



November 1, 2022

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

Re: Resubmission of Comments and Reopening of Comment Periods for Certain Rulemaking Releases (Release Nos. 33-11117, 34-96005, IA-6162, IC-34724; File Nos. S7-32-10, S7-18-21, S7-22-21, S7-03-22, S7-08-22, S7-09-22, S7-13-22, S7-16-22, S7-17-22, and S7-18-22) (87 Fed. Reg. 63,016-63,017, October 18, 2022)

Dear Chair Gensler:

The U.S. Chamber of Commerce writes regarding the October 7 notice from the Securities and Exchange Commission (SEC) reopening the comment period for 11 comment files due to a recently discovered technological error in the SEC's Internet comment form ("Reopening Notice" or "Notice"). The SEC has so far determined that the error affected comment letter submissions as far back as June 2021.

This unprecedented and troubling development comes at an unfortunate time for the SEC. Over the last 18 months, the SEC has pushed the envelope in terms of both policy and process with its regulatory agenda. The SEC has issued nearly three dozen rule proposals during this period, including several that rely on questionable assertions of legal authority, and which would collectively impose billions of dollars in compliance costs on a fragile economy. Equally as concerning, the SEC has proactively sought to limit public feedback by providing arbitrarily truncated comment periods for most proposals. The prioritization of speed and volume over quality has weakened the SEC's longstanding reputation as an independent and apolitical regulator. These concerns were recently vocalized in the SEC Inspector General's report on staff sentiments.¹ It is apparent that a 14 day reopening of an already truncated comment period is not sufficient to allow for proper commentary on multiple proposals. Accordingly, we suggest that the re-opened comment periods remain open for the equivalent to the traditional 90 day period normally afforded rulemaking proposals.

¹ <https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf>

The public comment process is an indispensable part of effective rulemaking for any regulator. Public comments assist regulators in identifying problems, mistaken assumptions, or potential unintended consequences embedded within a proposed rule. Public commenters do not take this process lightly – businesses and individuals alike dedicate significant time and resources towards analyzing rules and drafting comments. The thousands of comments the SEC has received on rulemakings since June 2021 reflect how important it is for market participants to provide feedback to the SEC. Relatedly, the Commission should disclose which specific letters were impacted by the “glitch” in the discrete comment files. The Commission has made corrections or posted letters according to the date of submission, not the date of posting. The comment file serves to educate the Commission and provides the public with an opportunity to evaluate other views presented in the file and either build or attempt to refute those views. For instance, in the past, the Chamber has reviewed other commenters’ submissions and responded in kind. Issuing a brief statement – on a Friday afternoon before a holiday weekend – that an unexplained technological “error” has been preventing the SEC from receiving comments for a year and a half only fuels growing concerns over the SEC’s approach to its recent rulemaking agenda.

Ironically, one of the rulemakings included in the Notice is a cybersecurity disclosure rule that would mandate public companies to disclose certain cyber incidents within four days of those events occurring – yet in this case, the SEC is only now informing the public of a major technological problem that has plagued its internet comment form for at least 18 months. This delay in identification and reporting of the problem reflects a clear failure of internal processes within the SEC. We can also report that several comment letters submitted by the Chamber in August 2022 may have never been received had it not been for proactive outreach by Chamber staff to the SEC once several weeks went by and the comments never appeared on the SEC’s website.

What is truly perplexing, however, is the SEC’s non-explanation for how the technological error may have affected certain rules that were recently finalized by the SEC. Two rules in particular – Pay Versus Performance² and Proxy Voting Advice³ – were both proposed and finalized during the window in which the SEC now says a problem afflicted the comment submission process. The Reopening Notice lists only 11 comment files where the SEC has identified the problem as occurring, but notably it does not say anything about the SEC completing a full investigation of the problem or verifying that the error did not affect other comment files.

The Chamber and our members are struggling to comprehend how the problem could have affected only certain comment files but not others. Perhaps there is a reasonable explanation for this, but there remains the very real possibility that the Pay Versus

² 87 FR 55134

³ 87 FR 43168

Performance and Proxy Voting Advice rules were finalized *without the SEC considering the full extent of public input on those rules*. Until the SEC provides further information about the nature and extent of the error, the public is left to assume that these comment files may have been subject to the error and these final rules therefore stand on questionable legal ground under the Administrative Procedure Act (APA). Additionally, there are at least 16 other outstanding rulemakings not included in the Notice that could also have been affected by the error. The SEC must take steps to determine whether any or all of these comment files should be re-opened in light of the error's discovery.

While no single action can rectify a problem of this magnitude, we urge the SEC to disclose more information about the nature of the technological error, and to expeditiously determine whether it affected more comment files than just the 11 listed in the Reopening Notice.

Accordingly, we pose the following questions regarding the technological error:

- What is the exact nature of technological error, and did it affect other comment submission methods, for example comments that may have been e-mailed to rules-comments@sec.gov?
- How many total comment letters over the last 18 months has the SEC identified as being affected by the error?
- When did the SEC first identify problems with its internet comment form? Did the SEC continue to issue rule proposals *after* it first became aware of the technological error?
- How did the technological error affect only certain comment files, but not others? Has the SEC determined whether any comments were not received on rules that the SEC proposed *and finalized* since June 2021, including Pay Versus Performance, Proxy Voting Advice, Whistleblower Program Rules⁴, and Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants⁵?
- Has the SEC's internal investigation of the problem been concluded, or is it still trying to determine whether other comment files are affected, or if the problem occurred before June 2021? If an investigation is ongoing, will the SEC continue to propose new rules before the problem has been completely resolved?

⁴ 87 FR 54140

⁵ Release No. 34-96034

- Has the SEC considered disclosing which specific letters in individual comment files were affected? The SEC has not identified which letters may have been posted late or were corrected. Will the SEC release a list of letters that were affected by the “glitch”?

The Notice has created more questions than answers. We believe the public would benefit from answers to these questions and greater transparency in general from the SEC regarding this troubling development.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long, sweeping horizontal line.

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