U.S. Chamber of Commerce

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April 14, 2023

The Honorable Patrick McHenry
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman McHenry and Ranking Member Waters:

The U.S. Chamber of Commerce appreciates the House Financial Services Committee convening a hearing that features testimony from the Securities and Exchange Commission's (SEC) Chair, Gary Gensler. The SEC's role is central to the function of U.S. capital markets, and as such its rulemaking agenda has significant consequences. Despite this important role, this will concerningly be Chair Gensler's first appearance before the House Financial Services Committee since October 5, 2021. Moreover, in a break from tradition, the Chair will not appear before the Senate Banking, Housing, and Urban Affairs Committee in complement to his testimony in the House, suggesting either a lack of interest in exercising oversight by Senate leadership or an aversion to testimony from the leadership at the SEC. Chair Gensler's absence from regular testimony in both the House and Senate has been notable, especially given the agency's expansive and unwarranted regulatory agenda under the Chair's leadership.

The barrage of rulemaking at the SEC is unprecedented and merits the close scrutiny of Congress. Chair Gensler has identified a range of 50-55 regulatory priorities since the start of his tenure, and has already proposed twice as many rules as his predecessor in just half the time. Further, this SEC has a rulemaking agenda four-times larger than each of the two years following the enactment of the Dodd-Frank Act; unlike Dodd-Frank implementation, however, the majority of this SEC's rulemaking agenda is not mandated by Congress. The Chamber agrees that the rules governing the marketplace should be updated from time-to-time to account for market developments, but the rulemaking agenda under Chair Gensler's leadership has been torrential, disjointed and rushed.

A letter from the SEC Inspector General (IG) in October 2022 raises serious concerns about the capacity of the SEC to review, assess and analyze comments in light of the unprecedented volume of proposed rulemakings from the SEC since 2021.[1] Senior SEC officials reported a troubling increase in attrition and expressed concern that the SEC "may not have received as much feedback during the rulemaking process, either as a result of shortened timelines during the drafting process or because of shortened public comment periods." SEC staff also told the IG that the SEC's haste increases the litigation risk associated with several

[1] The Inspector General's Statement on the SEC's Management and Performance Challenges, October 22

rules. Notwithstanding these warnings from its own staff, the SEC has marched ahead apace with rulemaking proposals under the same flawed process that has defined the last two years.

Because of its important 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. This SEC has been quick to reverse policy, including recently enacted rules that had not even yet taken effect in the market.

The SEC's rulemaking – which businesses rely upon to understand how to operate within the market – has invited more questions than answers. We look forward to Congress exerting greater oversight on the SEC and demanding transparency about how pending regulatory proposals could drastically reshape our capital markets.

Below are fifteen questions that, at minimum, we believe Congress should ask Chair Gensler during his testimony on April 18th.

Respectfully,

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

cc: Members of the House Committee on Financial Services

<u>Questions</u>

1. How has the Securities and Exchange Commission heeded the major questions doctrine – as advanced in *West Virginia v. EPA* – in its interpretation of its rulemaking authority?
2. Amidst such a robust rulemaking agenda, why has the SEC not proposed a single rule directed at expanding capital formation? This crucial responsibility is one of the core

spokes of the SEC's tripartite mission: to protect investors, maintain fair, orderly, and efficient markets, and facilitate *capital formation*.

3. In the proposed climate disclosure rule, the SEC's own estimate finds that the proposed disclosures from this one rule would be two-and-a-half times more expensive than all SEC disclosures companies currently make, *combined*, raising the total cost burden associated with its related forms from a *total* of $3.9 billion to $10.2 billion. Does the Commission intend to remove unnecessary and immaterial requirements – such as Scope 3 emissions disclosure and Regulation S-X analysis – from the final rule to minimize the burden of any final regulation?
4. 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?
5. In the Fall of 2022, the SEC reopened the comment file on its stock buyback proposal and requested information on how the new stock buyback excise tax, as required by the recently enacted Inflation Reduction Act, would affect the assumptions of its cost-benefit analysis. If it is important to get the cost-benefit analysis right on such a rule, before finalizing the rule, will the SEC wait until after the excise tax has been fully implemented and its effects on the market can be quantified?
6. How has the SEC sought to incorporate feedback from other independent agencies and the Administration on its proposed rule to mandate cybersecurity disclosures for corporate issuers? How has the SEC sought to understand the unintended consequences that its proposed rule could have on the work of law enforcement? Has the SEC consulted relevant agencies, including the Department of Homeland Security, regarding the implementation of the discreet disclosure regime prescribed by the Cyber Incident Reporting for Critical Infrastructure Act that was signed into law in March 2022?
7. How has the SEC sought to ensure that Staff Legal Bulletin 14L, which requires staff to make determinations about shareholder proposal exemption requests under the ordinary business exception according to whether the proposal in question has a "broad societal impact," has been applied evenly across exemption requests and has not been subject to potential political bias from SEC staff?
8. 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?
9. 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?

10. What steps has the SEC taken to update its regulatory framework to account for the unique benefits of crypto assets? What obligation does the SEC have to understand a new method of conducting securities transactions, and to review the potential benefits of those methods in light of existing regulations?
11. The SEC's agenda increasingly includes regulations that would blur the lines between the regulation of public and private companies, creating a one-size-fits-all capital markets where private companies are subject to many of the same rules as public companies. What's the point of being a private company if the SEC is going to make you follow the rules intended for public companies? Is the SEC conducting analyses to evaluate how its private company proposals will impact capital formation, innovation, job growth, and investors?
12. Proper oversight of outside service providers is widely understood to be part of an investment adviser's existing legal obligations and the SEC already has sufficient authority to take actions against advisers for any violations of fiduciary duty. Can the SEC point to data or solid evidence of compliance failures as justification for its rule, proposed in October 22, that would move away from the successful, principles-based approach to overseeing outsourcing by investment advisers?
13. The COVID-19 pandemic accelerated the evolution toward a digital economy. What steps does the SEC plan to take to revise outdated rules to permit e-delivery of investment documents? Why does the SEC continue to believe paper disclosures should be the default option provided to investors?
14. The SEC recently accepted comments on four separate proposals to reshape equity market structure; however, the agency has not considered how they would interact with each other. Will the SEC heed a more deliberative process in order to avoid unintentionally undermining deepest, most liquid, and resilient markets in the world?
15. The SEC's recordkeeping sweep of investment advisers appears to request records related to communications that are far broader than what is outlined under Advisor Act rules. If the SEC believes that recordkeeping obligations for investment advisers should be expanded, will it continue to regulate by enforcement or will it open the rulemaking to public comment under the APA?