

March 16, 2023

Helen Albert
Acting Inspector General
Securities and Exchange Commission
Office of Inspector General

Dear Acting Inspector General Albert:

Under Chairman Gensler’s leadership, the Securities and Exchange Commission (“SEC”) has pursued an aggressive regulatory agenda. In the first six months of 2022, the SEC has published 20 notices of proposed rulemaking (“NPRMs”)¹ which take up 1,627 pages in the Federal Register and pose thousands of questions for comment. Many of the NPRMs propose new or amended regulations with far reaching consequences, and, if finalized, would cover activity the SEC has not previously regulated. Also, many of the NPRMs are interrelated and affect the same entities, meaning the SEC has forced commenters to analyze multiple, complex proposals simultaneously.² Since commenters have no way of knowing which parts of a proposal will make it into a final rule, their ability to assess and meaningfully comment on how one proposal will affect the policy implications of other proposals is limited. This is inconsistent with the SEC’s history and will have implications for securities markets and investors.³

Given these circumstances, it is essential that the SEC adhere to the procedural safeguards that govern its rulemakings under the Administrative Procedure Act (“APA”), the Securities Exchange Act (“SEA”), and the National Securities Market Improvement Act (“NSMIA”). Unfortunately, the SEC is shortcutting its analyses of the economic impact of proposals and shortchanging commenters with truncated comment periods.

We request that the SEC Office of Inspector General (“SEC OIG”) audit the SEC’s compliance with its rulemaking obligations. Specifically, we ask that you review and report back to us on the following topics:

- (1) The comment windows under Chairman Gensler’s leadership are materially shorter than under all previous modern Chairs. What is the basis for that inconsistency, and to what extent have these shortened comment windows potentially limited meaningful public comment?
- (2) A previous OIG report found that the SEC was using employees who lacked rulemaking experience to assist with rulemakings. How has the lack of rulemaking experience affected the SEC’s and regulated entities’ ability to assess the impact the proposed rules will have on competition, efficiency, and capital formation? and
- (3) To what extent is the SEC’s political leadership underutilizing the expertise of its career staff in formulating the proposed rules?

¹ See Federal Register, 2022 Securities and Exchange Commission Index, available at <https://www.federalregister.gov/index/2022/securities-and-exchange-commission#proposed-rule-securities-and-exchange-commission>

² See Committee on Capital Markets Regulation, “The Unprecedented Incidence of SEC Proposed and Final Rulemakings,” (July 15, 2022), available at <https://www.capmksreg.org/wp-content/uploads/2022/07/sec-rulemaking-diagram.pdf>.

³ Additionally, the SEC has dramatically expanded the scope of an existing rule through the No-Action process in a manner that may have impermissibly avoided requirements under the Administrative Procedures Act, imposing material new duties on market participants without any public notice, opportunity for public comment, or analysis by the SEC of the potential impact. See e.g., SEC No-Action Letters related to Rule 15c2-11, available here: <https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf> , here: <https://www.sec.gov/files/fix-income-rule-15c2-11-nal-finra-121621.pdf> and here: <https://www.sec.gov/files/fix-income-rule-15c2-11-nal-finra-113022.pdf>.

The SEC's Obligation to Provide the Public a Meaningful Opportunity to Comment on Proposed Rules

It is critical that the SEC “give interested persons an opportunity to participate in the rule making [process] through submission of written data, views, or arguments.”⁴ Soliciting public comment is an integral part of the rulemaking process,⁵ and failing to give the public adequate time to comment on a proposal risks introducing “arbitrariness and irrationality in[to] the formulation of [its] rules.”⁶

For that reason, multiple presidents have made clear that proposed regulations should have comment periods that “should generally be *at least* 60 days.”⁷ For larger, more complex proposals, 90 days or more should be the “usual” comment period length,⁸ and the APA may mandate a longer comment period for more complex rules.⁹ Similarly, where an agency “engages in a slew of interrelated rulemaking activity, 30 days is likely insufficient to provide a meaningful opportunity to comment on a highly technical and complex regulation.”¹⁰

