opposite is true: An estimate by SIFMA found that a mere subset of the rulemaking proposals and requests for information issued by the SEC within a 12-month period constituted 3,570 pages and included 2,260 questions and requests for data.[26] A CCMR analysis of SEC rulemakings during Chair Gensler's tenure illustrates the complex and unpredictable interconnections between these proposals.[27]

Furthermore, the SEC under Chair Gensler has, relative to prior periods, undertaken minimal public engagement, such as via public roundtables, before publishing its proposed rules. As a result, recent SEC proposals generally do not reflect feedback from a broad range of affected parties.

The disproportionality between the SEC's unprecedented rulemaking agenda and the minimal comment periods that it has provided, and its lack of public engagement, suggest that the SEC may be seeking to speed the finalization and effectiveness of its rulemaking agenda to avoid the possibility of its rules being overturned by a new Administration or under the Congressional Review Act. That statute empowers Congress and the President to overturn agency rules by joint resolution within 60 days of the rule's finalization and receipt by Congress.[28] Thus, if Congress

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(2022), https://www.cato.org/blog/sec-short-changes-public-comment.

[25] *See, e.g.*, SEC, *SEC Proposes to Enhance Private Fund Investor Protection,* Press Release (Feb. 9, 2022), https://www.sec.gov/news/press-release/2022-19.

[26] BPI, SIFMA et al., Letter to Chair Gensler, "Importance of Appropriate Length of Comment Periods" 4 (Apr. 5, 2022), https://fsforum.com/a/media/importance-of-appropriate-length-of-comment-periods.pdf.

[27] CCMR, *Regulatory Incidence of SEC Proposed & Final Rulemakings (Gensler Chairmanship, April 17, 2021 to August 15, 2023)* (Aug. 31, 2023), https://capmktsreg.org/wp-content/uploads/2023/08/CCMR-Statement-on-SEC-Agenda-Mapping-08.31.2023.pdf.

[28] CONGRESSIONAL RESEARCH SERVICE, THE CONGRESSIONAL REVIEW ACT (CRA): A BRIEF OVERVIEW (updated Feb. 27, 2023), https://crsreports.congress.gov/product/pdf/IF/IF10023.

and the Presidency were to become Republican in the next election then the new Congress and President could overturn regulations finalized within 60 days of the new Congress through the Congressional Review Act. The speed of SEC rulemaking and effectiveness date may be designed to preclude this possibility.

Failing to consider interrelated proposals.

The SEC has also on several recent occasions issued interrelated rule proposals but failed to consider the aggregate impact or interaction between those proposals. This has resulted in overlapping and conflicting regulations and overall incoherencies in the SEC's policymaking process. As one prominent example, the SEC recently finalized its short selling disclosure rule,[29] which delays the public release of short selling data by one month and aggregates the data so as to avoid quickly disclosing an individual market participant's short positions, because doing so would discourage short selling activity that is beneficial for capital markets.[30] However, the SEC's securities lending disclosure rule, which was finalized on the same day, inexplicably requires daily disclosure of transaction-level information for the securities loans that are used to facilitate short sales.[31] The daily disclosure of the securities loans underlying the short sales is the equivalent to disclosing the short sale itself, therefore the SEC's securities lending rule would publicly disclose the very short selling positions that the SEC was seeking to avoid disclosing in its short selling

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[29] SEC, *Short Position and Short Activity Reporting by Institutional Investment Managers*, Exchange Act Release No. 34-98738, 88 Fed. Reg. 75,100, 75,132-33 (Nov. 1, 2023).
[30] *Id.* at 75,126.
[31] SEC, *Reporting of Securities Loans*, Exchange Act Release No. 34-98737, 88 Fed. Reg. 75,644, 75,741-42 (Nov. 3, 2023).

disclosure rule.[32] The SEC's securities lending rule is currently being legally challenged in the Fifth Circuit for this and other shortcomings.[33]

Ignoring the logical outgrowth principle

Recent SEC rulemakings have also departed significantly from the proposed versions without reopening the comment process. This has deprived the public of a meaningful opportunity to comment on the proposal and conflicts with the logical outgrowth doctrine outlined above. The SEC's securities lending rule again provides an instructive example. The final version of the SEC's securities lending rule introduced a 20-day delay in disclosure of the loan size for a securities loan that was not included in the proposed rule.[34] In the final release, the SEC claimed that the delay would avoid publicly exposing the short selling positions that were the basis of the securities loans.[35] But as CCMR explained in its amicus brief to the Fifth Circuit in the lawsuit challenging the securities lending rule, the SEC's rationale is invalid, and the contemplated delay will not provide the claimed benefits.[36] The public never had the opportunity to make these comments during the rule proposal stage, because the delay provision was not contemplated in the proposed rule, and the SEC did not reopen the comment process after making this change to the proposal.

