

November 11, 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)

Dear Chair Gensler:

The undersigned organizations write regarding the recent notice from the Securities and Exchange Commission (SEC) reopening 11 comment files due to a “technological error” that prevented some comments from being received by the SEC (“Reopening Notice” or “Notice”). An October 7 SEC press release announcing the reopening of these comment periods notes that the technological error has affected comment files as far back as June 2021.

Over the last 18 months, our organizations and many of our member companies have devoted significant time and resources towards developing comments in response to what has become an unprecedented SEC regulatory agenda. Since Spring of 2021, the SEC has proposed or reopened comment periods for 34 distinct rulemakings. Many of these rulemakings are extremely complex, run to hundreds of pages in length, and collectively ask the public to comment on thousands of questions that often involve highly technical subject matter. These proposals have compelled commenters to devote time and energy to determine the impact a rule may have on their business or on the broader economy and to convey relevant and useful feedback to the Commission.

Complicating matters, during this period the SEC has adopted a *de facto* policy of providing unreasonably short comment periods for the public to submit feedback on rule proposals – sometimes providing only 30 days, even for highly consequential proposals. While commenters have done their best to provide the SEC with informed feedback, the combination of short comment periods and a high volume of rule proposals has inhibited the public’s ability to provide thoughtful and reasonable comments. Adding to these concerns, a recent report from the SEC’s Inspector General found that some of the SEC’s own staff believe the SEC’s “*more aggressive agenda - particularly as it relates to high-profile rules that significantly impact external shareholders – potentially (1) limits the time available for staff research and analysis, and (2) increases litigation risk.*”¹

The fact that the SEC has now informed the public that many comments may have never been received by the SEC is incredibly frustrating for the businesses and individuals that spent significant time and effort to construct comments in accordance with the SEC’s compressed

¹ The Inspector General’s Statement on the SEC’s Management and Performance Challenges (October 13, 2022)

timelines. This development also creates a real risk that many individual voices will not be heard in the rulemaking process and undermines the public's faith in the rulemaking process, which is based upon the premise that regulatory agencies consider the public's views when promulgating new rules.

However, the frustration felt by public commenters is not the most pressing issue facing the SEC or regulated entities in light of the October 7 announcement. While the Reopening Notice lists 11 comment files that were open during the time period during which the technological error occurred, it says nothing about rulemakings that were proposed *and finalized* during the period in which the SEC acknowledges the error prevented comments from being submitted. The Notice also does not provide any explanation for how the error affected some outstanding rule proposals, but not others.

Although the SEC admits the error occurred as early as June 2021, the public deserves more information regarding the full scope of the problem, including how many total comments were "missed" by the SEC, the exact nature of the technological error, and whether the SEC is able to verify that the error has been corrected and the problem will not occur with future rulemakings. While we recognize SEC staff is likely working internally to address and answer some of these unknowns, we encourage the SEC to disclose further information to the public as soon as practicable.

Our concerns and observations on this matter are discussed in greater detail below.

I. The SEC has not addressed whether the technological error affected recently finalized rulemakings.

The Reopening Notice lists 11 comment files that the SEC has confirmed were impacted by the technological error. The Notice states that most of the missed comments were submitted in August 2022, but that the SEC believes problems occurred as early as June 2021. However, the Notice does not indicate that the SEC's investigation of the problem has been concluded. Indeed, the Notice seems to suggest that a review is ongoing, stating that "*To date*, the staff's review of the available information indicates that the error only affected the comment files for the Rulemaking Releases and self-regulatory organization matters identified in the tables below"² (emphasis added).

Since the October 7 announcement, our organizations have struggled to understand how the technological error could apply only to a certain list of rulemakings, given that the timeframe in the SEC's own Notice implicates a larger number of rules. The SEC's lack of an explanation in the October 7 announcement for why this error was so limited in nature fuels the public's concern that the problem could be more widespread than initially reported.

This is especially important given that the SEC recently issued final rulemakings that were initially proposed during the period in which the error apparently occurred. These rulemakings include Proxy Voting Advice (proposed November 2021); Pay Versus Performance (comment period reopened January 2022); Whistleblower Program Rules (proposed February 2022); and

² Reopening Notice at 3

Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants (proposed November 2021).

We understand there may be a technological explanation for how the error only affected certain comment files. But until the SEC provides more information publicly about the nature and reach of the error, the possibility of the error impacting comment files for recently finalized rules, and the SEC's mandate under the Administrative Procedure Act to appropriately consider public comment in finalizing those rules, will remain an open question. At a minimum, if and when the SEC can demonstrate that the error somehow did not affect these rulemakings, it should provide further information publicly that confirms all comments for these rules were received by the SEC.

II. The Reopening Notice does not explain how other outstanding proposed rulemakings were not affected by the error.

Similar to the concerns about recently finalized rulemakings outlined above, the Reopening Notice says nothing about other rule proposals that have been issued since June 2021. By our estimation, there are no fewer than 16 outstanding rule proposals – all proposed after June 2021 – that are not listed on the Reopening Notice.³ Since the SEC's examination of the problem appears to be ongoing, we urge the SEC to determine whether these rulemaking files were also impacted, notify the public, and re-open comment periods if necessary. As with the recently finalized rules, absent further explanation from the SEC it is difficult for the public to understand how only a select group of comment files experienced the error.

III. The SEC should determine the full extent of the problem and promptly provide the public with more information about whether the error has been fixed going forward.

The Reopening Notice provides limited information about the SEC's investigation of the technological error and the SEC's current determination that only 11 comment files were

³ Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers (S7-11-21); Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation (S7-12-15); Rule 10b5-1 and Insider Trading (S7-20-21); Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers (S7-01-22); Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities (S7-02-22); Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies (S7-04-22); Shortening the Securities Transaction Settlement Cycle (S7-05-22); Modernization of Beneficial Ownership Reporting (S7-06-22); Removal of References to Credit Ratings From Regulation M (S7-11-22); Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (S7-12-22); Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities (S7-14-22); Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8 (S7-20-22); Exemption for Certain Exchange Members (S7-05-15); Clearing Agency Governance and Conflicts of Interest (S7-21-22); Amendments to Form PF to Amend Reporting Requirements for All Filers and Large Hedge Fund Advisers (S7-22-22); 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 Fund Advisers (S7-23-22)

affected. Critically, there is no explanation whatsoever about the nature of the actual error, whether it affected only one type of submission method and, importantly, whether the SEC has determined the error has been corrected for future rulemakings. Simply extending a select group of comment files by an additional 14 days creates more questions than it does answers for those who have engaged or wish to engage in the comment process.

Given the gravity of this problem and its relevance to the integrity of the rulemaking process and the SEC's reputation, our organizations encourage the SEC to provide the public with timely and complete answers for how this problem occurred, the universe of comments it affected (including those not mentioned in the Reopening Notice), and how the SEC will take steps to ensure that commenters' voices are heard on both past and future rulemakings. The public deserves no less than full transparency regarding this unprecedented situation.

Sincerely,

American Securities Association

Business Roundtable

Center on Executive Compensation

Nareit

National Association of Manufacturers

U.S. Chamber of Commerce