

STATEMENT OF

DALIA O. BLASS

PARTNER, SULLIVAN & CROMWELL LLP

on

**“EXAMINING THE SEC’S AGENDA: UNINTENDED CONSEQUENCES FOR U.S.
CAPITAL MARKETS AND INVESTORS”**

before the

**SUBCOMMITTEE ON CAPITAL MARKETS OF THE COMMITTEE ON FINANCIAL
SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES**

November 2, 2023

2128 Rayburn House Office Building

Chairman Wagner, Ranking Member Sherman, and Members of the Subcommittee, thank you for the opportunity to testify today on this important topic. My name is Dalia Blass, and I am the Senior Investment Management Partner at Sullivan & Cromwell LLP. I am testifying in my personal capacity and not on behalf of Sullivan & Cromwell or any of its clients.

Before joining the Firm, I was a Senior Managing Director, Global Head of External Affairs, and a member of the Global Executive Committee at BlackRock, where I led teams that managed the firm's key regulatory, policy, and reputational challenges and opportunities. Prior to that, I had the honor of serving at the U.S. Securities and Exchange Commission ("SEC" or "Commission") for more than 14 years. I started at the SEC as an Attorney Adviser in the Division of Investment Management and had the privilege of culminating my tenure as the Director of the Division. The Division's work is critical to ensuring that America's Main Street investors have access to high-quality investment opportunities from which they can make well-informed investment decisions. The breadth and strength of our capital markets—the deepest and most liquid in the world—enable hardworking Americans to save for retirement, send their children to college, and achieve their financial goals.

Based on my experience at the SEC, in industry, and in private practice, I am concerned by the pace and scope of the SEC's rulemaking agenda, as well as the process under which many of these proposals were issued. If finalized and implemented, these rules would—both individually and in the aggregate—significantly reshape an industry that is serving investors well and would do so without regard to adverse consequences.

At the outset, let me be clear that I believe Congress and the Commission play vital roles in modernizing and enhancing investor protection and the resilience of our capital markets. I strongly support well-reasoned rulemaking that fulfills the SEC's tripartite mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.¹

My support for such rulemaking is clear from my record as Division Director, where I recommended several major rules for the Commission's consideration that improved investor protection and the resilience and efficiency of our markets, including: (i) enhancing the regulatory framework for the use of derivatives by registered investment companies and business development companies;² (ii) addressing valuation practices and clarifying how fund boards of directors can satisfy their statutory obligations in light of market developments;³ and (iii) modernizing rules governing adviser advertisements and payments to solicitors.⁴ During my

¹ See SEC, "About the SEC" (describing the SEC's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation), available at <https://www.sec.gov/about>.

² See Use of Derivatives by Registered Investment Companies and Business Development Companies, 85 Fed. Reg. 83,162 (Dec. 21, 2020).

³ See Good Faith Determination of Fair Value, 86 Fed. Reg. 748 (Jan. 6, 2021).

⁴ See Investment Adviser Marketing, 86 Fed. Reg. 13,024 (Mar. 5, 2021).

time as Division Director, the Division finalized more than 70 regulatory initiatives affecting investment companies and investment advisers.⁵

The Division's staff and I focused on modernizing the regulatory framework for key parts of the asset management industry that were operating under outdated rules (or, worse, staff guidance and individual exemptions). For example, we issued a rule that modernized the regulation of the \$6.5 trillion exchange-traded fund industry,⁶ and established a clear and consistent framework for the vast majority of ETFs in operation.⁷ We also issued a rule that established a consistent and comprehensive regulatory framework for fund of funds arrangements, replacing outdated rules and individuals exemptions.⁸

In addition, following decades of debate and a number of failed proposals, we issued rules to enhance the quality and transparency of retail, and every day American, investors' relationships with investment advisers and broker-dealers, including: (i) finalizing a standard of conduct for broker-dealers when they make recommendations to retail customers;⁹ (ii) issuing an interpretation of the federal fiduciary standard for investment advisers;¹⁰ and (iii) adopting new rules and forms to require investment advisers and broker-dealers to provide retail investors with simple, easy-to-understand information about the nature of their relationships with their financial professionals.¹¹ These rules have empowered retail investors to better understand and compare the services offered by financial professionals and to make more informed choices regarding the financial professionals best suited to their individual needs and circumstances.

My tenure at the Commission deepened my appreciation for the important role of asset management in our economy and the lives of Main Street investors. Regulated funds provide professional management, reasonable cost, and exposure to assets and strategies that investors could not obtain on their own.¹² These funds have democratized investments for Main Street

⁵ See Press Release, Securities and Exchange Commission, "Dalia Blass to Conclude Tenure as Director of the Division of Investment Management" (Dec. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-335>.