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[32] Brief for *Amicus Curiae* Committee on Capital Markets Regulation in Support of Petitioners at 14, *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 23-60626 (5th Cir. Mar. 12, 2024), ECF No. 21, https://capmktsreg.org/wp-content/uploads/2024/03/CCMR-Amicus-Brief-%E2%80%93-SEC-Securities-Lending-Rule-Litigation.pdf.

[33] MANAGED FUNDS ASSOCIATION, *NAPFM, MFA, and AIMA Challenge SEC Securities Lending and Short Position Reporting Rules* (Dec. 12, 2023), https://www.mfaalts.org/press-releases/napfm-mfa-and-aima-challenge-sec-securities-lending-and-short-position-reporting-rules/.

[34] SEC, *Reporting of Securities Loans*, Exchange Act Release No. 34-98737, 88 Fed. Reg. 75,644, 75,665 (Nov. 3, 2023).

[35] *Id.* ("Such concerns are largely addressed by requiring that an RNSA delay public disclosure of the loan amount by 20 business days.")

[36] Brief for *Amicus Curiae* Committee on Capital Markets Regulation in Support of Petitioners, *supra* note 32, at 23-24.

This failure to abide by the logical outgrowth principle is another basis on which the securities lending rule is being legally challenged.[37]

Economic Analysis

Although recent economic analyses by the SEC have been lengthy and purported to examine many issues, CCMR has found that these economic analyses have often been based on material factual inaccuracies, riddled with conclusory assertions, failed to contend with fundamental issues, and ignored significant amounts of empirical research that reveal the potential for significant costs or cast doubt on purported benefits of a proposal.[38] CCMR has raised concerns that this may reflect a trend of seeking to demonstrate a technical or superficial compliance with the APA with the aim of achieving a specific regulatory agenda rather than treating the economic analysis as an opportunity for an objective and self-critical analysis of the costs and benefits of a rule.[39]

Inadequate economic analysis exposes rulemakings to legal challenges thereby creating costly market uncertainty. In the recent case of *Chamber of Commerce v. SEC,* the Fifth Circuit held that when the SEC asserts that a rulemaking will create benefits by addressing a purported problem in the market, the SEC's economic analysis must demonstrate with evidence that the problem actually exists.[40] In this case, the SEC asserted that its share repurchase rule would address the problem of managers of public corporations opportunistically timing share buybacks to financially benefit themselves. But the court found that the SEC failed to offer any evidence that improperly timed

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[37] *See* Opening Brief for Petitioners at 50-53, *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 23-60626 (5th Cir. Mar. 5, 2024), *available at* https://www.aima.org/asset/D2DC3124-7E14-4420-838AD9E47AEE99BB/..
[38] *See, e.g.*, COMMITTEE ON CAPITAL MARKETS REGULATION ["CCMR"], *U.S. Financial Regulatory Agencies and the Rule of Law*, at 3-5 (Oct. 18, 2022), https://capmktsreg.org/wp-content/uploads/2022/11/CCMR-Financial-Regulatory-Agencies-and-the-Rule-of-Law-10.18.22.pdf.
[39] *Id*. at 5.
[40] *Chamber of Com. v. SEC*, No. 23-60255, 2023 WL 7147273 (5th Cir. Oct. 31, 2023).

buybacks actually occurred and were a "genuine problem" in the market.[41] The court also found that the SEC claimed that it was impossible to quantify the rule's effects but then ignored evidence that commenters provided demonstrating that such a quantification was in fact possible.[42] The court found that this was "arbitrary and capricious" and was therefore another fatal flaw in the economic analysis and invalidated the SEC's rule.[43]