The average length of the comment periods for the 20 NPRMs the SEC published in the first half of 2022 was 43 days.¹¹ While that length might be adequate for a less complicated rule published by itself, it fails to provide a meaningful opportunity to comment on the complex rulemakings the SEC has been initiating in overlapping proposals.¹² The SEC has published, on average, a new NPRM once every nine days in the first half of 2022, forcing commenters to balance multiple, technical rules at the same time. Moreover, on the occasions it has extended the comment periods, the SEC has repeated its original mistakes, failing to provide adequately long comment periods for complex rules; publishing multiple extensions almost simultaneously; and neglecting to explain why the short extensions are sufficient.¹³

The SEC's historical practices further highlights the inappropriateness of the agency's recent use of shortened comment periods. From 2013-2020, the SEC proposed 61 rules, 55 (~90 percent) of which had comment periods of 60 days or longer.¹⁴ By contrast, all but three of the 20 NPRMs the SEC published in the first half of 2022 have comment periods *less than* 60 days. Even in the aftermath of the 2008 financial crisis, when Congress tasked the SEC with completing complex rulemakings in a short period under emergency conditions, the agency still made less frequent use of truncated comment periods than the SEC under Chairman Gensler.¹⁵

⁴ 5 U.S.C. § 553(c).

⁵ *State of N. J., Dep't of Env't Prot. v. U.S. Env't Prot. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (“[N]otice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive.”).

⁶ *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

⁷ Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011), 76 Fed. Reg. 3821 (Jan. 21, 2011) (emphasis added); *see also* Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993), 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁸ *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d Cir. 2011).

⁹ *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 820–21 (N.D. Cal. 2020) (30 day comment period failed to provide public with meaningful opportunity to comment, in violation of the APA).

¹⁰ *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021).

¹¹ For purposes of the APA, a comment period starts when the official rule text is published in the Federal Register, not when an agency informally publishes the rule on its website. *See* 5 U.S.C. § 553 (b), (c).

¹² For example, the proposed “Enhancement and Standardization of Climate-Related Disclosures for Investors” and “Position Reporting of Large Security-Based Swap Positions” rules would, if finalized, radically alter the SEC's disclosure regime and require regulated entities to engage in complicated and detailed reporting activities. *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (April 11, 2022); *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, 87 Fed. Reg. 6652 (Feb. 4, 2022).

¹³ *Catholic Legal Immigration Network*, 2021 WL 3609986 at *3 (“Given the Rule's complexity and the numerous changes involved, it is troubling that defendants failed to . . . explain their” use of shortened comment periods).

¹⁴ Jennifer Schulp & Nicholas Anthony, “The SEC Short-Changes Public Comment,” Cato Institute (Jan. 14, 2022), available at <https://www.cato.org/blog/sec-short-changes-public-comment>.

¹⁵ *See generally* Congressional Research Service, Rulemaking Requirements and Legal Authorities in the Dodd-Frank Act (2010), available at <https://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf>.

The SEC’s Obligation to Assess Its Rules’ Impact on Efficiency, Competition, and Capital Formation

The economic analyses in the SEC’s recent NPRMs in many instances only pay lip service to the SEC’s regulatory obligations under the SEA and the NSMIA. Generally, when the SEC engages in rulemaking, it is required to consider whether its “action will promote efficiency, competition, and capital formation.”¹⁶ As a result, unless the agency “apprise[s] itself—and hence the public and the Congress—of the economic consequences of a proposed regulation,” the “promulgation of the rule [is] arbitrary and capricious and not in accordance with law.”¹⁷

An NPRM should measure the economic consequences of the proposed rule “against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.”¹⁸ That means the NPRM should describe the “existing state of efficiency, competition, and capital formation, against which to measure the likely impact of the proposed rule and the principal alternative regulatory approaches.”¹⁹ Thus, the SEC violates its statutory mandate by failing to “make any finding on the existing level[s] of competition, [efficiency, or capital formation] in the marketplace.”²⁰ Relatedly, wherever possible, the SEC must “adequately . . . quantify the certain costs [of its rules] or . . . explain why those costs could not be quantified.”²¹