⁶ See Investment Company Institute, *2023 Investment Company Fact Book* (May 2023), available at <https://www.ici.org/system/files/2023-05/2023-factbook.pdf>.

⁷ See Exchange-Traded Funds, 84 Fed. Reg. 57,162 (Oct. 24, 2019).

⁸ See Fund of Funds Arrangements, 85 Fed. Reg. 73,924 (Nov. 19, 2020).

⁹ See Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019).

¹⁰ See Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669 (July 12, 2019).

¹¹ See Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33,492 (July 12, 2019).

¹² See, e.g., Jack Pitcher, "Index Fund Fees Push Closer to Zero," WALL STREET J. (Sept. 18, 2023, 6:05 PM), available at <https://www.wsj.com/livecoverage/stock-market-today-dow-jones-09-18-2023/card/index-fund-fees-push-closer-to-zero-FM7B1vXvXLZJ1CjvkIxC> ("An individual investor can now build a fully balanced portfolio using ETFs without paying more than 0.05% in total fees, said Susan Thompson, head of SPDR Americas distribution at State Street, compared with around a 1% average fee 20 years ago . . . Fees

investors. Private funds are integral to portfolios of well-managed pension plans and endowments and have been key to the continued growth of the U.S. economy, driving job creation and innovation.¹³ The U.S. asset management industry far outpaces every other country in the benefits it provides to investors and is a primary driver of our nation's economy. Regulations, and any changes to existing regulations, should be undertaken with care and rigor. They should recognize the dynamic, multi-faceted and interdependent nature of our capital markets. They should enhance the industry's ability to grow, innovate, compete, and better provide more Main Street investors with well-regulated products and services that enable them to save for retirement and meet their financial goals.

I. The SEC's interconnected current rule proposals are substantively flawed and procedurally deficient.

This is why I am concerned with the breadth, pace, and scope of the SEC's current rulemaking agenda.¹⁴ Many of these significant rulemakings are not being conducted in response to a legislative mandate from Congress, nor has the Commission demonstrated any market failure or regulatory failure in support of their breadth and scope.¹⁵

Many of the proposals fail to show an accurate understanding of the markets or the participants they seek to regulate.¹⁶ Many rely on speculative statements rather than rigorous

make a huge difference over a longtime horizon: A \$1 million account invested for 40 years would save about \$370,000 in fees at a 0.05% fee versus a 1% fee, according to a State Street analysis.”)

¹³ In 2022, the U.S. private equity sector directly employed 12 million workers earning \$1 trillion in wages and benefits and directly generated \$1.7 trillion of U.S. GDP. Suppliers to the U.S. private equity sector employed an additional 7.8 million workers earning \$700 billion in wages and benefits and generating \$1.1 trillion of U.S. GDP. The consumer spending of workers of the U.S. private equity sector and its suppliers supported an additional 11.5 million workers earning \$700 billion in wages and benefits and generating \$1.3 trillion of U.S. GDP. See EY, *Economic contribution of the US private equity sector in 2022* (Apr. 2023), available at <https://www.investmentcouncil.org/wp-content/uploads/2023/04/EY-AIC-PE-economic-contribution-report-FINAL-04-20-2023.pdf>.

¹⁴ This testimony draws from letters submitted to the SEC by the Investment Company Institute and the American Investment Council. See Letter from Investment Company Institute to SEC Chair Gary Gensler (Aug. 17, 2023), available at <https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf> (“ICI Letter”); Letter from American Investment Council to SEC Chair Gary Gensler (Aug. 8, 2023), available at <https://www.sec.gov/comments/s7-03-22/s70322-245759-509782.pdf> (“AIC Letter”).

¹⁵ See *infra* note 20.

¹⁶ For example, the Commission's proposal to update the definition of “dealer” fails to take into account that common activities undertaken by investment advisers, including managing distinct client accounts that follow similar investment objectives and strategies, could subject those accounts to be treated as “dealers” under the Exchange Act. See Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer, 87 Fed. Reg. 23,054 (April 18, 2022) (“Dealer Definition Proposal”). Unfortunately, the Dealer Definition Proposal does not consider how those accounts could, from a practical or common sense standpoint, comply with being designated as “dealers.” The Dealer Definition Proposal also fails to address how designating private fund accounts as dealers would interact with (i) broker-dealer net capital requirements and liquidity rights frequently granted to investors, (ii) customer asset and sales practice protections that are not currently available to broker-dealers under applicable SEC and FINRA regulations, and (iii) existing FINRA regulations relating to restricted access to the U.S. IPO market for broker-dealers and certain owners of broker-dealers. In another example, in

substantive analysis backed by factual and empirical evidence.¹⁷ Many do not reflect how intermediaries operate nor how the interconnections among them will cumulatively affect the operation and function of our capital markets.¹⁸ If adopted and allowed to take effect, I believe that they could disrupt the operation and efficiency of our capital markets.