The economic analyses for several recent SEC rulemakings have suffered from these same issues. Two particularly significant examples are the economic analyses for (1) the private funds rule and (2) the four related equity market structure proposals. The inadequacy of the SEC's economic analysis for its private funds rule is one key basis on which that rule is currently being legally challenged in the Fifth Circuit.[44]

Private Funds

In its private funds rule, the SEC asserted that there is a lack of competition in the market for private investment fund advisers and that its rule will benefit the market by enhancing competition.[45] However, the SEC's economic analysis failed to demonstrate that there is any such problem with competition in the private funds market. First, as addressed by CCMR's comment letters and amicus brief in the Fifth Circuit case, the SEC's economic analysis ignored the fundamental metrics that both government authorities and academic experts use to measure

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[41] *Id*. at *11.
[42] *Id.* at *9.
[43] *Id.*
[44] AMERICAN INVESTMENT COUNCIL, *AIC Joins Lawsuit Against SEC for Unlawful Private Funds Advisers Rule that Harms Small Businesses, Investors, and the Economy* (Sept. 1, 2023), https://www.investmentcouncil.org/aic-joins-lawsuit-against-sec-for-unlawful-private-fund-advisers-rule-that-harms-small-businessesinvestors-and-the-economy/.
[45] SEC, *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance*, Advisers Act Release No. IA-6383, 88 FED. REG. 63,206, 63,360 (Sept. 14, 2023).

whether a market is competitive, including price competition and industry concentration.[46] Moreover, the evidence on private fund fees, net-of-fee performance and industry concentration in the private funds market decisively demonstrates that the private-funds market is highly competitive.[47]

Furthermore, the SEC claimed in its economic analysis of the private funds rule that it "lacks the information necessary" to quantify the costs and benefits of the rule.[48] However, the economic analysis ignored data from the SEC's very own Form Private Fund filings, which contains detailed data on fees and net-of-fee returns for thousands of private funds going back to 2013, which the SEC could have used to determine whether there is an actual problem with competition in the private funds market.[49] The SEC also largely ignored the voluminous evidence presented by commenters, including over 200 empirical studies, indicating that the SEC's basic characterization of the private funds market as uncompetitive is inaccurate.[50] Because of these and other flaws with the private funds rule, the Fifth Circuit is currently considering whether to invalidate it.

Equity Market Structure

The economic analyses for the SEC's four interrelated equity market structure ("EMS") rules suffer from the same critical flaws. Specifically, the SEC asserted that the current U.S. equity market structure is uncompetitive and that the off-exchange segment of the U.S. equity market is

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[46] CCMR, *Committee Files Amicus Brief Challenging the SEC's Private Funds Rule*, 12 (Nov. 2023) https://capmktsreg.org/wp-content/uploads/2023/11/CCMR-Amicus-Brief-Private-Funds-Litigation.pdf.
[47] *Id.* at 14.
[48] SEC, *supra* note 45 at 63,293.
[49] CCMR, *supra* note 46 at 22-23.
[50] *Id*. at 25.

too concentrated.[51] The SEC's economic analyses asserted that the EMS proposals will benefit the market by increasing competition and reducing concentration.[52]

However, the economic analyses failed to substantiate any such problem with the U.S. equity market structure. In fact, the SEC ignored empirical evidence showing the opposite. CCMR's comment letter demonstrated that the U.S. equity market structure provides investors with the lowest transaction costs out of all jurisdictions in the world, and that these costs have been declining over time.[53] Indeed, retail investors now benefit from commission-free trading at the major brokerages.[54] With regard to concentration, CCMR presented an analysis showing that concentration in the market for off-exchange trading, is substantially lower than in the market for on-exchange trading and below the threshold that the FTC and DOJ use to identify concentrated marketplaces for purposes of antitrust analysis, thus directly undercutting the SEC's rationale for the rule.[55] In addition, the SEC based its economic analysis on non-public Consolidated Audit Trail ("CAT") data but did not publicize this data – which could have been anonymized to protect confidentiality – in connection with its proposal, even after multiple commenters identified it as crucial to assessing the economic analyses.[56] As such, commenters could not assess the reliability

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[51] *See, e.g.*, *See, e.g.*, SEC, *Order Competition Rule*, Exchange Act Release No. 34-96495, 88 Fed. Reg. 128, 190 (Jan. 3, 2023); Chair Gary Gensler, *Statement on Proposal to Enhance Order Competition*, SEC (Dec. 14, 2022), https://www.sec.gov/news/statement/gensler-order-competition-20221214.