Many of the SEC’s recent NPRMs contain economic analyses that fall short of these standards. For example, the Climate Disclosure NPRM contains little analyses of a baseline against which to compare projected costs and benefits, and fails to quantify most of the expected costs and benefits.²² Likewise, the Private Fund Advisers NPRM fails to assess existing levels of capital formation, competition, and efficiency, and fails to quantify costs and benefits, instead saying that it is “difficult to quantify how costly it would be to comply with the [proposed] prohibitions,” and that it is “difficult to quantify the benefits of these prohibitions.”²³ We are concerned the SEC may have breached its regulatory obligations by doing “nothing to estimate and quantify the costs” and failing to “make tough choices” about how to estimate costs and benefits,²⁴ and many of the NPRMs fail to explain the full scope of the proposals which makes it impossible for commenters to meaningfully engage with what little cost benefit analysis the SEC has provided. The SEC failing to provide robust assessments of how proposed rules would impact capital formation, competition, and efficiency further undermines the validity of these rulemakings, and will ultimately diminish the quality and legality of final rules eventually adopted.²⁵

The Underutilization of SEC Career Staff

The SEC should draw upon the expertise of career economists to ensure that proposed rules contain the robust economic analysis required by the SEA and NSMIA. As the SEC’s regulatory handbook states, “rulewriting staff should work with [Division of Economic and Risk Analysis] economists” when preparing regulatory impact analyses, and “work closely” with that office “to determine the appropriate

¹⁶ 15 U.S.C. § 78c(f); *see also* 15 U.S.C. § 80b-2(e); 15 U.S.C. § 78w(a)(2).

¹⁷ *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

¹⁸ SEC, Current Guidance on Economic Analysis in SEC Rulemakings 6 (March 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

¹⁹ *Id.* at 7.

²⁰ *Am. Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 178 (D.C. Cir. 2010).

²¹ *Business Roundtable*, 647 F.3d at 1149.

²² *See Climate-Related Disclosures*, 87 Fed. Reg. at 21428 (“In many cases . . . we are unable to reliably quantify . . . potential benefits and costs.”).

²³ *Private Fund Advisers*, 87 Fed. Reg. at 16944.

²⁴ *Business Roundtable*, 647 F.3d at 1150.

²⁵ This concern is especially acute given Chairman Gensler’s record from his time as head of the Commodity Futures Trading Commission of shortcutting cost-benefit analysis in the rulemaking process. *See The SEC’s Aversion to Cost-Benefit Analysis: Hearing Before the TARP, Financial Services and Bailouts of Public and Private Programs, Subcommittee of the H. Comm. on Oversight and Gov’t Reform, 112th Cong. 2–7 (2012)*, available at <https://republicans-oversight.house.gov/wp-content/uploads/2012/04/4-17-12-McCabe-Testimony.pdf> (testimony of Jacqueline C. McCabe, Exec. Dir. of Rsrch, Committee on Capital Markets Regulation).

approach for each rulemaking.”²⁶ The SEC OIG has similarly recommended that the SEC’s rulewriting divisions should look for ways for the agency’s “economists to provide additional input into cost-benefit analyses of SEC rulemakings to assist in including both quantitative and qualitative information to the extent possible.”²⁷

The inadequacies of the economic analyses of the SEC’s recent NPRMs raise concerns that the SEC’s political leadership may be sidelining the agency’s career staff as they pursue an expedited rulemaking agenda. This is particularly true given that the last time the SEC engaged in a series of rulemakings on the same scale as the agency’s current, expansive agenda, your office conducted an audit and concluded that agency’s rulewriting staff did not always maintain strong working relationships or fully consult with the agency’s expert economists.²⁸ We believe a similar audit is warranted given the magnitude of the rules the SEC is now proposing and the speed with which it is moving.

For all these reasons outlined above, we respectfully request that you launch a comprehensive audit of the SEC’s recent rulemaking activity. Please respond in writing by April 14, 2023, as to whether you will initiate such an audit. Thank you for your attention to this important matter.

Sincerely,



JOHN BOOZMAN
United States Senator



KATIE BRITT
United States Senator



MIKE CRAPO
United States Senator



STEVE DAINES
United States Senator



BILL HAGERTY
United States Senator

²⁶ SEC, Current Guidance on Economic Analysis in SEC Rulemakings 2, 7 (March 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

²⁷ SEC OIG, Follow-Up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings, Report No. 499, vii (January 27, 2012).

²⁸ See SEC OIG, Report of Review of Economic Analyses Performed by the Securities and Exchange Commission in Connection with Dodd-Frank Rulemakings 42 (June 13, 2011).