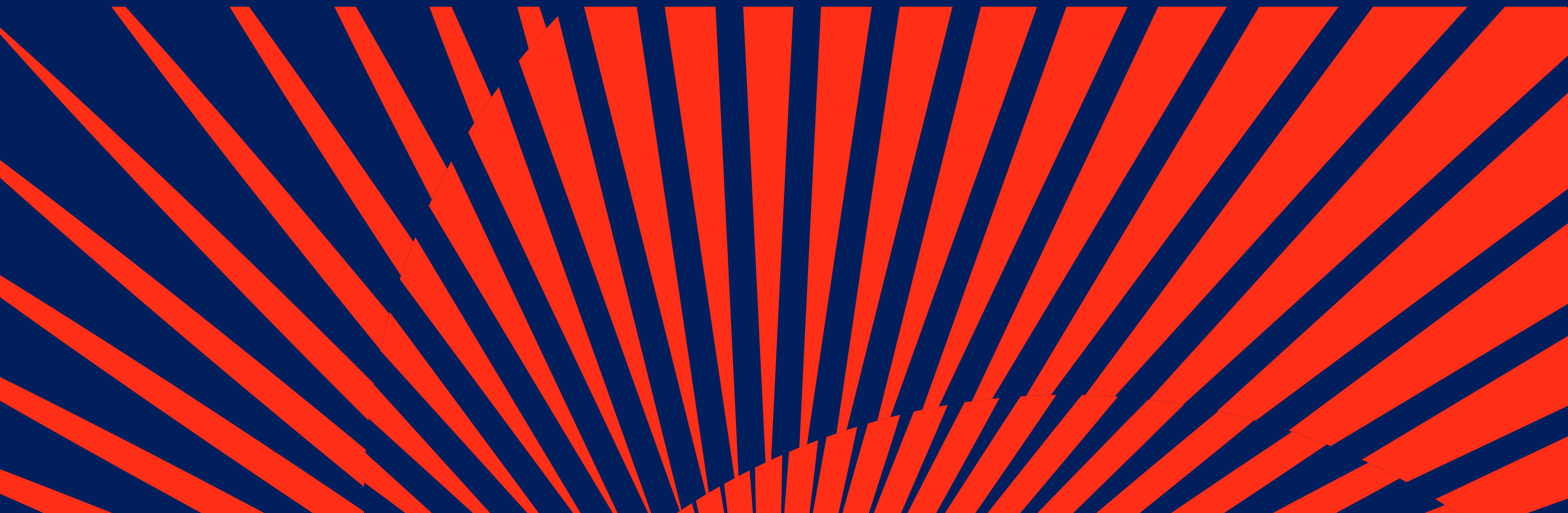
U.S. Chamber of Commerce
Center for Capital Markets
Competitiveness

Investors and the Markets First: Reforms to Restore Confidence in the SEC



Executive Summary

The U.S. capital markets are the largest, deepest, and most liquid in the world. They power economic growth and prosperity due to the efforts of both the public and private sectors. American businesses fuel the markets through innovation and competition, supporting employment and retirement security. Regulators can empower these endeavors through sound, tailored, informed, consistent, and transparent regulation that protects investors while promoting competition, innovation, and opportunity—thereby giving investors and other market participants confidence to participate and innovate.

The past three years have demonstrated that the Securities and Exchange Commission (SEC) has not lived up to its role in maintaining the strength of our capital markets. The undersigned trade associations have witnessed a concerning shift in the SEC's regulatory approach that threatens the resiliency of our capital markets and the financial well-being of American investors. The SEC has undertaken an unprecedented and often unlawful rulemaking agenda that, without sound justification, will radically redesign the foundation of our capital markets. The majority of the proposed changes are non-investment–, non-investor–, and non-market–oriented changes that limit choice and flexibility.

The SEC's approach does not generally reflect a single cohesive framework to improve efficiency, competition, and capital formation in the capital markets; rather, it would create fundamental shifts in the markets' functioning that the SEC fails to consider or analyze due to its piecemeal approach. The consequence of such an approach is that it will be harder for American companies to grow and compete and for American investors to pursue important investment objectives, including higher education and planning for retirement.

The SEC oversees the annual trading of approximately $118 trillion in U.S. equities markets and $237 trillion in fixed-income markets. Disclosures and financial statements of more than 5,000 exchange-listed public companies with an aggregate market capitalization of $51 trillion are subject to SEC regulation and review. The Commission regulates the activities of more than 29,000 registered entities (including investment advisers, broker-dealers, and investment companies), which employ at least one million people.[1] Broker-dealers and investment advisers provide 76 million American households with an opportunity to invest in our capital markets to meet their financial goals.[2]

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1. See Testimony of Jennifer J. Schulp, Director of Financial Regulation Studies, Center for Monetary and Financial Alternatives, Cato Institute, before the U.S. House Committee on Financial Services Subcommittee on Capital Markets Hearing on "SEC Overreach: Examining Need for Reform" (Mar 20, 2024) (citing Securities and Exchange Commission, Strategic Plan Fiscal Years 2022-2026, at 4, https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf) ("Testimony of Jennifer J. Schulp").

2. See Testimony of John A. Gulliver, Executive Director, Committee on Capital Markets Regulation, before the U.S. House Committee on Financial Services Subcommittee on Capital Markets Hearing on "SEC Overreach: Examining Need for Reform" (Mar. 20, 2024), https://capmktsreg.org/wp-content/uploads/2024/03/Gulliver-SEC-Testimony-03-20-24.pdf.

And the SEC oversees 24 national securities exchanges, nine credit rating agencies, seven registered clearing agencies, the Public Company Accounting Oversight Board, and the Financial Industry Regulatory Authority (FINRA), among other nongovernmental organizations.[3] Therefore, the reach and impact of the SEC's regulation is vast and affect entrepreneurs, investors, employers, and employees—both at home and abroad.[4]

Given the critical role of the SEC, we, on behalf of our members who are American investors, businesses, and market participants, call for much-needed reforms to preserve the public-private partnership that has been the hallmark of our successful capital markets. We call for reforms to protect and reinforce the SEC's role as an impartial regulator of the markets.

In furtherance of this purpose, on behalf of various signatory trade associations that represent different participants in the U.S. capital markets, this white paper (1) identifies areas where the SEC's current rulemaking agenda has deviated from regulatory process protections and (2) presents solutions to ensure that investors and the markets are always put first when the SEC considers regulatory reforms.[5]

The SEC current rulemaking has presented the following issues:

- **The SEC Has Ignored Its Obligations Under the Administrative Procedure Act (APA).**
  The SEC has engaged in a pattern of rulemaking that is arbitrary and capricious, eschewing its obligations under the APA. Many rules are unnecessary and fail to identify the market failure or problem they seek to solve.

- **The SEC Has Not Considered the Interconnectedness of Its Rules.**
  Many of the final rules fail to consider the cumulative substantive and procedural impacts of existing and other contemporaneously proposed rules. Interconnections are not analyzed, or they are given little consideration. Examples include rules that are duplicative or in outright conflict with existing or pending rules. Many of the SEC's recent rules are vague and ambiguous—whether intentionally or because of a rushed process. This ambiguity will raise costs of entry in our capital markets, discourage innovation, and limit opportunities for American investors—without providing additional benefits or protections.

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3. *See* Testimony of Jennifer J. Schulp, *supra* note 1.

4. *Id.*

5. This white paper represents the consensus view of the undersigned trade associations, and it is not necessarily true that each of the undersigned endorses each of the positions taken in this paper.

- **The SEC Has Adopted Final Rules That Differ Drastically From the Proposals.** Many final rules exhibit dramatic shifts from what was proposed. As a result, the final rules lack public input on the ramifications of the changes, rendering the comment process inadequate for purposes of the APA and heightening the risk of policy failure.

- **The SEC Has Exceeded Its Statutory Authority.** The SEC, in many cases, has exceeded its statutory authority by using rulemaking power that is inadequate to regulate the entities or activities subject to the rule.

- **The SEC Has Not Promoted Capital Formation.** No recent SEC rule or regulatory action has promoted capital formation or innovation—despite the SEC's explicit mission to facilitate capital formation and the powerful array of tools Congress provided the Commission to accomplish it.

- **Many of the SEC's Rules Will Disrupt Orderly Functioning of the Markets.** Further compounding the issue is the SEC's failure to undertake the necessary work to understand how markets and participants will be affected by proposed changes, leading to unnecessary and flawed rules that will in some cases disrupt the orderly functioning of the markets.

On behalf of our members, we call for consideration of the following reforms to ensure that rulemaking by the SEC promotes its mission and is bound by rigorous economic analysis.

- First, require the SEC to affirmatively conduct an analysis of all interrelated and interconnected rules (existing and contemporaneously proposed) for each proposed rule and then amend or repeal rules as necessary to account for such interconnections.

- Second, require the SEC to provide comment periods for proposals with a minimum of 60 days, calculated from the date published in the Federal Register, unless there is an emergency.[6]

- Third, require a third party to perform and publish for public comment no later than 90 days from the date of enactment a post-adoption cost impact assessment for each major rule the SEC has adopted in the past three years.

- Fourth, integrate and expand on the mission of several offices at the SEC, such as the Office of the Advocate for Small Business Capital Formation, Office of Strategic Hub for Innovation and Financial Technology, Office of Minority and Women Inclusion, and the Office of the Investor Advocate, to centralize and appropriately resource mandates that focus on opportunities for U.S. investors and market entrants as well as promote market innovation and capital formation.

- Fifth, require the SEC to (a) publish an annual report on the number of exemptions granted or exemptive rules adopted to promote capital formation and innovation, and the actions the SEC has taken to promote financial security, opportunity, choice, and wealth creation for American investors, and in particular retail investors; and (b) review and adjudicate exemptive applications under the Investment Company Act of 1940 ("1940 Act") for relief in no more than 180 days.

6. *SEC Overreach: Examining the Need for Reform*, Subcommittee on Capital Markets, Committee on Financial Services, 118th Cong. 2 (2024).

Business Roundtable

Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. GDP. Through CEO-led policy committees, Business Roundtable members develop and advocate directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans.

American Investment Council

The American Investment Council (AIC) is an advocacy and resource organization established to develop and provide information about the private investment industry and its contributions to the long-term growth of the U.S. economy and retirement security of American workers. Member firms of the AIC consist of the country's leading private equity and growth capital firms united by their successful partnerships with limited partners and American businesses.

The Center for Capital Markets Competitiveness, U.S. Chamber of Commerce

The Center for Capital Markets Competitiveness' (CCMC) mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world.

CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

The Investment Company Institute

The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $34.1 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $9.4 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

Managed Funds Association

MFA, based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

National Venture Capital Association

The National Venture Capital Association (NVCA) empowers the next generation of American companies that will fuel the economy of tomorrow. As the voice of the U.S. venture capital and startup community, NVCA advocates for public policy that supports the American entrepreneurial ecosystem. Serving the venture community as the preeminent trade association, NVCA arms the venture community for success, serving as the leading resource for venture capital data, practical education, peer-led initiatives, and networking. For more information about NVCA, please visit www.nvca.org.

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I. Discussion

A. The SEC Has Ignored Its Obligations Under the APA

The APA governs how federal agencies approach regulatory changes.[7] It requires proper notice and comment with respect to proposals and for courts to remand (and in certain cases vacate) final rules that fail to comply with the APA's procedural requirements or are otherwise arbitrary and capricious. APA requirements are not voluntary; they exist to ensure the input of all stakeholders. They circumscribe the power of an agency that could, if left unchecked, result in an abusive exercise of power.[8]

For many of the rules it has proposed and, in some cases, finalized, the SEC has failed to act consistently with the APA.

