



September 11, 2023

The Honorable Sherrod Brown  
Chair  
Committee on Banking, Housing,  
and Urban Affairs  
United States Senate  
Washington, DC 20510

The Honorable Tim Scott  
Ranking Member  
Committee on Banking, Housing,  
and Urban Affairs  
United States Senate  
Washington, DC 20510

Dear Chair Brown and Ranking Member Scott:

The U.S. Chamber of Commerce urges you to raise several important issues with Securities and Exchange Commission (SEC) Chair Gary Gensler during his long overdue appearance before the Committee on September 12. Oversight of the SEC is a critical priority for Congress, yet Chair Gensler has not appeared before the Senate Banking Committee since September of 2022.

Over the past year, members of the Committee have lacked the opportunity to question the Chairman regarding the SEC's ongoing attempts to fundamentally transform major aspects of the U.S. capital markets through the most aggressive regulatory agenda in modern SEC history. The Chair's responses to written inquiries from members of Congress are frequently lackluster and avoid answering basic questions about the SEC's rulemaking process, economic analyses, enforcement activities, and other functions that are core to the SEC's mission. Your upcoming hearing will enable the Committee to assert its oversight responsibilities.

Since April 2021, the SEC has proposed or finalized 47 separate rulemakings, a pace not seen since the SEC was charged by Congress with implementing dozens of provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. According to a recent report from the Committee on Capital Markets Regulation (CCMR), these rules collectively run to 3,765 pages in the Federal Register.<sup>1</sup> Most concerning, the vast majority of these rules have not been mandated or even *authorized* by Congress. CCMR estimates that 83%, or 39 rulemakings, lack a Congressional mandate.<sup>2</sup>

Such a malleable view of securities laws embraced by the SEC represents a startling expansion of the administrative state and, if allowed to stand, would make market

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<sup>1</sup> Regulatory Incidence of SEC Proposed and Final Rulemakings (Gensler Chairmanship, April 17, 2021 to August 15, 2023), Committee on Capital Markets Regulation. Available at <https://capmksreg.org/wp-content/uploads/2023/08/CCMR-Statement-on-SEC-Agenda-Mapping-08.31.2023.pdf>

<sup>2</sup> *Id.*

participants and investors vulnerable to whatever idiosyncratic priorities or views may be held by a future SEC Chair.

As the Chamber has pointed out in several comment letters to the SEC, many of the regulations recently proposed or finalized by the SEC fail to articulate an actual problem or market failure that would justify new rules. Much of the SEC's agenda appears to rely on the irrational theory that imposing billions of dollars' worth of prescriptive new mandates on public companies, broker-dealers, investment advisers, private equity funds, and others will somehow unlock capital and create more opportunities for investors. This theory is entirely unfounded and is especially alarming at a time when businesses and households are already dealing with a fragile economy and the effect of rising interest rates and inflation.

Because of its significant role in the marketplace, the SEC has traditionally been known as a sober market regulator that avoids the 'pendulum swing' of policy from one administration to the next. Under Chair Gensler, that has not been the case. The SEC has been willing to reverse recently enacted policies, including a final rulemaking to gut the SEC's proxy advisor reforms and an outstanding rule proposal designed to subvert reforms to the shareholder proposal process adopted in 2020. An April 2023 report from the Chamber highlighted the threats posed to businesses and their shareholders from abrupt swings in public policy and the growing perception by businesses that public policy risks are material to their long-term performance.<sup>3</sup>

Given these concerns, below are several questions that the Chamber suggests members of the Committee pose to Chair Gensler during his appearance on September 12.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' with a long, sweeping underline.

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

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<sup>3</sup> Public Policy Risks Faced by Companies Soar, U.S. Chamber. Available at <https://www.uschamber.com/assets/documents/USCC-Public-Policy-Risk-Report.pdf>

1. How has the SEC's view of its regulatory authority – in particular as it relates to corporate disclosure – evolved in light of the Supreme Court's 2022 *West Virginia vs. EPA* decision regarding the major questions doctrine?
2. Do you believe the Commission has the authority to include certain provisions of the climate proposal – such as Scope 3 emissions disclosure and Regulation S-X analysis – in the final rule? Does the SEC intend to include these provisions in the final rule?
3. The SEC recently adopted new rules to mandate certain cybersecurity disclosures and policies and procedures for public companies. One aspect of the rule is an “interagency communication process” between the SEC and DOJ that will ostensibly help determine whether a company may delay disclosure of a cyber incident due to national security concerns. Who from the SEC will take part in this “interagency communication process?” Who should companies be contacting at the SEC and DOJ during the period when the agencies are communicating about potential national security risks?
4. A November 2022 SEC Inspector General (IG) report found that senior SEC staff were concerned about litigation risk regarding the SEC's regulatory agenda, and that truncated comment periods for proposed rules may have limited public feedback on proposals. What actions have been taken in response to the IG's findings? Do you disagree with the concerns raised by these senior SEC staff about the length of comment periods?
5. Since the adoption of Staff Legal Bulletin 14L (SLB 14L) in November 2021, the number of shareholder proposals at public companies– including those dealing with sensitive social and political topics – has increased substantially. Was an increase in such proposals one of the goals of adopting SLB 14L?
6. During testimony before the House Financial Services Committee in July, the Director of the Division of Corporate Finance said that staff will consider whether a shareholder proposal topic is subject to “widespread public debate” when deciding whether a company must include the proposal with its proxy materials. How does the SEC define “widespread public debate?”
7. The SEC's proposed rule that would require open-end funds to implement swing pricing and a 4:00pm ET hard close explains that the negative impacts to investors will include increased costs, decreased portfolio returns, reduced investment choices, inefficient portfolio allocation, and additional market risk. Why isn't the SEC more concerned about hurting the retirement savings of hard-working Americans when it cannot justify with solid evidence the benefits (purported to be minimizing dilution and first-mover advantage) of the proposed rule?
8. SECURE 2.0 is a piece of landmark legislation passed by Congress last year with clear, bipartisan intent to encourage small businesses to offer retirement plans to their employees so that they can save for the future. The SEC's open-end funds proposal notes that the extensive costs would be prohibitive for

many small plan sponsors because they may not enjoy economies of scale. Will the SEC revise its open-end fund proposal to ensure it does not undermine the clear directive from Congress to expand opportunities for businesses to offer retirement plans?

9. How has the SEC sought to protect American markets and companies from the impending threat of foreign disclosure requirements from the European Union, specifically the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive? Should the European Union set disclosure standards for US companies? When the SEC engages with EU or other jurisdictions, do you prioritize the application of US law to US companies?
10. The SEC's recently finalized rule regarding private funds relied on statutory authority from Section 913 of the Dodd-Frank Act. Section 913 has been widely understood – even by the SEC staff itself in a [2011 report](#) – to deal with standards applicable for adviser interactions with *retail* investors and *personalized* investment recommendations. Where did the SEC come up with the theory that Section 913 could be used to justify rules for advisers to private funds, which are generally available only to institutional or accredited investors?
11. Earlier this year the Public Company Accounting Oversight Board (PCAOB) issued a proposal that would require auditors to report on potential public company noncompliance with certain laws and regulations that go beyond those governing financial statements. Do you believe auditors are best positioned to investigate and report on noncompliance with laws and regulations that are outside an auditors' normal remit?
12. The SEC's current regulatory agenda contains roughly 50 separate items. What specific items on this list are intended to facilitate capital formation for small businesses?