



January 31, 2023

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair Gensler:

The U.S. Chamber of Commerce's (Chamber) Center for Capital Markets Competitiveness (CCMC) is concerned regarding inquiries made by the Securities and Exchange Commission (SEC or Commission) involving recordkeeping practices of investment advisers,¹ and that this investigative "sweep" is based upon a fundamentally misguided and novel view of recordkeeping requirements under the Investment Advisers Act of 1940 (Advisers Act) that could undermine the integrity of the SEC's investigative and enforcement processes.

The Chamber has been a leading voice in providing observations and reform recommendations related to the enforcement practices of the SEC. Vibrant markets and the protection of investors depend upon vigorous enforcement of the securities laws and the deterrence of illicit behavior. At the same time, regulated entities and investors alike benefit from clear "rules of the road" and an SEC enforcement program that is fair and grounded in existing law.

CCMC SEC Enforcement Recommendations

In 2015, the CCMC issued a report outlining 25 recommendations for how the SEC could make its enforcement program more efficient and effective without compromising the SEC's ability to hold bad actors accountable.² ("2015 CCMC Report") The 2015 CCMC Report was based upon a survey conducted across 75 companies and extensive interviews with more than 30 former SEC officials. In that report, the CCMC discussed our longstanding concern regarding the use of the SEC's enforcement authority to create regulatory policy:

While agencies must be prepared to, and should, take effective enforcement action in the face of violations, if enforcement actions are the primary tool by which regulatory policy is developed and put into effect, the significance and impact of enforcement actions will decrease. Moreover, increasing reliance on individual

¹ SEC scrutiny into Wall Street communications shifts to investment funds – sources. Reuters (October 11, 2022), available at <https://www.reuters.com/business/sec-scrutiny-into-wall-street-communications-widens-investment-funds-sources-2022-10-11/>

² Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices (July 2015), available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf

enforcement cases effectively squanders the Commission's available assets to secure increased protection of investors through enhanced regulatory compliance.³

The 2015 CCMC report also recommended that the SEC proceed carefully with investigations that raise novel or complex legal matters, and that SEC commissioners remain fully informed regarding such investigations. These recommendations are particularly relevant to the adviser sweep.

Concerns Regarding Interpretation of Advisers Act Recordkeeping Obligations

The adviser sweep implicates several deficiencies with current SEC enforcement practices that the 2015 CCMC Report sought to rectify. Most concerning, SEC staff is basing the sweep upon a newfound interpretation of the Advisers Act that is squarely at odds with longstanding law and market practice.

Advisers Act Rule 204-2(a)(7) requires that advisers maintain communication records relating to 1) any recommendation made or proposed to be made and any advice given or proposed to be given; 2) any receipt, disbursement or delivery of funds or securities; 3) the placing or execution of any order to purchase or sell any security; and 4) predecessor performance, and the performance or rate of return of any or all managed accounts, portfolios, or securities recommendations.

Investment advisers have long understood these defined obligations and have established policies and procedures to comply with them. Moreover, the categories outlined under Rule 204-2(a)(7) differ substantially from recordkeeping obligations that apply to broker-dealers, which are much more expansive and mandate that brokers maintain all communications related to their "business as such."

However, the SEC's adviser sweep requests appears to request records related to communications that are far broader than what is outlined under Rule 204-2(a)(7). This suggests to investment advisers that there exists a regulatory obligation to maintain records which go well beyond what is currently required by statute and regulation. This is an unprecedented and erroneous interpretation of Advisers Act obligations and is another example of an agency using its enforcement powers to establish new regulatory requirements.

Equally as troubling, the SEC's sweep raises the possibility that an investment adviser could be in violation of its Advisers Act obligations for not following its internal policies and procedures related to communication recordkeeping – *even if those internal policies and procedures extend to communications not covered by Rule 204-2(a)(7) or any other provision of the Advisers Act*. This would create an incentive for investment advisers to avoid adopting recordkeeping policies and procedures that exceed their regulatory obligations if it means that the SEC could initiate an enforcement action for any technical

³ 2015 CCMC Report, page 35.

violation of those policies. In other words, the SEC's efforts in this area could ultimately disincentivize good behavior and weaken protections for investors.

Conclusion

If the SEC believes that recordkeeping obligations for investment advisers should be expanded, it could request that Congress amend the Advisers Act or initiate a rulemaking process pursuant to the Administrative Procedure Act to update recordkeeping requirements. Both of these approaches would have the benefit of public input and open debate and are far preferable to a regulation-by-enforcement approach that embraces a malleable view of requirements under the Advisers Act. We urge the SEC to base all its investigations and enforcement efforts upon existing law and regulation, and to avoid using its enforcement powers to establish new mandates for regulated entities.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK', with a long horizontal flourish extending to the right.

Tom Quadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: Commissioner Hester Peirce, Securities and Exchange Commission
cc: Commissioner Caroline Crenshaw, Securities and Exchange Commission
cc: Commissioner Mark Uyeda, Securities and Exchange Commission
cc: Commissioner Jaime Lizárraga, Securities and Exchange Commission