1. Many of the SEC's Rules Are Arbitrary and Capricious

The SEC's power to promulgate rules is not without limits. A regulation aiming at a problem is "highly capricious if that problem does not exist,"[9] and federal agencies are obliged to demonstrate that its rules respond to real-world problems and to assess the significance of such problems.[10]

For example, the Fifth Circuit Court recently granted the Chamber of Commerce's petition to set aside the Stock Buyback Rule because the SEC "acted arbitrarily and capriciously in failing to adequately respond to petitioners' comments and substantiate the rule's benefits."[11]

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7. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.

8. *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("The [APA] was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."); *see also* S. Doc. No. 248, 79th Cong., 2d Sess. 44-46 (1946) ("Although [the APA] is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law. . . ."); *New York Stock Exch. LLC v. S.E.C.*, 962 F.3d 541, 546 (D.C. Cir. 2020) ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002)).

9. *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1998); *see New York Stock Exch.*, 962 F.3d at 556 ("Normally, unless an agency's authorizing statute says otherwise, an agency regulation must be designed to address *identified* problems" as "*[r]ules are not adopted in search of regulatory problems to solve*; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address" (emphasis added)).

10. *See, e.g.*, Exec. Order No. 12866, 58 Fed. Reg. 51735, at § 1(b)(1) (Oct. 4, 1993) ("EO 12866") ("Federal agencies should promulgate only such regulations as required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."); *see also* Off. of Gen. Counsel & Division of Risk, Strategy, and Financial Innovation, Memorandum to Staff of the Rulewriting Divisions and Offices: Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), at 5 ("SEC Staff Economic Guidance").

11. *Chamber of Commerce,* 85 F.4th at 779. After the SEC failed to remedy the deficiencies in the rule during a remand period, the court vacated the rule effective as of December 19, 2023. *Chamber of Commerce v. S.E.C.*, 88 F. 4th 1115 (5th Cir. 2023).

In holding that the Buyback Rule's primary benefit—decreasing investor uncertainty about motivations underlying buybacks—was "inadequately substantiated," the Court noted that the SEC had not shown that there was a genuine problem with opportunistic or improperly motivated buybacks.[12] The Court stated that "[i]f opportunistic or improperly motivated buybacks are not genuine problems, then there is no rational basis for investors to experience any of the uncertainty the SEC now claims warrants the rule."[13] The court agreed that the lack of solving real-world problems evidences arbitrary and capricious rulemaking.[14]

Government agencies under the current administration have pushed an expansive regulatory agenda despite a strong financial system. Unlike previously intense periods of rulemaking, such as during the implementation of the Dodd-Frank Wall Street Reform and Consumer Act of 2010, which was in direct reaction to a financial crisis, the current administration is not pursuing regulation that responds to major market failures.

In fact, the White House has touted that the economy has added more than 13 million jobs, that 10 million applications for new small businesses were filed in 2021 and 2022, that our economy has experienced the strongest growth since the pandemic of any leading economy, and that unemployment is at record lows.[15] Nevertheless, during President Biden's first 18 months in office, agencies proposed 142 major and 451 significant rules.[16] By contrast, during the previous administration, agencies proposed only 81 major and 270 significant rules in the same period.[17] This is a 75 percent increase in major rules and a 67 percent increase in significant rules. The SEC has followed the same pattern.

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12. *Chamber of Commerce,* 85 F.4th at 778-79 (emphasis added).

13. *Id.* at 777 (emphasis added).

14. *Id.* at 779. *See also New York Stock Exch.*, 962 F.3d at 545–46 (vacating SEC's "one-off" regulation in part because SEC "did not identify any problems with existing regulatory requirements or propose rules that might rectify any perceived issues" but instead sought to "induce an *exogenous* shock to the market" (cleaned up)); *see also Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 468 F.3d 831, 842 (D.C. Cir. 2006) (finding an agency order framed as creating a solution to a problem was arbitrary and capricious where the agency "provided no evidence of a real problem"); *see also,* Hester M. Peirce, Comm'r, U.S. Sec. and Exch. Comm'n, Flexibility at the Expense of Clarity Statement on Adoption of Exchange Act Rules 9j-1 and 15fh-4(c) (June 7, 2023) ("The Commission instead should delay taking any action here and wait to see whether the problem of opportunistic trading strategies is significant enough to warrant a solution as blunt as the one before us today.") ("Peirce 9j-1 Statement"); Prohibition Against Fraud, Manipulation, Deception in Connection With Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers, 88 Fed. Reg. 42546 (June 30, 2023) ("Rule 9j-1").

15. The White House, *Bidenomics Is Working: The President's Plan Grows the Economy from the Middle Out and Bottom Up—Not the Top Down* (June 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/28/bidenomics-is-working-the-presidents-plan-grows-the-economy-from-the-middle-out-and-bottom-up-not-the-top-down/; *see also* Rebekah Goshorn Jurata, General Counsel, American Investment Council, Comment Letter on Proposed Amendments to Premerger Notification Rules under the Hart-Scott-Rodino Act (Sept. 27, 2023), https://www.investmentcouncil.org/wp-content/uploads/2023/09/American-Investment-Council-Comments-re-Proposed-HSR-Amendments-9.27.2023.pdf.

16. *See* Keith B. Belton, Regulatory Activity in the Biden Administration 1, Regulation: Regulatory Review (Fall 2022), https://www.cato.org/sites/cato.org/files/2022-09/regulation-v45n3-4.pdf. ("Belton Report"). Major rules include, among others, those that have resulted in, or are likely to result in, "an annual effect on the economy of $100,000 or more." 5 U.S.C. § 804(2)(A). "Significant rules" include (among other things) those with an annual economic effect of $100 million or more. *See* EO 12866, *supra* note 10, at § 3(f)(1).

17. *See* Belton Report, *supra* note 16.

During the first 1,063 days of Chair Gensler's tenure, the Commission has proposed or adopted 48 new rules, the majority of which are major rules.[18] Importantly, 79% of Chair Gensler's proposals were not mandated by congressional statute.[19] This high volume is despite the absence of any exigent circumstances, Congressional mandates, or market failures.[20] There is evidence to suggest that this unjustifiable pace and scope of rulemaking by the SEC will eventually be detrimental to investments, investors, and the U.S. capital markets, having the effect of increasing costs and decreasing competition.[21]

2. The SEC's Failure to Consider Interrelated and Cumulative Impacts of Rules Is an APA Violation

Over a decade ago, the D.C. Circuit held that agencies must "acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking."[22]

While courts afford considerable discretion to agencies conducting cost-benefit analyses, such discretion cannot excuse ignoring an important element of the cost-benefit analysis.[23] Disregarding the interrelatedness of rules is a serious flaw because the cost-benefit analysis fails to account for the actual, real-world impact of an agency's actions on market participants. For example, proposing rules that address the same or similar issues in different ways can result in inconsistent or illogical regulatory results.

And rules are not proposed in a vacuum: Each agency must examine whether existing regulations have created, or contributed to, the problem that a new regulation is intended to correct—and whether those regulations should be modified to achieve the intended goal of regulations more effectively.

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18. *See* Testimony of John A. Gulliver, *supra* note 2; *see also* Securities Industry and Financial Markets Association, SEC Rulemaking Tracker: Data Set, https://www.sifma.org/resources/general/sec-rulemaking-tracker/ (last accessed Apr. 11, 2024) (choose "SEC Rulemaking Tracker.xls"; then choose sheet titled "Proposals Comparison") ("SIFMA Rule Tracker") (indicating that by month 30, the Commission under Chair Gensler has issued 52 proposals, whereas for the same time period, Chair Clayton and Chair White had 35 and 28, respectively).

19. Under Chair Gensler, 38 out of 48 rules were voluntary. *See* Testimony of John A. Gulliver, *supra* note 2. The number of voluntary rules was calculated by subtracting the total substantive rulemakings by the number of rules mandated by statute (as determined by the Committee on Capital Markets Regulation). *See id.* "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law or are made necessary by compelling public need." *See* E.O. 12866, *supra* note 10, at §1(a); *see also* discussion, *infra* § I.D.

20. *See also infra* note 47 and accompanying text for a discussion of how multiple rules affect the same market participants.

21. *See, e.g.*, Greg Ip, *Europe Regulates Its Way to Last Place*, Wall Street J. (Jan. 31, 2024) (illustrating that excessive regulation in Europe both hurts investment in the continent and dampens return on invested capital for companies); Massimo Giordano et al., *Accelerating Europe: Competitiveness for a New Era*, McKinsey Glob. Inst. (Jan. 16, 2024) (proposing that Europe rethink its "precautionary approach" to regulation of the markets to facilitate increased competition with global capital markets).

22. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (per curiam) (responding to the EPA's assertion that it had no obligation to account for potential changes to the regulatory environment, explaining that "[i]t is not absurd to require that an agency's right hand take account of what its left hand is doing" and holding that the delay by the EPA in proposing definition for commercial and industrial solid waste incinerators until another related proposal's comment period has closed was arbitrary and capricious); *see also* Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (generally requiring agencies to "tailor . . . regulations to impose the least burden on society" and account for "the costs of *cumulative* regulations" (emphasis added)).

23. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 452 (5th Cir. 2021) (citation omitted); *see also New York Stock Exch.*, 962 F.3d at 553 (observing that courts have "made it clear that the SEC has a statutory obligation to determine as best it can the economic implications of [a proposed] rule" (cleaned up)); *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (stating that an Agency cannot "fail[] to 'apprise itself . . . of the economic consequences of a proposed regulation.'" (quoting *Chamber of Com. v. S.E.C.*, 412 F.3d 133, 144 (D.C. Cir. 2005)).

To do this, the agency should analyze the economic consequences against a baseline of current rules, which is the agency's best assessment of how the world would look in the absence of the proposed action.[24] The SEC has failed to adequately undertake this exercise to determine whether, under existing regulation, sufficient protections exist.[25]

The SEC's rulemaking agenda reflects examples of rules that are designed to address the same problem and affect overlapping categories of market participants—without rigorous analysis of such rules' costs and benefits, either in isolation or cumulatively.

For instance, the SEC proposed six rulemakings in just over two years that would dramatically alter the structure of the equity markets by, among other things, changing the ways stock orders are regulated. None of the proposals or final rules analyzed the overlapping, cumulative, or compounding economic impacts.[26] In fact, the proposals barely acknowledged one another despite being indisputably interrelated. At most, the SEC, in certain proposals, has encouraged commenters to read the other recently issued proposals; this approach does not satisfy the SEC's obligation to do the analysis required by the APA.[27]

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24. *See* SEC Staff Economic Guidance, *supra* note 10, at 6 (citing Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4, Regulatory Analysis (2003)); *see also* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4, Regulatory Analysis (2023) ("The benefits and costs of a regulation are generally measured against a no-action baseline: an analytically reasonable forecast of the way the work would look absent regulatory action being assessed."). *See also* Complaint, *Nat'l Assoc. of Priv. Fund Mgrs. v. SEC*, Case No. 4:24-cv-00250 (N.D. Tex. 2024) ("MFA Dealer Complaint") at ¶ 6 ("The Commission estimates that only a dozen or so funds will be swept up in its new definition, but this estimate arbitrarily considers the effect of only a single prong of the Rule, in a single market, and is untethered to any meaningful data or other record evidence."); *id.* at ¶ 51 ("The Commission also failed to consider that many funds employ multiple, independent strategies for investing, thereby reducing the risk to funds and their investors through diversification."); Complaint, *Crypto Freedom Alliance of Texas v. SEC,* Case No. 4:24-cv-00361-P (N. D. Tex. 2024) ("DeFi Dealer Complaint") at ¶ 81 ("In the single instance where the Commission did mention costs to digital asset markets, the Commission gave some indication for the very first time about how net capital requirements would apply to digital assets— acknowledging that dealers holding digital assets would face uniquely higher costs and implicitly recognizing that trading in digital assets presents unique considerations. But that was the extent of the Commission's discussion of the costs to the digital assets industry . . . .").