With dozens of rule proposals in our hindsight, we are now starting to see interconnections and interdependencies across many of the rules. The SEC, however, has not appeared to consider these interconnections in any rigorous manner nor has it provided commenters with any analyses of these interconnections, including from an operational or compliance perspective. Moreover, the pace of rulemaking comes at a time when the attention of market participants is directed at navigating their businesses through stresses such as inflation and a high interest rate environment.

To address the substantive and procedural deficiencies with respect to rule proposals that are interconnected or interdependent, the SEC should:

- publish a thorough analysis of their cumulative effect that accounts for interconnections among them, as well as any other rules the Commission intends to propose in the near term;
- reopen comment periods thereafter to provide stakeholders with an opportunity to understand and assess these interconnections holistically; and
- only with the benefit of these efforts, finalize the rules holistically—not in an isolated series—with phased, multi-year implementation schedules that take into account the interconnections and costs of the rules.

connection with proposed revisions to the adviser custody rule, the SEC fails to perform the analysis necessary to understand that many types of assets will be unduly burdensome or impossible to custody (e.g., non-security contractual investments, real estate, and loans). *See* Safeguarding Advisory Client Assets, 88 Fed. Reg. 14,672 (Mar. 9, 2023) (“[Safeguarding Proposal](#)”). The Safeguarding Proposal also threatens to completely shut down the prime brokerage market for no discernable reason, as it would prohibit re-hypothecation of collateral by broker-dealers acting as qualified custodians, even when re-hypothecation is otherwise permitted under applicable SEC regulations.

¹⁷ *See, e.g.*, Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, 87 Fed. Reg. 77,172 (Dec. 16, 2022) (noting that the proposed measures “may” address the underlying policy proposal); *see also* Letter from Representatives Ann Wagner and Brad Sherman to SEC Chair Gary Gensler (Mar. 9, 2023), *available at* <https://wagner.house.gov/sites/evo-subsites/wagner.house.gov/files/evo-media-document/wagner-sherman-letter-to-sec-swing-pricing-3.9.23.pdf> (“We are writing to express our concern with the [SEC’s] recent proposal on open-end fund liquidity risk management programs and swing pricing . . . We are concerned that the rule will have far-reaching negative impacts without clear justification, adequate substantive economic analysis or supporting data.”); *see also* Letter from Representatives Ann Wagner, Brad Sherman, and 36 Other Members of Congress to SEC Chair Gary Gensler (Sept. 9, 2023), *available at* <https://sherman.house.gov/sites/sherman.house.gov/files/F%20Letter%20to%20SEC%20re%20Swing%20Pricing%20and%20Hard%20Close%20FINAL.pdf>.

¹⁸ *See* ICI Letter, *supra* note 14 at notes 13-15 and accompanying text; *see also* AIC letter, *supra* note 14 at notes 25-31 and accompanying text for a discussion of interconnected rules.

A. The failure to analyze and consider the interrelated and cumulative impacts of the rules is without precedent and is not justified by any exigencies or legislative mandate.

Over the past two-and-a-half years, the SEC has issued an unprecedented number of rule proposals,¹⁹ and has not analyzed and considered the interrelated and cumulative effects of its 47 proposed or finalized rules. This rulemaking push is breathtaking in scope and affects the entire financial market ecosystem. Assessed on an individual or aggregate level, these rules have the potential to fundamentally alter the capital markets, how investors interface with the markets, and the availability of products on which investors rely to meet their financial goals. Taken as a whole, the proposals would radically alter the regulatory framework applicable to funds, public companies, audit firms, custodians, national exchanges, security-based swap dealers, and broker-dealers, among others.