[52] SEC, *Regulation Best Execution*, Exchange Act Release No. 34-96496, 88 Fed. Reg. 5,440, 5,529 (Jan. 27, 2023); SEC, *Disclosure of Order Execution Information*, Exchange Act Release No. 34-96493, 88 Fed. Reg. 3,786, 3,862 (Jan. 20, 2023); SEC, *Order Competition Rule*, Exchange Act Release No. 34-96495, 88 Fed. Reg. 128, 178 (Jan. 3, 2023); SEC, *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*, Exchange Act Release No. 34-96494, 87 Fed. Reg. 80.266, 80,337, 80,349 n.717 (Dec. 29, 2022).

[53] CCMR, Comment Letter Re.: File Number S7-29-22 – *Disclosure of Order Execution Information*; File Number S7-30-22 – *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*; File Number S7-31-22 – *Order Competition Rule*; File Number S7-32-22 - *Regulation Best Execution*, at 5-6 (Mar. 31, 2023), https://capmktsreg.org/wp-content/uploads/2023/04/CCMR-Comment-Letter-on-EMS-Proposals-03.31.23.pdf.

[54] *Id.* at 45.

[55] *Id.* at 8-9.

[56] *See, e.g.*, Virtu Financial, Comment Letter Re: Order Competition Rule, Release No. 34-96495; File No. S7-31-22 (Mar. 30, 2023), https://virtu-www.s3.us-east-

of the data or the validity of the conclusions that the SEC drew from that data. The economic analyses for the EMS proposals therefore demonstrate the same fatal flaws as the share buyback rule.

4. Enhancing the SEC's Regulatory Process – Economic Analyses and Other Procedural Reforms

A well-reasoned and evidence-based economic analysis is both a legal requirement and essential for SEC rulemakings to achieve their policy goals. I therefore support legislative reforms to clarify and enhance the criteria for the SEC's economic analyses. Various reforms of this type have been proposed in the SEC Regulatory Accountability Act and other bills. Although some of these reforms reflect criteria that the courts have already articulated based on existing statute, codifying these principles will reduce the likelihood of litigation, increase certainty for market participants and the SEC, and streamline the rulemaking process.

For example, as part of its economic analyses, the SEC should be required to:

- *Clearly identify and substantiate that a market failure exists and that a proposed rule will address the failure:* For each of its rulemakings, the SEC should be required to show in its economic analysis how the rule would address an identifiable problem in the market and substantiate with evidence that the problem actually exists.[57] Several recent SEC rulemakings have failed to do so.[58]

1.amazonaws.com/uploads/documents/Virtu%20Financial%20Inc.%20Re%20Order%20Competition%20Rule%20Release%20No.%2034-96495_File%20No.%20S7-31-22.pdf.

[57] *See* SEC Regulatory Accountability Act, H.R. 9603, 117th Cong. § 2 (2022) (requiring the SEC to "clearly identify the nature and source of the problem that the proposed regulation is designed to address, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted").

[58] *See, supra* pp.13-15 (discussing Private Funds and Equity Market Structure rules).

- *Make a reasonable determination that the benefits of a proposed rule outweigh its costs:* A basic principle of sound policymaking is that the benefits of a rule should outweigh its costs. The law requires that the SEC seek to identify the positive and negative economic effects of its proposals, but it should be clear that the results of that cost-benefit analysis must be positive for a rulemaking proposal to become law.[59]
- *Quantify the costs and benefits of a proposed rule to the extent reasonably possible:* As detailed above, several recent economic analyses have failed to use readily available data to quantify the economic effects of a rule despite the SEC's claims that such a quantification is not possible.[60] The law should be clear that the SEC must quantify the economic effects of its rules where such a quantification is reasonably possible, and that the SEC must take account of relevant data supplied by commenters.[61] Both the U.K.[62] and the E.U.[63] have similar requirements.
- *Consider the effects of other related proposed rules:* In several of its recent economic analyses, the SEC has omitted consideration of the effects of its related and contemporaneous proposals.[64] Economic analyses that ignore the consequences stemming