25. *See Am. Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 178 (D.C. Cir. 2010) (rule vacated and preexisting state law regulations remained in place where SEC "did not assess the baseline level of price transparency and information disclosure under state law" and "fail[ed] to determine whether, under the existing regime, sufficient protections existed" as to competition and efficiency before proposing a rule that would subject fixed indexed annuities to panoply of new requirements).

26. *See* Disclosure of Order Execution Information Rule, 88 Fed. Reg. 3786 (Jan. 20, 2023) ("Rule 605 Proposal"); Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders Rule, 87 Fed. Reg. 80266 (Dec. 29, 2022) ("Regulation NMS Proposal"); Competition for Certain Orders, 88 Fed. Reg. 128 (Jan. 3, 2023) ("Order Competition Proposal"); and Regulation Best Execution, 88 Fed. Reg. 5440 (Jan. 27, 2023) ("Best Execution Proposal") (collectively, the "Equity Market Structure Rule Proposals"). Prior to issuing the Equity Market Structure Rule Proposals, the Commission first proposed to shorten the settlement cycle to T+1. *See* Shortening the Securities Transaction Settlement Cycle, 87 Fed. Reg. 10436 (Feb. 24, 2022). As discussed *infra,* after issuing the Equity Market Structure Rule Proposals, the SEC proposed a fifth proposal. *See* Volume-Based Exchange Transaction Pricing for NMS Stocks, 88 Fed. Reg. 76282 (Nov. 6, 2023) ("Rebate Tiers Proposal"). The SEC also did not discuss in any of the Equity Market Structure Rule Proposals how the shortening of the standard settlement cycle to T+1 will affect intersecting portions of those proposals.

27. Specifically, the Regulation NMS Proposal noted that current fee schedules and rebates are calculated at month's end and could "*impede[] a market participant's ability to evaluate best execution and order routing*" and that the proposed amendments would address this problem. *See* Regulation NMS Proposal, *supra* note 26, at 80269 (emphasis added). Yet the Commission did not analyze the interconnectedness of this proposal with the Best Execution and Order Competition Proposals, both of which also purport to address the ability of market participants to receive best execution. It only "encourage[d] commenters to review [the 605 Proposal]." *Id.* at 80302 n.425. The Order Competition Proposal likewise does not undertake any analysis of how it would interact with the other market structure proposals, including the Best Execution Proposal. The Best Execution Proposal goes only a step further by adding a sentence in a footnote acknowledging the interconnectedness. *See* Best Execution Proposal, *supra* note 26, at 5456 n.136 ("If the proposed Order Competition Rule were adopted, a broker-dealer when evaluating which qualified auction to use for segmented orders under proposed Regulation Best Execution (if adopted) would have to have policies and procedures addressing how the broker-dealer will assess the execution quality of different qualified auctions and identify those that are likely to result in the most favorable price for customer orders.").

Even the Antitrust Division of the U.S. Department of Justice, in a comment letter to the SEC, noted the Commission's lack of a cumulative economic analysis, stating, "The number of changes contemplated by the [Equity Market Structure Rule Proposals] means that there are a number of ways in which these rules could interact with one another," and "encourag[ing] the Commission to carefully consider the potential interactions among the [Equity Market Structure Rule Proposals] when preparing their final versions, planning for the rules' implementation timelines, and evaluating the actual effects of the rules once they go into effect."[28] Despite this comment and other commenters urging the same approach, when the SEC finalized the first of the proposals under the current Chair—the 605 Proposal—it expressly rejected commenters' request to consider the "aggregate" impacts of other proposed rules.[29]

The SEC has failed to consider cumulative economic impacts even in instances where it has acknowledged interconnectedness. For example, the SEC proposed a rule for reporting of securities loans in November 2021.[30] Three months later, in February 2022, it proposed a short sale reporting rule.[31] The SEC acknowledged the interconnections and reopened the comment period for the Securities Lending Rule Proposal so that commenters could consider and apprise the SEC of the interrelations.[32]

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28. Antitrust Division of the United States Department of Justice, Comment Letter on Disclosure of Order Execution Information; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders; Order Competition Rule; and Regulation Best Execution (Apr. 11, 2023), at 6, https://www.sec.gov/comments/s7-29-22/s72922-20164065-334011.pdf.

29. Disclosure of Order Execution Information, 89 Fed. Reg. 26428, 26434 n.82 (Apr. 15, 2024) ("Rule 605 Adopting Release") (noting "[t]o the extent the Commission takes final action on any or all of [the Equity Market Structure Rule Proposals], the baseline in each of those subsequent rulemakings will reflect the regulatory landscape that is current at the time"). The Commission also adopted T+1 with no mention of any of the Equity Market Structure Rule Proposals despite commenters urging the SEC to consider the cumulative impacts on shortening the settlement cycle and the fundamental changes contemplated in those proposals. *See* Shortening the Securities Transaction Settlement Cycle, 88 Fed. Reg. 13872 (Mar. 6, 2023) ("T+1 Adopting Release"). The Rebate Tiers Proposal also did not discuss the interconnectedness between the other Equity Market Structure Rule Proposals and instead encouraged commenters to review the Best Execution and Regulation NMS Proposals (despite the comment periods being closed). *See Bloomberg L.P. v. S.E.C.*, 45 F. 4th 462, 477 (D.C. Cir. 2022) (The SEC "must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision" and "if public comments raise relevant and significant concerns about the costs associated with a proposed rule, then the agency should provide a reasoned response to those comments."); *NetCoalition v. S.E.C.*, 614 F.3d 525, 539 (D.C. Cir. 2010) (stating that the SEC "may not shirk a statutory responsibility simply because it may be difficult."); *Chamber of Commerce v. S.E.C.*, 412 F.3d 133, 143 (D.C. Cir. 2005) (difficulty in formulating cost estimate did not relieve SEC of "statutory obligation to determine as best it can the economic implications of the rule it has proposed" because even "in face of uncertainty, agency must exercise its expertise to make tough choices . . . and to hazard a guess as to which is correct, even if . . . the estimate will be imprecise").

30. Reporting of Securities Loans, 86 Fed. Reg. 69802 (Dec. 8, 2021) ("Securities Lending Rule Proposal").

31. *See* Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed. Reg. 14950 (Mar. 16, 2022) ("Short Sale Rule Proposal").

32. *See* Reopening of Comment Period for Reporting of Securities Loans, 87 Fed. Reg. 11659 (Mar. 2, 2022). The SEC recognized in adopting the Securities Lending Rule that "[b]ecause of the need to borrow" stock in order "to facilitate a short sale," securities loans are a direct proxy for short sales. *See* Reporting of Securities Loans, 88 Fed. Reg. 75644, 75705 (Nov. 3, 2023) ("Securities Lending Adopting Release").

Nonetheless, when the Commission finalized the two rules on the same day at the same meeting,[33] it declined to consider the interrelated substantive and procedural impacts and as a consequence adopted rules that are clearly interrelated.[34] The SEC also failed to adequately consider existing frameworks. For example, it did not adequately consider whether the existing short position reporting program administrated by FINRA, which collects and publishes information on short sales, could be enhanced to achieve its policy goals.[35]

When the SEC adopted the Share Repurchase Disclosure Modernization Rule ("Stock Buyback Rule"), the SEC imposed new, onerous disclosure requirements on nearly two-thirds of domestic stock issuers who repurchase their shares.[36] The SEC justified this rule on a theory that corporate executives "may" misuse share repurchases to induce temporary share price spikes, boost the value of executive stock compensation, and thus "realize additional gains unavailable to other investors."[37]

But just months before issuing the Stock Buyback Rule, the SEC had adopted another final rule—the Insider Trading Arrangements and Related Disclosures ("Insider Trading Rule") —that addressed the closely related problem of corporate insiders using material nonpublic information to gain advantage in the markets.[38] These two rules were proposed on the same day and then were pending together at the proposal stage. The close relationship between the two rules was so obvious during the proposal stage that the SEC acknowledged that they addressed "similar concerns" and proposed them on the same day so the Commission could "coordinate the two releases."[39] Yet despite this acknowledgment, the SEC's final Stock Buyback Rule never considered whether the just-finalized Insider Trading Rule's cooling-off period obviated the need for the Stock Buyback Rule.[40]

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33. *See generally* Securities Lending Adopting Release, *supra* note 32; Short Position and Short Activity Reporting by Institutional Investment Managers, 88 Fed. Reg. 75100, 75100 (Nov. 1, 2023) ("Short Sale Adopting Release").

34. Securities Lending Adopting Release, *supra* note 32, at 75694-95 n.725; Short Sale Adopting Release, *supra* note 33, at 75149 & 75171. *See also* Opening Brief for Petitioners at *40, *Nat'l Assoc. of Priv. Fund Mgrs. v. S.E.C.*, 2024 WL 1094316 (5th Cir. 2024) (No. 23-60626) ("Short Sale/Securities Lending Pet. Brief") (internal citations omitted). In the short sale and securities lending rules, the SEC adopted "wildly inconsistent disclosure regimes with respect to the same market activity." *Id.* at *2. In the Short Sale Adopting Release, the SEC "concluded that publicly disclosing short sales can substantially harm markets and investors by revealing short sellers' investment strategies, and by increasing the threat of retaliation against short sellers by other market participants. It therefore determined that short-sale information should be published only on an aggregated and delayed basis." *Id.* at *2-3. "In the [Securities Lending Adopting Release], however, the [SEC] took the exact opposite approach, requiring publication of granular detail reflecting short sale activity on a transaction-by-transaction, next day basis." *Id.* at *3. "Not only did the [SEC] fail to justify that contradictory approach; it did not even acknowledge the issue." *Id.* The SEC stated that "it would ignore the Short Sale Rule's requirements in its economic analysis of the Securities Lending Rule because the former 'remained at the proposing stage'—even though it was scheduled to be finalized minutes later at the same open meeting." *Id.* (quoting Securities Lending Adopting Release, *supra* note 32, at 75695-95 n.725).

35. *See* Hester M. Peirce, Comm'r, U.S. Sec. and Exch. Comm'n, Statement on Short Sale Disclosure (Oct. 13, 2023) ("FINRA collects aggregate short interest information in individual securities on a bimonthly basis from broker-dealers. The relevant listing exchange or FINRA publishes the data with a two-week lag. As suggested by commenters, the Commission could have built on this system . . . .").

36. *See* 88 Fed. Reg. 36002 (June 1, 2023).

37. *Id.* at 36006.

38. *See* 87 Fed. Reg. 80362 (Dec. 29, 2022).

39. 87 Fed. Reg. 8686, 8688 (Feb. 15, 2022); 87 Fed. Reg. 8443, 8466 (Feb. 15, 2022).

40. The Fifth Circuit vacated the Stock Buyback Rule effective as of December 19, 2023. *See infra* notes 13-16 and accompanying text.