Not only does the Commission lack any significant legislative mandate for this heavy rulemaking agenda,²⁰ it is also not acting in response to extraordinary market dislocations or regulatory failures. Indeed, the current pace of rulemaking outpaces the Commission's rulemaking agenda following the enactment of the Dodd-Frank Act, pursuant to which the Commission had a statutory mandate to promulgate several dozen rules.²¹

The proposals have been issued at a rapid-fire pace and without, (i) as many members of this Committee have noted to the Commission, adequate notice and opportunity for public comment, leaving stakeholders without the ability to fully appreciate and evaluate the impacts and interdependencies of the rules;²² or (ii) adequate analysis or explanation by the Commission of the necessity, or the individual or cumulative costs and impacts, of these proposals. The absence of these critical hallmarks of reasoned rulemaking risks harming our economy, our

¹⁹ An analysis of the SEC's spring 2023 rule list published as part of the Unified Agenda of Regulatory and Deregulatory Actions found that the SEC is on pace to propose and finalize 63 new rules by the end of Chair Gensler's first four years in office, compared to 22 rules and 43 rules during the entire terms of former Chairs White and Clayton, respectively. See SIFMA, "The Unprecedented Speed and Volume of SEC Rulemaking" (Sept. 21, 2023), available at <https://www.sifma.org/resources/news/the-unprecedented-speed-and-volume-of-sec-rulemaking/>.

²⁰ See Committee on Capital Markets Regulation, *The Unprecedented Pace of SEC Proposed and Final Rulemakings Continues* (Aug. 31, 2023), available at <https://capmktsreg.org/wp-content/uploads/2023/08/CCMR-Statement-on-SEC-Agenda-Mapping-08.31.2023.pdf> ("...the SEC has proposed or finalized 47 substantive rulemakings over the approximately 28 months since Chairman Gensler entered office on April 17, 2021. Of these rulemakings, fully 39 (or 83%) were *not* required by congressional statute, meaning that the overwhelming majority of the SEC's rulemaking agenda has been voluntarily undertaken.").

²¹ See SEC, "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act," available at <https://www.sec.gov/securities-topics/dodd-frank-act>.

²² Letter from Representatives Bill Foster, Andy Barr, and 45 Other Members of Congress to SEC Chair Gary Gensler (Apr. 13, 2022), available at <https://www.sec.gov/comments/s7-03-22/s70322-20127548-288697.pdf>.

capital markets, funds, and investors, including retirement savers, who rely on these products for their financial well-being.

B. The rules would have a significant impact—both individually and in the aggregate—on investors, but lack adequate cost-benefit analyses.

Many of the proposals’ cost-benefit analyses do not adequately capture the current vulnerabilities (if any) of affected markets or reasonably estimate the effects of the proposed rule changes on investors, market participants, market function, or capital formation.

For example, the SEC’s fund liquidity proposal would limit the availability of products for Main Street investors and create two classes of shareholders depending on time zone or method of purchase.²³ In addition, the SEC’s proposal on conflicts of interest associated with the use of predictive data analytics by broker-dealers and investment advisers would have a sweeping effect—impacting every SEC-registered broker-dealer and investment adviser, as well as their associated persons—imposing costly, burdensome, duplicative, and conflicting obligations.²⁴ The SEC’s safeguarding proposal would impose requirements that are inconsistent with the nature of how certain markets and banks operate, which could result in significant market disruptions and would also make it more difficult for banks to serve as qualified custodians.²⁵ The SEC’s private funds rule would treat private funds like regulated funds—ignoring the statutory limitations on regulating these structures that Congress statutorily mandated—and impact their ability to continue supporting growth and innovation in our economy.²⁶ These examples are not exhaustive.

Not only do the cost-benefit analyses under these and other proposals lack an adequate explanation of interconnections among the related rulemakings, but they also provide very little analysis or explanation of alternatives that could support the Commission’s purpose at lower cost and ignore the impact on smaller market participants.²⁷ If finalized, these rules could have a

²³ See Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N–PORT Reporting, 87 Fed. Reg. 77,172 (Dec.16, 2022).

²⁴ See Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53,960 (Aug. 9, 2023).

²⁵ See Safeguarding Proposal, *supra* note 16; see also Comments of the Managed Funds Association, Rel. No. IA-6240; File No. S7-04-23 (May 8, 2023); Comments of SIFMA Asset Management Group, Rel. No. IA-6240; File No. S7-04-23 (May 8, 2023).

²⁶ See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 88 Fed. Reg. 63,206 (Sept. 14, 2023). As noted by the AIC Letter, “[i]f Congress had intended to grant the Commission the authority to fundamentally alter the regulatory ecosystem for private funds, it would have provided ‘clear congressional authorization’ to that effect. It did not.” (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)).

²⁷ For instance, the Commission failed to consider whether reasonable, less restrictive alternatives to the Private Fund Advisers Proposal could meet its objectives, including whether the rule could be tailored to apply to a subset of funds with the most vulnerable investors.

chilling effect on potential market entrants, leading to less choice in products and services and at higher costs.²⁸

C. The comment process is deficient when interrelated proposals do not acknowledge or analyze interconnections or dependencies.