[59] H.R. 9603 § 2 (requiring the SEC to "…adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the regulation").
[60] *Id.*
[61] *See* Independent Agency Regulatory Analysis Act of 2017, S. 1448, 115th Cong. § 3(b)(1)&(2) (2017) (specifying that the President may require an independent regulatory agency to publish a quantification of costs and benefits, to the extent feasible, for economically significant rules); see also id. § 3(a)(7) (specifying that the President may require an independent regulatory agency to "base its rulemaking decisions on the best reasonably obtainable scientific, technical, economic, and other information…").
[62] UK Public General Acts, *Financial Services and Markets Act 2000*, § 138I (Jan. 30, 2024), https://www.legislation.gov.uk/ukpga/2000/8/section/138I.
[63] European Commission, *Better Regulation: Joining forces to make better laws*, Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions (2021), https://commission.europa.eu/document/download/199176cf-6c4e-48ad-a9f7-9c1b31bbbd09_en?filename=better_regulation_joining_forces_to_make_better_laws_en.pdf.
[64] *See, e.g.*, SEC, *Reporting of Securities Loans*, Exchange Act Release No. 34-98737, 88 Fed. Reg. 75,644 (Nov. 3, 2023); SEC, *Regulation Best Execution*, Exchange Act Release No. 34-96496, 88 Fed. Reg. 5,440 (Jan. 27, 2023); SEC, *Disclosure of Order Execution Information*, Exchange Act Release No. 34-96493, 88 Fed. Reg. 3,786 (Jan. 20, 2023); SEC, *Order Competition Rule*, Exchange Act Release No. 34-96495, 88 Fed. Reg. 128 (Jan. 3, 2023); SEC,

from the interaction and aggregate impact of interrelated rules are not grounded in reality and are therefore ineffective. Although these omissions may violate the SEC's existing obligation to perform an adequate economic analysis, this basic principle of requiring sound economic analysis should be strengthened in new legislation.

In addition to reforms that improve the quality of the SEC's economic analyses, I also support legislation clarifying and supplementing other aspects of the SEC's rulemaking procedures. For example:

- *Adding a general look-back requirement*: The SEC should be required to periodically review its past rulemakings and to identify rules that have become obsolete, redundant, or ineffective.[65] While the Regulatory Flexibility Act includes a version of this requirement, it is limited to rules that affect a large number of small businesses.[66] Generalizing this requirement to all SEC rules would better ensure that outdated rulemakings do not unduly curtail competition or innovation. Financial regulation in other jurisdictions implement similar principles. For example, the EU's financial regulatory framework requires that regulators periodically review existing rules to assess their continued effectiveness and, if necessary, recommend that they be amended or repealed.[67]
- *Increasing the minimum comment period*: SEC rule proposals are increasingly complex, lengthy, and wide-ranging. They also commonly contain numerous questions and requests for data and analysis from market participants. It is important that affected parties have

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Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Exchange Act Release No. 34-96494, 87 Fed. Reg. 80.266 (Dec. 29, 2022).
[65] *See* SEC Regulatory Accountability Act, H.R. 9603, 117th Cong. § 2 (2022) (requiring periodic assessment of "major rules") (citation omitted).
[66] 5 U.S.C. §§ 601-612.
[67] *See, e.g.,* MiFID II, Art. 90.

sufficient time to analyze and respond to these proposals, including the SEC's questions and requests for data. Many of the SEC's recent comment periods are clearly insufficient in this regard. The SEC should be subject to a statutory minimum comment period of 60 days, with an extended minimum of 180 days for complex or economically significant rulemakings, consistent with the Office of the Federal Register's Guide to the Rulemaking Process.

- *Requiring the proposal of related rulemakings together*: The SEC should be prohibited from simultaneously proposing related and overlapping rulemakings separately to avoid potential conflicts between rules and to ensure a coherent approach to policymaking. This will also facilitate economic analyses that account for the interaction and aggregate impact of interrelated rules.
- *Requiring re-proposals after major changes from an initial proposal*: The courts have held that current statutes require the SEC to repropose a rule when the final rule is not a "logical outgrowth" of the original proposal. This is necessary to ensure the public has the ability to comment on major SEC actions. However, the application of this standard can be unclear and become the subject of litigation. Legislation should provide for a clearer standard.

Appendix 1: Regulatory Incidence of SEC Proposed & Final Rulemakings (Gensler Chairmanship, Apr. 17, 2021 – Mar. 15, 2024)