The SEC also has failed to consider interconnectedness with other adopted rules when providing an appropriate baseline for subsequent rulemakings. For example, the Commission proposed new rules that purport to mitigate conflicts of interest that arise in the use of predictive data analytics by broker-dealers and investment advisers.[41]

But in this proposal, the SEC fails to acknowledge that the proposal conflicts with, and potentially overrides, certain of the SEC's current regulations including Regulation Best Interest (Reg BI),[42] the Commission's Final Interpretation of the Investment Advisers Fiduciary Duty[43] ("Fiduciary Duty Interpretation" and collectively with Reg BI, the "Standards of Conduct"),[44] the Investment Adviser Marketing Rule,[45] the regulatory framework around soft dollars and securities lending, and certain other SEC proposals.[46]

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41. *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, 53960 (Aug. 9, 2023) ("PDA Proposal"). As another example, the Dealer Rule (as defined below) failed to consider the Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule with respect to U.S. Treasury Securities, 89 Fed. Reg. 2714 (Jan. 16, 2023) ("Treasury Clearing Rule"), which adopted a mandate for the clearing of U.S. Treasury Securities. *See* MFA Dealer Complaint, *supra* note 24, at ¶57 (stating that the Treasury Clearing Rule addresses many of the same risks purportedly addressed by the Dealer Rule). The Dealer Rule also failed to consider the cumulative impacts of another proposal, Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, 87 Fed. Reg. 15496 ("ATS-G and Definition of Exchange Proposal") (March 18, 2022), which proposed, among other things, to expand Regulation ATS to alternative trading systems that trade government securities, including U.S. Treasury securities, and to expand the definition of "exchange" in Rule 3b-16 under Securities Exchange Act of 1934 ("Exchange Act") to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. *See* Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and "Government Securities Dealer" in Connection with Certain Liquidity Providers, 89 Fed. Reg. 14938, 14977 n.456 (Feb. 29, 2024) ("Dealer Rule") ("The Regulation ATS Proposal has not been adopted and is therefore not part of the baseline for this economic analysis.").

42. Regulation Best Interest, 17 C.F.R. § 15*l*-1.

43. Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (July 12, 2019).

44. *See* Am. Council of Life Insurers, Am. Inv. Council, The Alternative Inv. Mgmt. Ass'n, American Sec. Ass'n, Fin. Servs. Inst., Fin. Tech. Ass'n, Finseca, Inv. Co. Inst., Inst. for Portfolio Alts., Insured Ret. Inst., Loan Syndications & Trading Ass'n, Managed Funds Ass'n, Nat'l Ass'n of Ins. & Fin. Advisors, Nat'l Ass'n of Inv. Cos., Nat'l Soc. Of Compliance Pros. & Ctr. For Cap. Mkts. Competitiveness, Comment Letter on Proposed Rule to Address Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (Sept. 12, 2023), at 10, https://www.sec.gov/comments/s7-12-23/s71223-258279-605062.pdf ("PDA Comment Letter"). The PDA Proposal does not explain why the Standards of Conduct do not apply to conflicts of interest presented in the use of "covered technologies" and why such a standard is not sufficient to address the concerns noted in the proposing release— nor why it is necessary or appropriate to override the definition of conflicts of interest and eliminate disclosure as a means of addressing the conflict.

45. Investment Adviser Marketing, 17 C.F.R. § 275.206(4)-1. The SEC stated that the PDA Proposal captures "any advertisements . . . that offer or promote services or that seek to obtain or retain *one or more investors*." *See* PDA Proposal, *supra* note 41 at 53974 (emphasis added). Notably, the Marketing Rule defines an advertisement as "any direct or indirect communication an investment adviser makes *to more than one person*. . . ." 17 C.F.R. § 275.206(4)-1(e)(1)(i) (emphasis added).

46. *See* Outsourcing by Investment Advisers, 87 Fed. Reg. 68816 (Nov. 16, 2022) ("Outsourcing Proposal"). Instead of discussing this potential overlap, the Commission includes a footnote that "encourage[s] commenters to review [the Outsourcing Rule Proposal] to determine whether it might affect comments on [the PDA Proposal]." *See* PDA Proposal, *supra* note 41, at 53972 n.124.
The SEC also failed to discuss the overlap between its proposal regarding Position Reporting of Large Security-Based Swap Positions and its Modernization of Beneficial Ownership rulemaking as well as data that are already reported to the SEC under Regulation Security-Based Swap Reporting. *See* 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. 662 (Feb. 4, 2022) ("10B-1 Proposal"). Specifically, the 10B-1 Proposal failed to consider whether the information required under the proposed rule could be obtained through securities-based swap data repositories and the implications of the proposed public disclosures in conjunction with the amendments to the beneficial ownership reporting rules, which were adopted on October 10, 2023. *See also* Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association, Comment Letter on Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10 (May 16, 2023) at 6 ("MFA 10B-1 Comment Letter"), https://www.sec.gov/comments/s7-32-10/s73210-190219-374542.pdf; Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896 (Nov. 7, 2023) ("Beneficial Ownership Rules").

Finally, the SEC has failed to consider the interconnectedness of rulemakings and total compliance costs when multiple rules affect the same market participants. For example, the SEC has proposed or adopted at least 15 rules that directly affect investment advisers to private funds.[47] None of the rules consider the total costs on these advisers and the aggregate impact on market participants, even when the changes are to the same systems. For example, the SEC proposed and adopted changes to Form PF in two separate rulemakings and declined to align the compliance dates. At the same time, it adopted substantial disclosure obligations and restrictions on a broad range of activities by private fund advisers without considering the compliance burdens of these additional requirements.[48]

3. The SEC Has Not Provided Sufficient Notice and Comment

An agency's ability to achieve its objectives through a proposed rule can be understood only in the context of its other regulations (proposed or final) bearing on those same objectives.

Recent SEC proposals did not give adequate notice and comment because they failed to discuss and account for the interrelations and interdependencies of the SEC's existing rules and other proposed rules. When the first tranche of proposals was published, the public was not privy to the breadth, scope, and impact of the interconnected rules. Subsequent SEC proposals would impose related requirements on the same constituencies affected by the first and are designed to address the same problems or affect similar or overlapping market participants, and they likely would apply to the same or similar internal systems and processes. Because proposals were issued using a piecemeal approach, the public is not able to view the interrelated proposals together and meaningfully comment on the cumulative impact of the proposed changes in conjunction with existing rules.[49]

Rather than do the necessary analysis mandated by the APA and present such analysis for public comment, the SEC has shifted the burden of analyzing costs and benefits to commenters.

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47. *See* Comment Letter from Managed Funds Association, Rel. No. 34–93784 (File No. S7–32–10); Rel. No. 34–94062 (File No. S7–02–22); Rel. Nos. IA–5955 (File No. S7–03–22); Rel. Nos. 33–11028; 34–94197; IA–5956; IC–34497 (File No. S7–04–22); Rel. Nos. 33–11030; 34–94211 (File No. S7–06–22); Rel. No. 34-94313 (File No. S7–08–22); Rel. No. 34–94524 (File No. S7–12–22); Rel. Nos. 33–11068; 34–94985; IA–6034; IC–34594 (File No. S7–17–22); Rel. No. IA–6083 (File No. S7–22–22); Rel. No. IA–6176 (File No. S7–25–22); Rel. No. 34-95763 (File No. S7-23-22); Rel. No. 33-11151 (File No. S7-01-23); Rel. No. IA-6240 (File No. S7-04-23) (July 21, 2023), https://www.mfaalts.org/wp-content/uploads/2023/07/MFA-Comment-Letter-on-Operational-Challenges-of-Recent-SEC-Proposals-Affecting-Advisers-As-submitted-7.21.23.pdf; *see also* Testimony of John A. Gulliver, *supra* note 2 (highlighting the substantive rulemaking activity under Gensler's chairmanship in Appendix 1).

48. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 88 Fed. Reg. 63206 (Sept. 14, 2023) ("PFA Rules Adopting Release"). The Fifth Circuit vacated the PFA Rules Adopting Release effective as of June 5, 2024. *Nat'l Ass'n. of Priv. Fund Mgrs v S.E.C.*, 2024 WL 2836655 (5th Cir. 2024).

49. Of the 64 rules issued for comment in Gensler's tenure, 23 featured comment periods less than 40 days from the date of publication in the Federal Register. *See* SIFMA Rule Tracker, *supra* note 18 (listing the time periods between publication in the Federal Register and the cessation of the comment period for each proposed rule during each administration).

In fact, the SEC in 14 proposals referred commenters to 29 other outstanding proposals.[50] Even when the SEC issued interconnected proposals at the same time or close in time, the comment periods have been inadequate for understanding each proposal and providing meaningful replies.[51] While a 30-day comment period is the allowable minimum period under the APA, it is not the appropriate time period for complex proposals, nor is it appropriate when interrelated proposals are artificially separated and do not discuss their interrelations and interdependencies.

For example, in a span of two months, the SEC proposed multiple rules aimed (in whole or in part) at environmental disclosures. On March 21, 2022, the SEC issued its Climate Rule Proposal that would require public issuers to provide certain climate-related information in their registration statements and annual reports.[52] Two months later, the SEC proposed two additional rules, addressing environmental disclosure rules for investment companies and advisers ("IM ESG Rule Proposal")[53] and naming conventions for ESG funds ("Names Rule Proposal").[54] The SEC asserted that the IM ESG Rule Proposal would "complement" the Climate Rule Proposal, but it did not offer any analysis of the interconnectedness beyond noting that if the Climate Rule were adopted, then certain funds could rely on issuer disclosures for certain metrics.[55]

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50. *See* Short Sale Rule Proposal, *supra* note 32; Exemption for Certain Exchange Members, 87 Fed. Reg. 49930 (Aug. 12, 2022); Outsourcing Proposal, *supra* note 46; Rule 605 Proposal, *supra* note 26; Regulation NMS Proposal, *supra* note 26; Order Competition Proposal, *supra* note 26; Best Execution Proposal, *supra* note 26; Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information, 88 Fed. Reg. 20616 (Apr. 6, 2023) ("Regulation S-P"); Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants; the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories; Securities-Based Swap Dealers, and Transfer Agents, 88 Fed. Reg. 20212 (Apr. 5, 2023) ("34 Act Cybersecurity Proposal"); Regulation Systems Compliance and Integrity, 88 Fed. Reg. 23146 (Apr. 14, 2023) ("Reg. SCI Proposal"); Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, 88 Fed. Reg. 34708 (May 30, 2023) ("CCA RWD Proposal") (failing to consider the Treasury Clearing Rule proposal); Daily Computation of Customer and Broker-Dealer Reserve Requirements under the Broker-Dealer Protection Rule, 88 Fed. Reg. 45836 (July 18, 2023) ("BD Reserve Requirements"); PDA Proposal, *supra* note 41; Rebate Tiers Proposal, *supra* note 26. *See also Bloomberg*, 45 F. 4th at 477 (holding SEC's approval of FINRA proposal was arbitrary and capricious because "Commission failed to respond adequately to . . . concerns about the cost of [the proposal] and the extent to which those costs—which could conceivably amount to millions, or tens of millions, of dollars—will be borne by market participants.").

51. *See* Sen. Patrick McHenry & Sen. Pat Toomey, *Letter to Chairman Gary Gensler* (Jan. 10, 2022), https://financialservices.house.gov/uploadedfiles/2022-01-10_pmc_toomey_letter-gensler_sec_comment_period.pdf; Declan Harty, *Senate Dems Press SEC Chair to Slow Wall Street Rules*, Politico (Oct. 10, 2022), https://www.politico.com/news/2022/10/20/senate-democrats-gensler-public-comments-sec-00062732 (highlighting that 12 Democrat senators sent a letter to Chairman Gary Gensler asking for longer comment periods). In fact, the SEC's Office of Inspector General has initiated an audit to assess aspects of the SEC's rulemaking process and related internal controls. U.S. Sec. and Exch. Comm'n, Office of Inspector General, Semi-Annual Report to Congress, at 9 (4.1.2023 to 9.30.23). "The overall objective of the audit is to review the SEC's processes for (1) giving interested persons an opportunity to participate in rulemaking; and (2) assessing and documenting the impact(s) of proposed rules on competition, efficiency, and capital formation." *Id.*

52. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) ("Climate Rule Proposal") (proposing to apply to SEC Exchange Act reporting companies, including business development companies).

53. Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022).

54. Investment Company Names, 87 Fed. Reg. 36594 (June 17, 2022). The Names Rule expanded the scope of the 80% investment policy to apply to any fund name with terms suggesting that the fund focuses on investments that have, or investments whose issuers have, particular characteristics, including terms such as "green," "growth," and "value."