As many of the proposals are deeply interconnected and impact interdependent aspects of the capital markets, the Commission should have conducted holistic rulemakings, as prior Commissions have done, that accounted for these interconnections and interdependencies.²⁹ By conducting roundtables, engaging in thorough analyses of interconnected proposals, and providing for robust comment periods, the Commission's rules are strengthened from the input of commenters.

II. There are significant consequences for the U.S. capital markets—and the Commission itself—if the SEC does not reverse course.

Not only does the process of good, reasoned rulemaking help to maintain the vibrancy and competitiveness of the U.S. capital markets—the deepest and most liquid capital markets in the world—but it also ensures the durability of the Commission's rules and the Commission's authority.

²⁸ Lack of adequate cost-benefit analyses on an individual and cumulative level ignores the attendant compliance costs and their disproportionate impact on smaller market participants. *See, e.g.*, Comments of the Investment Company Institute, Rel. No. IC-34441; File No. S7-22-21 (Apr. 11, 2022), at 21 (noting that even if funds could accommodate the operational challenges of swing pricing, only the largest funds would likely survive because the costs would be substantial and prohibitive for smaller funds).

²⁹ For example, prior Commissions have conducted holistic rulemakings with respect to fund disclosure, proxy voting advice, standards of conduct for financial professionals, swaps, and market structure. *See e.g.*, Chairman Jay Clayton, Statement at Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors (June 5, 2019) (noting extensive review of data in promulgation of Regulation Best Interest); U.S. Securities and Exchange Commission, Comments on Proposed Rule: Regulation Best Interest (including transcripts from Investor roundtables, among other meetings with relevant market participants), Chairman Jay Clayton, Statement at Open Meeting on Commission Actions to Enhance Transparency for Investors and the Commission (August 5, 2020) (noting substantial feedback from investors and others regarding modernizing and improving disclosure).

The SEC has already been sued over major rules that have been finalized,³⁰ and several potential legal challenges are looming.³¹ If SEC continues hurtling towards a finish line of its own making, it will harm the vibrancy of the U.S. capital markets, which rely on regulatory clarity and predictability. It will also potentially harm its own ability to fully and fairly regulate the capital markets as its authority is challenged and tested in courts.

III. Conclusion

As the SEC looks to the future, it must remain focused on maintaining the strength and accessibility of the U.S. capital markets for the next generations of investors, many of whom engage and interact with new technology and new products differently than current and previous generations.

Although I appreciate the importance of understanding the risks of use of predictive data analytics and artificial intelligence (AI) by advisers and broker-dealers, I believe we should do so in a studied fashion—that is, understand what the risks are, understand the potential shortcomings of current regulations, and engage with stakeholders for common-sense solutions to any such shortcomings. Rules that act as a *de facto* ban on technology—like the predictive data analytics proposal—risk in effect blocking access to generations of investors who are just beginning their investing journey.

The SEC is fortunate to have an incredibly talented slate of professional public service officials—lawyers, accountants, economists, analysts, and former industry specialists, among others. With time to do their job and an agenda grounded in the SEC’s critical tripartite mission, these talented officials have and will deliver on behalf of Main Street investors.

Thank you again for the opportunity to share my views with the Subcommittee. I look forward to answering your questions.

³⁰ See, e.g., Carolina Mandl, “US private funds industry sues securities regulator over new rules,” REUTERS (Sept. 1, 2023, 3:27 PM), available at <https://www.reuters.com/legal/government/us-private-funds-industry-sues-securities-regulator-over-new-rules-2023-09-01/>; Chris Prentice, “US Chamber of Commerce sues securities regulator over new share buyback rule,” REUTERS (May 12, 2023, 1:19 PM), available at <https://www.reuters.com/legal/us-chamber-commerce-sues-securities-regulator-over-new-share-buyback-rule-2023-05-12/>; Douglas Gillison, “Citadel Securities, trade body sue US SEC over ‘consolidated audit trail,’” REUTERS (Oct. 18, 2023, 4:58 PM), available at <https://www.reuters.com/markets/us/citadel-securities-trade-body-sue-us-sec-over-consolidated-audit-trail-2023-10-17/>.

³¹ See, e.g., Bob Pisani, “Gensler is testifying before Congress and facing increasing lawsuits over his many rule changes,” CNBC (Sept. 27, 2023, 10:10 AM), available at <https://www.cnbc.com/2023/09/27/sec-chair-gensler-facing-increasing-lawsuits-over-his-rule-changes.html>.