55. *See* IM ESG Rule Proposal, *supra* note 32, at 36742 (stating that the rule would complement the Climate Rule Proposal in the Regulatory Flexibility Act section); *id.* at 36713 n.400 (noting in a footnote in the economic analysis that environmentally focused funds could use issuer regulatory files to calculate certain metrics required under the IM ESG Rule Proposal). The Names Rule Proposal mentioned the IM ESG Rule Proposal only twice (and vice versa) and only with respect to the definition of "integration funds," but neither proposal attempted to analyze the cumulative benefits or costs for registered investment companies and investment advisers. *See, e.g.*, *id.* at 36660 n.47. The SEC also adopted amendments to Form N-PX, which requires, among other things, for funds to disclose shareholder votes with respect to environment or climate matters. *See* Enhanced Reporting of Proxy Votes by Registered Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, 87 Fed. Reg. 78770 (Dec. 22, 2022) ("Fund Proxy Votes").

Two weeks prior to issuing the IM ESG and Names Rule Proposals, the SEC extended the comment period for the Climate Rule Proposal.[56] At that time, the SEC was well aware that it was shortly going to consider those proposals and should have analyzed and disclosed the interconnectedness among the three proposals and ensured that the comment periods were aligned and sufficiently meaningful to give interested stakeholders the opportunity to consider and comment on the interconnections.

When the SEC finalized the Names Rule, it declined to address commenters' concerns about the rule's duplication with the IM ESG Rule Proposal because the former was still a proposal.[57] Six months later, when the SEC finalized the Climate Rule, the SEC did not refer to the final Names Rule and made only a passing reference to the IM ESG Proposal by acknowledging, without addressing, the overlap with the IM ESG Rule Proposal for Business Development Companies (BDCs).[58]

4. The SEC's Rules Are Ambiguous and Vague and Lack Fair Notice of the Sweeping and Unprecedented Changes.

By proposing and adopting rules that are so vague that it is challenging to ascertain what conduct would trigger their application, the Commission has not complied with due process requirements. The courts have held that "[i]n order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit"[59] and that "[a] vague rule 'denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain what will result in sanctions.'"[60] Accordingly, regulations will be found to satisfy due process so long as they are "sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."[61]

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56. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 29059 (May 12, 2022) (extending the comment period).

57. Investment Company Names, 88 Fed. Reg. 70436, 70491 n.583 (Oct. 27, 2023) ("Names Rule Adopting Release") ("Commenters also specifically suggested the Commission consider the interaction between the final rule and the ESG Disclosure Proposal and/or its proposal relating to outsourcing by investment advisers. These proposals have not been adopted and thus have not been considered as part of the baseline here. . . . To the extent those proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.") (internal citations omitted).

58. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21824 (Mar. 28, 2024) ("Climate Rule Adopting Release") ("[W]e nonetheless believe that the climate-related information required to be disclosed by the final rules in a registrant's Securities Act registration statements and Exchange Act reports will be important to investors and should apply to BDCs . . . .").

59. *Freeman United Coal Min. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997).

60. *Timpinaro v. S.E.C.*, 2 F.3d 453, 460 (D.C. Cir. 1993) (quoting *Hastings v. Judicial Conferences of the United States*, 829 F.2d 91, 105 (D.C. Cir. 1987)).

61. *Freeman United Coal*, 108 F.3d at 362.

The SEC recently adopted changes to the statutory definition of "dealer" that provide unclear boundaries for who would be captured and required to register.[62] The rule includes "non-exhaustive" factors that abruptly depart from nine decades of precedent to now capture many entities that provide liquidity, without appropriate consideration of whether they are "in the business" of acting as a dealer. There is no limiting principle or clear boundaries to the tests in the rule.[63] To further compound this overreach, the SEC adopted a "no presumption" clause.[64] An entity that does not meet the broad tests in the rule nonetheless could find itself required to register as a dealer.

This lack of limiting principle results in ambiguity and legal risk for market participants seeking to determine whether they fall within the ambit of dealer registration.[65]

The SEC's actions in its PDA Proposal reflect this problem. The proposal casts a vague and arguably extremely wide net, covering anything that could conceivably fall under the term "covered technology" and that could remotely touch on an investor's experience with a broker-dealer or an investment adviser.[66] While the SEC states the proposal is purportedly "limited" to technologies that "predict, guide, forecast, or direct investment-related behaviors or outcomes," there is, in fact, no limit to its breadth.[67]

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62. Dealer Rule, *supra* note 41. It is also unclear whether the SEC had statutory authority to adopt such changes. *See, e.g.*, MFA Dealer Complaint, *supra* note 24, at ¶8.

63. Whether a person that is engaged in the buying and selling of securities or government securities for its own account is engaged in such activity "as part of a regular business" and thus is required to register as a "dealer" or "government securities dealer" if that person engages in a regular pattern of buying and selling securities or government securities that has the effect of providing liquidity to other market participants by regularly expressing trading interest that is at or near the best available prices on both sides of the market for the same security (the "expressing trading interest test") or earning revenue primarily from capturing bid-ask spreads, by buying at the bid and selling at the offer (the "primary revenue test"). *See* Dealer Rule, *supra* note 41, at 14944. Because no one would trade at bad prices and because trading interest need not "be expressed simultaneously on both sides of the market. . ." *id.* at 14951, any trader who both buys and sells the same security intraday and across days could potentially fall under the Dealer Rule's reach. Also, all trading involves buying at the bid and selling at the offer. The SEC also does not explain what period of time would apply to the tests and provides only vague examples of activity that might satisfy the tests. *See* MFA Dealer Complaint, *supra* note 24, at ¶3. *See also* Rule 9f-1, *supra* note 12; Peirce 9j1 Statement, *supra* note 12 ("Notwithstanding these improvements, the final rule is still overly broad. The affirmative defenses may not provide market participants with sufficient clarity to allow them, for example, to feel confident [that] somebody on a firm's trading desk can hedge a loan using security-based swaps when the firm has obtained material non-public information in connection with the loan. As another example, the negligence standard applicable to paragraphs (a)(3) and (a)(4) of the rule may facilitate second-guessing in enforcement actions.").

64. *See* 17 CFR § 240.3a5-4(d).

65. In its ATS-G and Definition of Exchange Proposal, the SEC proposed to expand the definition of "exchange" to include expressions of non-firm trading interest. *See* ATS-G and Definition of Exchange Proposal, *supra* note 33. Commenters highlighted that the proposed definition was so overbroad that it would include DeFi protocols, which do not have a central operator and thus did not have one person who could register under Regulation ATS. *See id.* at 29454.

66. *See* PDA Proposal, *supra* note 41, at 53974.

67. *See, e.g.*, PDA Comment Letter, *supra* note 44, at 11-12 & n.41. "The definition of 'covered technology' is without discernible limits." *Id.* at 11. "'Covered technology' could include commonly used tools such as: *monte carlo* simulations; retirement calculators; spreadsheets and formulas that guide investment allocation decisions and other financial planning tools; AI provided by third parties to transcribe notes from Zoom calls with clients; internal and third-party analyses and projections of portfolio performance used in portfolio assessments and construction; identification of potential clients based on simple predictive analytics, such as area codes; research pages or electronic libraries that provide investors with the ability to obtain or request research reports, news, quotes, and charts from a firm-created website; technologies that generate email alerts to subscribing investors which provide alerts such as news affecting the securities in the investor's portfolio or on the investor's 'watch list'; and technologies that provide alerts, which are used to convey various different types of information such as bankruptcy proceedings, corporate actions, and price alerts." *Id* at n.41. "Once a broker-dealer or investment adviser uses a 'covered technology,' whether a little or a lot, the onerous compliance burdens of the rules would apply: assessment, analysis, conflict elimination, annual reviews, testing and recordkeeping, to name a few. Every technology will have to be assessed to see if it is in scope of the [PDA] Proposal." *Id.* at 12.

In fact, even the SEC acknowledges that "[i]n certain cases, it may be difficult or impossible to evaluate a particular covered technology or identify any conflict of interest associated with its use or potential use within the meaning of the proposed rules" and simply suggests that a firm not use that technology.[68] The Chair recently recognized that the SEC "received a lot of feedback from the public" on the proposal and has indicated that the staff is considering whether to recommend a modified proposal.[69] It is not enough to take into account the feedback in the comment file, which only identifies problems with the PDA Proposal.; the SEC should engage in a robust process with outside stakeholders, including market participants, to understand the current regulatory framework and how technology is used by investment advisers and broker-dealers. Additionally, any revised proposal not only would need to be modified to stay within the authority Congress delegated to the SEC, but it also would need to articulate the problem that is being solved against a baseline of whether, under existing regulation, sufficient protections exist.[70]

By proposing and seeking to adopt vague and overreaching rules, the SEC steps away from its mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. Instead the Commission increases market participants' operational uncertainty.[71] Vague rules violate the due process requirements set forth in the APA, and this uncertainty could decrease participation in the U.S. capital markets as participants are unable to determine how they should be conducting business.

5. The SEC's Rules Are an Illogical Outgrowth

To ensure informed decision-making, the APA requires agencies to provide interested persons with the opportunity to provide input on the rulemaking.[72] For public comment to be meaningful, the APA requires that any changes reflected in a final rule as compared with the proposal must be a "logical outgrowth" of that proposal.[73] This approach allows agencies to adjust proposals to account for comments without endless notice and comment, while ensuring that any changes are not such a vast departure that meaningful comment from stakeholders is precluded.[74]

68. *See* PDA Proposal, *supra* note 41, at 53978.

69. *See* Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n, "Jack Bogle, Haystacks, and Putting the Interest of the Clients First," Prepared Remarks Before the 2024 Conference on Emerging Trends in Asset Management (May 16, 2024) ("Chair Statement").

70. *See* discussion *infra* § I.A.2.

71. *See* Hester M. Pierce, Comm'r, U.S. Sec. and Exch. Comm'n, Statement on Further Definition of "As a Part of a Regular Business" in the Definition of Dealer (Feb. 6, 2024) ("The rule is ambiguous in scope, which almost certainly will bring in firms the Commission has given no thought to including.").

72. 5 U.S.C. § 553(c); *see infra* notes 7-8 and accompanying text.

73. *See Mock v. Garland*, 75 F.4th 563, 583 (5th Cir. 2023); *Int'l Union, United Mineworkers of America v. Mine Safety and Health Admin*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

74. The objective of this logical outgrowth is "fair notice." *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 381 (5th Cir. 2021). The notice must be such that "commentators could have reasonably anticipated the Final Rule." *Mock*, 75 F.4th at 584.

Final rules that differ substantially from underlying proposals render the comment process inadequate for purposes of the APA and heighten the risk of policy failure due to a lack of input on potential ramifications.[75] It is clear that the SEC has not fulfilled its obligation under the APA based on its finalization of recent rule proposals. Several final rules have departed significantly from proposals without the benefit of public comment. The serious implications of this problem are becoming apparent. For example, in the 2023 final rules for private fund advisers, the SEC made sweeping changes that were not reasonably related to what it proposed.[76] Among other changes, the SEC abandoned its proposal to prohibit certain activities and instead adopted a disclose and consent requirement, and it adopted disclosure requirements for illiquid funds that it had not previewed in the proposal stage.[77] Commenters were not afforded an opportunity to assess and comment on the ramifications of these significant changes—a clear violation of the APA.

When the SEC adopted the 2023 Securities Lending Rule, the SEC's sole attempt to address commenters' concerns about the harmful effects that the new public disclosures would impose on markets was to delay publication of a single data point—the exact size of an individual securities loan—until 20 business days after the loan is effected.[78] That half-measure was still inconsistent with the SEC's short sale rule and was never previewed to the public with "reasonable specificity."[79] Because the SEC did not propose this alternative, commenters did not have an opportunity to explain that delaying public disclosure of loan-size information for 20 days would not address the risk to some market participants of copycat trading, manipulation, and retaliation.[80]

As another example, when the SEC finalized its money market fund (MMF) rule amendments, it replaced its proposed swing-pricing requirement for institutional prime and institutional tax-exempt MMFs with a mandatory liquidity fee framework for these MMFs in an attempt to "better allocate liquidity costs associated with redemptions to redeeming investors."[81]

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75. *See NetCoalition*, 614 F.3d at 538-39 (noting that "the APA establishes a scheme of 'reasoned decisionmaking' . . .[so] [n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational" (cleaned up)), *superseded by statute on other grounds*.

76. *See* PFA Rules Adopting Release, *supra* note 48; *see also* Opening Brief for Petitioners, *Nat'l Assoc. of Priv. Fund Mgrs v. S.E.C.*, Case No. 23-60471 (5th Cir. 2023) at § II ("PFA Pet. Brief"). The Fifth Circuit held that the SEC exceeded its statutory authority and did not need to rule on whether the PFA Rules were a logical outgrowth of the proposal. *Nat'l Ass'n of Priv. Fund Mgrs,* 2024 WL 2836655, at *9, *12.

77. PFA Pet. Brief, *supra* note 76, at 39-42.

78. *See* 17 CFR § 240.10c-1(a)(g)(2); Short Sale/Securities Lending Pet. Brief, *supra* note 34, at *51 (characterizing the adoption of the 20 business day delay for the exact size of an individual securities loan as the "sole gesture toward the many comments….").

79. *See* Short Sale/Securities Lending Pet. Brief, *supra* note 34, at *51.

80. *Id.* By going straight to adoption, affected managers had no chance to explain to the Commission that, in light of the substantial trade-by-trade data that would otherwise be disclosed under the Securities Lending Rule, delaying disclosure of this one data point (out of all the others) for 20 business days would not prevent the substantial harms posed to short sellers and the markets as a whole. *See also* Mark T. Uyeda, Comm'r, U.S. Sec. and Exch. Comm'n, Statement on Reporting of Securities Loans, Securities Lending Rule (Oct. 12, 2023) ("[T]he Changes from the proposal to [the Securities Lending Rule] are qualitatively of such a nature as to warrant a re-proposal, along with an updated economic analysis.").

81. Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A, 88 Fed. Reg. 51404, 51406 (Aug. 3, 2023) ("MMF Adopting Release"). The amendments were intended to improve the resilience and transparency of MMFs and were purportedly in response to the outflows experienced by certain types of MMFs in March 2020 during the economic shock related to the COVID-19 pandemic, which resulted in intervention by the Board of Governors of the Federal Reserve System. *Id.* at 51405.

But this mandatory liquidity fee requirement was not proposed, and the SEC did not provide commenters (including MMF investors and other stakeholders) with a meaningful opportunity to provide input on whether this novel mandatory liquidity fee framework raises any potential negative consequences for MMFs, their shareholders, and other market participants.[82]

The SEC has issued proposals with hundreds of multi-part, generalized, high-level questions, many of which were more suitable to an advance notice of proposed rulemaking (ANPRM).[83] While taking this approach may superficially suggest the public had fair notice of any changes at adoption, the sheer volume of questions (that are often suggesting opposite approaches) evidence a need for an ANPRM, a process better suited to reconciling and resolving these complex questions.[84] For example, the MMF Proposing Release and the Climate Rule Proposing Release had 155 and 201 requests for comments, respectively.[85]

Even if the provisions of the final rules could be said to fall within one of the enormous number of open-ended questions in those proposals, those questions often suggest opposing revisions, which without an explanation of what the change would be cannot "apprise fairly an interested party" of the agency's intentions.[86]

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82. *Id.* The consequences of this are being felt as many prime institutional money market funds, which serve funds and ETFs and other institutional investors for cash management and liquidity purposes, are choosing to liquidate, merge with other MMFs, or convert to government funds rather than attempt to comply with the mandatory liquidity fee. *See also* Harriet Clarfelt & Brooke Masters, *Managers to Shut or Convert $220bn of US Money Market Funds Before Rule Change*, Fin. Times (Apr. 11, 2024), https://www.ft.com/content/c0753ee8-3025-445d-ab44-ec957c09079b. The MMF amendments fundamentally ignore or misunderstand MMF portfolio management. *See* discussion *infra* note 110.

83. An Advanced Notice of Proposed Rulemaking (also known as a concept release, request for comment, or request for information) is a preliminary notice published in the Federal Register announcing that an agency is considering a regulatory action. *See, e.g.*, Abbreviations, Office of Information and Regulatory Affairs, Office of Management and Budget at https://www.reginfo.gov/public/jsp/eAgenda/Abbrevs.myjsp. An agency issues an ANPRM before it develops a detailed rule proposal and describes the general area that may be subject to regulation and usually asks for public comment on the issues and options being discussed. *See id.*; *see also* Concept Release on Harmonization of Securities Offering Exemptions, 84 Fed. Reg. 30460 (June 26, 2019); Transfer Agent Regulations, 80 Fed. Re. 81948 (Dec. 31, 2015).

84. *See, e.g.*, Brief of Respondent, *Nat'l Assoc. of Priv. Fund Mgrs v. S.E.C.*, Case No. 23-60471, ECF No. 76-1 at 13 (5th Cir. Dec. 15, 2023) ("The public had fair notice because the Commission requested comment on the possibility of the changes . . . .").

85. *See* Money Market Fund Reforms, 87 Fed. Reg. 7248 (Feb. 8, 2022) (number includes requests for comment in the economic analysis); Climate Rule Proposal, *supra* note 52 (number does not include requests for comments in the economic analysis).

86. *See United Steelworks of America, AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 318 (5th Cir. 1987); *see also* Short Sale/Securities Lending Pet. Brief, *supra* note 34, at *62. Additionally, the SEC, instead of reproposing rules that had been proposed more than four years before, simply reopened the comment period and went straight to adoption. For example, the SEC first proposed Pay Versus Performance, 80 Fed. Reg. 26329 (May 7, 2015), on April 29, 2015. The comment period was reopened almost seven years later. *See* Reopening of Comment Period for Pay Versus Performance, 87 Fed. Reg. 5939 (Feb. 2, 2022). Despite commenters' raising concerns, including two members of Congress commenting that requesting the SEC's offering regulatory alternatives without, among other things, an updated cost-benefit analysis, would "significantly impair[] the public's ability to comment thoughtfully on the proposals and [be] . . . inconsistent with the [APA]," the SEC adopted the final rules on August 25, 2022. *See* Pay Versus Performance, 87 Fed. Reg. 55134 (Sept. 8, 2022). *See also* Universal Proxy, 86 Fed. Reg. 68330 (Dec. 1, 2021) (originally proposed on October 26, 2016, and had the comment period reopened in May 2021); Listing Standards for Recovery of Erroneously Awarded Compensation, 87 Fed. Reg. 73076, 73077-78 (Nov. 28, 2022) ("Erroneously Awarded Compensation") (originally proposed on July 1, 2015, and had the comment period reopened both in October 2021 and June 2022).

B. The SEC Is Failing to Act Consistently With Its Tripartite Mission

In today's fiercely competitive global economy, the strength of our capital markets is critical to long-term national prosperity and the financial well-being of American investors. Regulatory decision-making by the SEC—whether in the form of promulgating rules, providing guidance, or bringing enforcement actions—has a direct impact on our capital markets.

To protect U.S. capital markets and their participants, the SEC is charged with a tripartite mission: protect investors; facilitate capital formation; and maintain fair, orderly, and efficient markets. Capital formation results in more capital that market participants can use to fuel innovation in the marketplace, creating investment opportunities and more efficient allocation of capital.

Despite Congress empowering the SEC with tools to promote capital formation, such as broad authority to promulgate exemptive rules and/or grant specific exemptive relief, there is little evidence that the SEC is employing these tools in its current rulemaking agenda.[87] The SEC under the current chair has not relied on this authority to issue any exemptive rules or orders that would introduce new products to the market and promote capital formation.

Quite the opposite, the SEC has engaged in promulgating a number of regulations that could harm capital formation by hurting small businesses.[88] For example, the SEC's recently vacated private fund adviser rules, due to their overbroad and onerous proposed requirements, would have caused smaller advisers to exit the market and reduced the diversity of investment advisers. Instructively, the SEC Office of the Advocate for Small Business Capital Formation (OBSA)

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87. *See, e.g.*, Letter from U.S. Representative Patrick McHenry, Chairman, House Financial Services Committee, and U.S. Representative Ann Wagner, Chairman, Subcommittee on Capital Markets of the House Financial Services Committee to Gary Gensler, Chair, U.S. Securities and Exchange Commission (Apr. 13, 2023). For example, Section 6(c) of the 1940 Act permits the Commission to exempt "any person, security, or transaction, or any class or classes of persons, securities, or transactions . . . if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes" of the 1940 Act. Investment Company Act of 1940, 15 U.S.C. § 80a-6(c). Such exemptive relief has promoted innovation and capital formation. Exchange-traded funds (ETFs) are a prime example. The Commission voted to approve the first ETF in 1992 and since then ETFs have become a popular investment vehicle. *See* Jay Clayton, Chairman, U.S. Sec. and Exch. Comm'n, Taking Significant Steps to Modernize Our Regulatory Framework (Sept. 26, 2019). For example, since May 2023 more than eight asset managers have sought SEC approval to add an exchange-traded fund share class to existing mutual funds. Suzanne McGee, *SEC approval for ETF share class of mutual funds,* Reuters (Apr. 4, 2024). These follow the expiration of a patent held by Vanguard Group and to date the SEC has not published notice of any of the applications. More broadly, unlike the process set forth under Section 19(b) of the Exchange Act for self-regulatory organizations to propose rule changes, the exemptive application process under the 1940 Act continues to present challenges despite the SEC's amendment of Rule 0-5 on July 6, 2020. *Compare* Section 19(b)(2)(D) of the Exchange Act, 15 U.S.C. § 78s(b)(2)(D) (providing that the proposed rules change is deemed approved if the Commission does not issue an order within a prescribed timeframe) with 17 CFR § 270.0-5 (governing, among other things, the procedure of any proceeding initiated by the filing of an application for an order).

88. *See* Universal Proxy, 86 Fed. Reg. 68330, 68369 (Dec. 1, 2021); Proxy Voting Advice, 87 Fed. Reg. 43168, 43196 (July 19, 2022); Erroneously Awarded Compensation, *supra* note 86; Fund Proxy Votes, *supra* note 55; Insider Trading Rule, *supra* note 38 at 80413; T+1 Adopting Release, *supra* note 29, at 13934; MMF Adopting Release, *supra* note 81, at 51485; Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51896, 51934 (Aug. 4, 2023) ("Issuer Cybersecurity"); Exemption for Certain Exchange Members, 88 Fed. Reg. 61850, 61864 (Sept. 7, 2023) ("Rule 15b9-1"); PFA Rules Adopting Release, *supra* note 48, at 63300, 63354; Names Rule Adopting Release, *supra* note 57, at 70484; Beneficial Ownership Rules, *supra* note 46, at 76970; Securities Lending Adopting Release, *supra* note 32, at 75724; Short Sale Adopting Release, *supra* note 33, 75173; Prohibition Against Conflicts of Interest in Certain Securitizations, 88 Fed. Reg. 85396, 85435 (Dec. 7, 2023); Treasury Clearing Rule, *supra* note 41, at 2819; Dealer Rule, *supra* note 4162, 14996; Climate Rule Adopting Release, *supra* note 58, at 21823; Rule 605 Adopting Release, *supra* note 29, at 26586-87.

advocated for Congress and the Commission to explore regulatory solutions to support emerging fund managers given the role these managers play in supporting startups.[89]

Despite Congress urging the SEC to "reconduct the economic analysis for the Private Fund Advisers proposal to ensure the analysis adequately considers the disparate impact on emerging minority and women-owned asset management firms, minority and women-owned businesses, and historically underinvested communities"[90] and commenters raising that the private fund adviser rules would harm smaller fund managers,[91] the Commission nonetheless moved forward to adopt the rules. The SEC merely acknowledged that certain smaller funds may need to exit the market due to the "high compliance costs" but asserted that certain "registered advisers . . . have the option of reducing their assets under management to forgo registration, thereby avoiding the costs of the final rule that only apply to registered advisers such as the mandatory audit rule."[92]

And, with respect to the loss of smaller advisers resulting in reduced diversity of investment advisers more specifically, the SEC stated, "[t]o the extent the compliance costs or other effects of the rules cause certain smaller advisers to exit, the rules may result in reduced diversity of investment advisers."

The potential reduced diversity of investment advisers may also have downstream effects on entrepreneurial diversity, as minority-owned venture capital and buyout funds are three-to-four times likely to fund minority entrepreneurs in their portfolio companies; however, the SEC rationalizes this effect stating that "wherever an adviser's funds are sufficiently concentrated in venture capital . . . they may forgo SEC registration and thus forgo many costs of the final rules."[93] The Commission expressly acknowledged that "smaller advisers are those most likely to either exit the market (or fail to enter) in response to high compliance costs."[94]

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89. *See* OBSA, Annual Report FY 2023, https://www.sec.gov/files/2023-oasb-annual-report.pdf, at 80 (generally noting "women and racially and ethnically diverse fund managers face disproportionate challenges raising capital from institutional investors, resulting in smaller funds and in turn smaller investments in their portfolio companies").

90. *See* H.R. Rep. No. 117-393, at 102 (2023).

91. *See, e.g.*, *id.* at 63211 n.50 and 63274 n.738.

92. *See id.* at 63361 n.1732, 63362 (noting, for example, that roughly 25% of funds with less than $2 million in assets under management that are advised by Registered Investment Advisers "will have to undergo an audit as a result of the final rule"); *see also supra* note 88 and accompanying text.

93. *Id.* at 63361 ("At the margin, however, some advisers, particularly smaller or emerging advisers, may find it more difficult to compete without offering preferential redemptions rights or preferential information that now will be prohibited.").

94. *Id.* at 63362. Likewise, on the Form N-PX Proposal, commenters highlighted concerns specific to small funds such as needing to hire third-party vendors to prepare Form N-PX and that the cumulative regulatory burden on small funds would be larger in relative terms because of the fixed nature of the costs and the funds' inability to achieve economies of scale that larger funds can realize. *See* Funds Proxy Funds, *supra* note 49, at 78806. One commenter suggested that the SEC exempt small funds. *Id.* The SEC declined to exempt small funds, stating, "It is important to establish a consistent framework for proxy information provided by funds to enhance the consistency and availability of information to investors, and investors in funds of all sizes will benefit . . . ." *Id.*

The SEC also received a recommendation from its Small Business Capital Formation Advisory Committee on the Climate Rule Proposal. The committee recommended the SEC "scal[e] and delay[] the compliance requirement for emerging growth companies, along with smaller reporting companies" and "provid[e] a more detailed cost-benefit analysis, including the impact that the proposed rules would have on smaller public and private companies."[95]

In addition, the Committee asked the SEC to consider "how the climate-related disclosure requirements may deter private companies from going public" and stated that "there should be a pathway for very small companies to become public reporting companies without hiring expensive climate-related consultants."[96]

The U.S. Small Business Administration (SBA) Office of Advocacy also submitted a comment letter urging the SEC to revisit its analysis on the costs to small entities, including providing more information that would better identify and describe the distribution of small entities and using detailed information to analyze the relative impact of the costs of the proposed rules on small entities based on their size and industry.[97] The SBA Office of Advocacy recommended these measures to help the SEC "understand the cost burden faced by the smallest regulated entities."[98]

Despite these comments, the SEC nonetheless promulgated a rule that will cause smaller registrants to face significant difficulty with compliance and may force those companies to exit the public market.[99]

95. Small Business Capital Formation Advisory Committee, Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors (July 13, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20134360-304077.pdf, at 1.

96. *Id.*

97. Comment Letter from U.S. Small Business Administration, Office of Advocacy, The Enhancement and Standardization of Climate-Related Disclosures for Investors – File Number S7-10-22 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131758-302192.pdf, at 5-6.

98. *Id.*

99. Climate Rule Adopting Release, *supra* note 58, at 21855-56 ("As with any other disclosure requirement, smaller registrants that are required to disclose governance information under the final rules may be disproportionally affected in terms of costs relative to larger registrants because of the direct fixed costs associated with producing disclosure."); *id.* at 21876 n.3042 ("[W]e recognize that in some cases, certain components of compliance costs may not vary with size and may be higher in proportional terms for smaller registrants."); *id.* at 21887 ("We therefore expect that smaller registrants will have more difficulty allocating resources to comply with the final rules as compared to larger firms.").
The SEC's adoption of Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections rules all but killed the market for special purpose acquisition vehicles. *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158 (Feb. 26, 2024). *See also* Mark T. Uyeda, Comm'r, U.S. Sec. and Exch. Comm'n, Dissenting Statement on Final Rule on Special Purpose Acquisition Companies, Shell Companies, and Projections: The Commission Embraces Merit Regulation (Jan. 24, 2024) ("Following the dramatic rise in SPAC IPOs and associated de-SPAC transactions in 2020 and 2021, the Commission had an opportunity to propose a harsh regulatory framework for this investment vehicle and method of accessing capital markets. Nearly two years after the Commission proposed this rulemaking, the SPAC market is a shell of its former self. Today's recommendation shows that the Commission intends to never let them return.").

C. The SEC's Rules Will Disrupt the Orderly Functioning of the Markets.

Further compounding the issue is the SEC's failure to undertake the necessary work to understand how markets and participants will be affected by proposed changes, leading to unnecessary and flawed rules that will in some cases disrupt the orderly functioning of the markets. Instead of approaching rulemaking with caution and utilizing the full arsenal of tools and expertise to ground rules on solid data and analysis,[100] the current SEC has rushed through numerous proposals that, when operating together, could have unintended consequences for the markets.

For example, the SEC's proposal to extend the current investment adviser's custody rule (rebranded as the proposed Safeguarding Rule) to a broader array of client assets and advisory activities, purportedly to enhance the custodial protections that client assets receive under the rule, reflects a misunderstanding of existing law and market functioning.[101] The proposed requirements are so burdensome and impractical that many currently qualified custodians have stated that they would stop offering such services. Such a narrowing of available custodians would increase industry concentration, potentially creating systemic risk.[102] If adopted, the Safeguarding Proposal would disrupt critical financial markets, including credit markets, prime brokerages, over-the-counter derivatives markets, and commodities markets.[103]

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100. Prior Commissions have done holistic rulemakings that rightfully accounted for interconnections and dependencies including 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). *See also* Comment Letter from Investment Company Institute, Need to Account for the Aggregated Impact of the Commission's Rulemaking (Aug. 17, 2023), https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf.

101. *See* Safeguarding Advisory Client Assets, 88 Fed. Reg. 14672 (Mar. 9, 2023) ("Safeguarding Proposal").

102. *See, e.g.*, Comment Letter from the New York City Bar Association Committee on Private Investment Funds and Committee on Compliance re: File No. S7-04-23 (May 24, 2023).

103. The Safeguarding Proposal would fundamentally alter the manner of transacting in these and other asset classes in ways the SEC did not properly consider. Specifically, the proposal to require qualified custodians to hold client cash in segregated, off-balance sheet accounts would fundamentally disrupt the core banking model of taking deposits, providing credit, and facilitating payments. For individuals, businesses, and communities, mandatory cash deposit segregation would reduce banks' ability to provide credit. For investors and other market participants, segregation of cash would slow down payment and settlement cycles, increase cost of funding and credit, and increase operational risks and trade failures. The requirement to segregate client assets would effectively prohibit prime brokers from providing margin financing by re-hypothecating client assets even when the prime broker has the client's consent to do so. This could result in repricing of these products for clients advised by registered investment advisers, materially affecting liquidity in the market and significantly reducing returns. For more on the many ways the Safeguarding Proposal would significantly impact the markets, *see, e.g.*, Letter from Multiple Trade Associations to Gary Gensler, SEC Chair, Negative Impacts of the Safeguarding Proposal on Investors, Market Participants, and the Financial Markets (Sept. 12, 2023), https://www.sec.gov/comments/s7-04-23/s70423-258159-603042.pdf (sec.gov).

This potential disruption of this proposal, if adopted, is so fundamental that even banking regulators have publicly raised concerns.[104]

The chair recently recognized that the SEC had "robust feedback" on the proposal and that, based on the feedback, has "asked staff to consider whether it would be appropriate to seek further comment, possibly, on a modified proposal."[105] It is not enough to take into account the feedback in the comment file, which only identifies problems with the Safeguarding Proposal. Before any reproposal is issued, the SEC should engage in a robust process with outside stakeholders, including market participants and the banking regulators, to understand the current regulatory framework and to articulate, among other things, the problem that is being solved against a baseline of whether, under existing regulation, sufficient protections exist.[106]

As another example, the SEC's Open-End Fund Liquidity Proposal[107] fails to understand how mutual funds actually process trades through intermediaries and record-keepers, and the value that investors place on prompt and transparent trade execution.[108]

Many retail mutual fund investors (i.e., retirement savers) may face trading cut-offs as early as 10 am ET if such investors wish to receive same-day pricing in the event the mandatory swing pricing and "hard close" amendments are adopted, while direct-at-fund investors may continue to place orders much later in the day while still receiving same-day pricing.[109] The SEC would create, through regulation, multiple classes of investors based on the time zone in which they live or the means by which they access the markets.[110]

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104. *See* Letter from Jerome Powell, Chair, Board of Governors of the Federal Reserve System to The Honorable Andy Barr, House of Representatives (Jan. 12, 2024) ("The proposed rule would, if adopted, require a significant change in custody practices at depository institutions."); Letter from Michael Hsu, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, to The Honorable Andy Barr, House of Representatives (Jan. 23, 2024) ("This requirement would be a departure from the usual manner in which bank custodians hold clients' cash.").

105. *See* Chair Statement, *supra* note 69.

106. *See* discussion *infra* § I.A.2.

107. *See generally* Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form NPORT Reporting, 87 Fed. Reg. 77172 (Dec. 16, 2022) (the "Fund Liquidity Proposal").

108. *See* Letter re Need to Account for the Aggregated Impact of the Commission's Rulemaking from Eric J. Pan, President and CEO, and Susan Olson, General Counsel, Investment Company Institute to Chair Gary Gensler, Securities and Exchange Commission (Aug. 17, 2023) at https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf.

109. *Id.* (citing Letter re Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting (File No. S7-26-22) from Eric J. Pan, President and CEO, Investment Company Institute at 6, 55-60 (Feb. 14, 2023), https://www.sec.gov/comments/s7-26-22/s72622-20157306-325651.pdf).

110. The SEC's rulemakings are replete with examples of changes that are similarly flawed. For example, the amended MMF rules require applicable MMFs, which generally do not sell portfolio securities to meet redemptions, to come up with hypothetical costs based on a sale of a vertical slice of the portfolio to calculate a liquidity fee. *See* MMF Adopting Release, *supra* note 81, at 51417. This ignores not only the fact that MMFs use cash to satisfy redemptions but also the rolling maturity nature of an MMF's portfolio. In yet another regulatory context, the Commission fails to understand how order flow works in the equity markets. Institutional investors and retail investors generally trade different securities and execute trades at different times of the day, which would affect the functioning of the Order Competition Proposal's auction system. *See* discussion *supra* note 27 and accompanying text; *see, e.g.*, Comment Letter on Regulation Best Execution, File No. S7-32-22 and on Order Competition Rule, File No. S7-31-22 from Sarah A. Bessin, Deputy General Counsel, Investment Company Institute (Mar. 31, 2023) at § III, https://www.sec.gov/comments/s7-31-22/s73122-20162786-332187.pdf. Finally, the SEC issued a follow-up request for comment after issuing ATS-G and Definition of Exchange Proposal because commenters highlighted that the proposed expansion of the definition of "exchange" would not work with DeFi Protocols and Automated Market Makers and could include requiring the registration of product developers, among other unintended consequences. *See* ATS-G and Definition of Exchange Proposal, *supra* note 33, at 29451-52.

In fact, commenters have submitted data on the costs to investors, particularly retirement savers, that were not addressed in the proposal's economic analysis, including one analysis estimating that a "set and forget retirement plan participant . . . could face an erosion of approximately $53,342 of retirement savings over a 26-year period."[111]

In light of these comments and others, the SEC's Investor Advisory Committee has urged the SEC to "expand and revisit its economic analysis, to examine other anti-dilution alternatives, and narrowly tailor any final requirement to actually observed risks."[112]

The chair recently noted that he has asked SEC staff to consult with bank regulators "on how to best mitigate for regulatory gaps between collective investment funds and open-end funds," reasoning that collective investment funds "lack limits on illiquid investments and minimum levels of liquid assets [and t]here is no limit on leverage, requirement for regulatory reporting on holdings to investors, or requirement for an independent board."[113] In addition to consulting with the banking regulators and after carefully evaluating the comment file, if the SEC continues to believe that pursuing dilution-related rulemaking potentially has merit, the SEC should engage in a robust process with market participants and incorporate any feedback received in a reproposal rather than a final adoption.

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111. *See* Recommendation of the SEC Investment Advisory Committee's Investor-as-Purchaser Subcommittee regarding Open-End Fund Liquidity Risk Management Programs and Swing Pricing (Draft as of September 11, 2023) at https://www.sec.gov/files/20230913-draft-recommendation-regarding-swing-pricing.pdf quoting Comment Letter on Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, File No. S7-26-22 from Kristen Malinconico, Director, Center of Capital Markets Competitiveness, U.S. Chamber of Commerce (July 25, 2023).

112. *Id.* ("Overwhelmingly . . . many commenters, including bipartisan members of Congress, investor groups, and industry participants, raised concerns about the practical impact of the proposal on Main Street investors and retirement savers.").

113. Chair Statement, *supra* note 69.

D. There Are Major Questions About the Scope of the SEC's Rulemaking Agenda.

Agency rulemaking authority is congressionally delegated. It is not limitless. Exercise of that authority must be clear and cannot be used as an indirect way of regulating markets or entities outside the jurisdictional scope of the agency's authority. "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need . . . ."[114] The SEC, however, is using rulemaking authority to regulate entities or activities outside its jurisdiction. "Public interest" and "investor protection" are not carte blanche rationales to regulate outside the context of the SEC's enabling statutory authority.

For example, the issuer Climate Rule exceeds its congressionally delegated regulatory authority by representing a roundabout way of regulating greenhouse gas (GHG) emissions, despite environmental regulation not being within the scope of the Commission's statutory ambit.[115] In adopting the Climate Rule, the Commission departed from the long-standing precedent of having disclosure to investors predicated on financial materiality.[116] Elements of the rule dispense with materiality and instead focus on providing "consistent, comparable and reliable" and "decision-useful" information regarding climate-related risks to investors.[117]

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114. *See* EO 12866, *supra* note 10, at § 1(a); *see also New York Stock Exch.*, 962 F.3d at 555 (observing that Commission had "no delegated authority to promulgate a 'one-off' regulation like Rule 610T that imposes significant, costly, and disparate regulatory requirements merely to secure information that *may or may not* indicate to the SEC whether there is a problem worthy of regulation" because "[i]f agencies were allowed to regulate in this way, absent delegated authority from Congress, the ramifications would be extraordinary" (emphasis in original)); *id.* at 556 (courts have made "it clear that a 'necessary or appropriate' provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized").

115. Harvey L. Pitt, *The Proposed SEC Climate Disclosure Rule: A Comment from Former SEC Chairmen and Commissioners*, Harv. L. Sch. F. on Corp. Governance (July 1, 2022), https://corpgov.law.harvard.edu/2022/07/01/the-proposed-sec-climate-disclosure-rule-a-comment-from-former-sec-chairmen-and-commissioners/.

116. See Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23924 (Apr. 22, 2016) (describing materiality as "'the cornerstone' of the disclosure system established by the federal securities laws"); see also Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway Inc., 426 U.S. 438, 449 (1976); Emergency Motion for Stay Pending Disposition of Petitions for Review, Chamber of Commerce of the United States of America v. S.E.C., Case No. 24-1628 (8th Cir. 2024) (stating that petitioners are likely to prevail on the merits because, among other things, the climate rule exceeds the SEC's authority).

117. Climate Rule Adopting Release, *supra* note 58, at 21676. Notably, despite Chair Gensler asserting that placement in Form 10-K would provide "assurance [in] a control environment," the final rule, is misleading on reasonable assurance and auditor independence. *See* Soyoung Ho, *Gensler Prefers Corporate Climate Change Disclosure in Annual Reports*, Thomson Reuters (Oct. 22, 2021). The final rule requires "reasonable assurance" for mandated GHG emissions disclosures, which is the standard level of assurance required for public issuer financial statements. While the Climate Rule Adopting Release notes "reasonable assurance is equivalent to the level of assurance provided in an audit of a registrant's consolidated financial statements included in a Form 10-K," it allows for the use of different standards such as PCAOB, AICPA, IAASB, or even ISO. *See* Climate Rule Adopting Release, *supra* note 58, at 21737 n.1078. Therefore, the level of reasonable assurance for GHG disclosures is not the same as or necessarily equivalent to that applicable to financial statements. Similarly, GHG attestation providers are required to satisfy only a subset of the stringent independence requirements required of financial statement auditors. *Id.* at 21759.

Although the mandated disclosures may be financially material depending on the company in question, an affirmative obligation for every company to provide these prescriptive disclosures extends far beyond the realm of materiality and the purposes behind the Securities Act of 1933.[118]

The Commission in its PDA Proposal proposes to regulate technology used by investment advisers and broker-dealers by using 211(h) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 15(l) of the Exchange Act as sources of authority.[119] The expansiveness of the PDA Proposal and the breadth of activities it would seek to prohibit raise serious questions about whether these statutory provisions support the weight that has been placed on them. The SEC does not provide any analysis of the basis on which the proposed rules are supported by Sections 211(h) of the Advisers Act and 15(l) of the Exchange Act. The PDA Proposal lacks a discussion of both the Commission's understanding of the scope of its authority under these statutory provisions and the specific findings of the Commission as they relate to covered technologies that would support the link between each of the proposed prohibitions and its statutory authority.[120]

Likewise, in its Outsourcing Proposal, the SEC seeks to indirectly regulate third-party service providers, some of which are expressly carved out of regulation under the Advisers Act.[121] The Outsourcing Proposal contemplates a new rule under Section 206(4) of the Advisers Act to prohibit registered investment advisers from outsourcing certain services or functions (a "covered function") without meeting certain requirements and to require the adviser to periodically monitor the service provider's performance. This is an indirect way to regulate third parties—index providers in particular, as they are expressly excluded from the Advisers Act.[122]

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118. *See* Federal Securities Act, Hearings before the House Interstate and Foreign Commerce Committee, 73rd Congress, 1st Session, on H.R. 4314, March 31, April 1, 4 and 5, 1933. President Franklin D. Roosevelt articulated that "[t]he purpose of the legislation I suggest is to protect the public with the least possible interference to honest business." *Id.; see also New York Stock Exch.*, 962 F.3d at 555 (vacating Rule 610T that was "not merely a benign quest for data" because "Commission has no regulatory mission" and yet "establishes *major regulatory requirements"* with market-altering effects (emphasis in original)).

119. *See* PDA Proposal, *supra* note 41, at 53971 ("The proposal draws upon [the SEC's] authority under section 211(h) of the Advisers Act and section 15(l) of the Exchange Act.").

120. Additionally, the SEC also exceeds its statutory authority by extending coverage of the PDA Proposal beyond retail investors. The Commission has no authority under Section 211(h) to adopt any rule applicable to private funds. *See also* PFA Pet. Brief, *supra* note 76, at 1-2 (arguing that the Commission exceeded its statutory authority in proposing the new rules governing private fund advisers because, in part, that Section 211(h) by its "plain terms" applies to "retail customers").

121. *See* Outsourcing Proposal, *supra* note 46.

122. *See* Request for Comment on Certain Information Providers Acting as Investment Advisers, 87 Fed. Reg. 37254, 37257 (Jun. 22, 2022). The Outsourcing Proposal suggests that advisers obtain reasonable assurance from service providers that the third party will coordinate with the investment adviser for purposes of the investment adviser's compliance with the federal securities laws. By requiring service providers to provide this representation, it extends the SEC's oversight and authority to third parties that the SEC does not have authority over, such as many index providers, which are expressly exempted from registration under the Advisers Act.
The SEC likewise exceeded its authority in its 10B-1 Proposal by requiring public reporting security-based swap positions. Section 13(o) of the Exchange Act establishes a predicate before including equity SBS in the public disclosure regimes set forth in Section 13 of the Exchange Act by requiring the SEC to consult with prudential regulators and the Secretary of the Treasury and make a determination that equity SBS provide incidents of ownership comparable to direct ownership of a reference security. The SEC did not engage in this process or make this determination and instead is using proposed Rule 10B-1 to require disclosure of SBS without satisfying the requirements of Section 13(o). *See* MFA 10B-1 Comment Letter, *supra* note 46, at 6-7 ("We continue to be concerned that the Commission is attempting to use its supposed authority under Section 10B to do what would otherwise be prohibited under Section 13 [of the Exchange Act].").

II. Conclusion And Recommendations For Reform

The current SEC is failing investors and the markets. At best, its rulemaking agenda will create conflicting obligations and expanded compliance costs; at worst, its rulemaking agenda will discourage participation in our capital markets, as too many simultaneous changes increase costs and regulatory uncertainty.

Certain legislative reforms should be considered to ensure that SEC rulemaking promotes its mission and is bound by rigorous economic analysis. Therefore, on behalf of our members who represent American investors, businesses, and the markets, we support the following:

- Requiring the SEC to affirmatively conduct an analysis of all interrelated and interconnected rules (existing and contemporaneously proposed) for each proposed rule, and amend or repeal rules as necessary to account for such interconnections.
- Requiring the SEC to provide a minimum of 60 days, comment periods for proposals calculated from the date published in the Federal Register unless there is an emergency.[123]
- Requiring a third party to perform and publish for public comment no later than 90 days from the date of enactment a post-adoption cost impact assessment for each major rule the SEC has adopted in the past three years.
- Integrating and expanding upon the mission of several offices at the SEC, such as the Office of the Advocate for Small Business Capital Formation, Office of Strategic Hub for Innovation and Financial Technology, Office of Minority and Women Inclusion, and the Office of the Investor Advocate, to centralize and appropriately resource mandates that focus on opportunities for U.S. investors and market entrants and to promote market innovation and capital formation.
- Requiring the SEC to (a) publish an annual report on the number of exemptions granted or exemptive rules adopted to promote capital formation and product innovation, and the actions the SEC has taken to promote financial security, opportunity, choice, and wealth creation for American investors, and in particular retail investors, and (b) review and adjudicate exemptive applications under the 1940 Act for relief in no more than [180] days.

123. *SEC Overreach: Examining the Need for Reform*, Subcommittee on Capital Markets, Committee on Financial Services, 118th Cong. 2 (2024).