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August 17, 2023

Chair Gary Gensler
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Re: Need to Account for the Aggregated Impact of the Commission's Rulemaking

Dear Chair Gensler:

The Investment Company Institute ("ICI")[1] is writing to supplement its comments[2] on a series of proposals issued by the Securities and Exchange Commission (the "Commission"). The Commission has issued a wide range of interconnected rule proposals (the "Interconnected Rules")[3] over the last two-and-a-half years. These proposals, assessed on either an individual or collective basis, have the potential to fundamentally alter many aspects of the current regulatory landscape. While we have expressed our concerns with these proposals during their respective comment periods, it is now clear that the Interconnected Rules in the aggregate warrant further analysis by the Commission.

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1 The Investment Company Institute ("ICI") is the leading association representing regulated investment funds ("Regulated Funds"). ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds ("ETFs"), closed-end funds, and unit investment trusts ("UITs") in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $31.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.7 trillion in regulated fund assets outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts ("CITs") and retail separately managed accounts ("SMAs"). ICI has offices in Washington DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

2 We have provided extensive comments on a great number of rules that affect our members as issuers and investors. *See, e.g.*, Comments of the Investment Company Institute, Rel. No. 34-96494; File No. S7-30-22 (Mar. 31, 2023) (on proposal related to Regulation NMS, minimum pricing increments, access fees, transparency); Comments of the Investment Company Institute, Rel. No. 34-96495; File No. S7-31-22 (Mar. 31, 2023) ("Order Competition Rule Letter"); Comments of the Investment Company Institute, Rel. No. 33-11130; File No. S7-26-22 (Feb. 14, 2023) ("Fund Liquidity Letter"); Comments of the Investment Company Institute, Rel. No. 33-11068; 34-94985, IA-6034, IC-34594; File No. S7-17-22 (Aug. 16, 2022)("Fund ESG Proposal" letter); Comments of the Investment Company Institute, Rel. No. 33-11067; 34-94981, IC-34593; File No. S7-16-22 (Aug. 16, 2022) ("Names Rule Letter"); Comments of the Investment Company Institute, Rel. No. IC-34441; File No. S7-22-21 (Aug. 8, 2022)(money market fund amendments); Comments of the Investment Company Institute, Rel. No. IC-34441; File No. S7-22-21 (Apr. 11, 2022) (money market fund amendments); Comments of the Investment Company Institute, Rel. No. 34-94524; File No. S7-12-22 (May 27, 2022) ("Dealer Definition Letter").

3 For further discussion of the Interconnected Rules, please refer to Appendix A attached hereto.

The ICI notes with approval the American Investment Council's recent letter to the Commission on this topic[4] and agrees with the concerns expressed in that letter. We similarly caution that the Commission's isolated and piecemeal approach to the Interconnected Rules is flawed both substantively and procedurally because the Commission has failed to consider and analyze the Interconnected Rules holistically. Without adequate analysis or explanation, the Commission is hurrying through a regulatory agenda that risks unnecessarily and unjustifiably altering many aspects of our capital markets, harming funds and long-term investors, including retirement savers.

The unprecedented number of proposals that have been introduced for adoption in a short period of time has not allowed regulated entities or other market participants to fully appreciate and evaluate the interconnections and interdependencies of the rules on a case-by-case basis. Now, with over 50 rule proposals in our rearview, we are able to see significant flaws in the Commission's separate treatment of the Interconnected Rules.

Regulated Funds, including mutual funds, closed-end funds, and exchange traded funds with a variety of investment objectives and strategies, are used by everyday investors to help meet their most important financial goals. These Regulated Funds provide substantial benefits to these investors, including professional management, reasonable cost, and exposure to assets and strategies that these investors could not obtain on their own. The Commission's mission is to protect investors and facilitate capital formation while maintaining fair, orderly, and efficient markets. To fulfill its mission and its duty to protect investors and the markets, the Commission must cure the significant deficiencies in the Interconnected Rules.

The Interconnected Rules are substantively flawed. In its inexplicable rush to promulgate so many significant rules in such a short period of time, the Commission either does not try, or fails, to show that it has made the effort to have an accurate understanding of the markets or the participants it seeks to regulate. This failure to do the necessary groundwork leads to substantively deficient proposals. The Commission replaces what should be rigorous substantive analysis with speculative statements as to how markets function (not backed by factual or empirical evidence), how participants and intermediaries operate (including Regulated Funds, investment advisers, and other market participants), and how the proposals will cumulatively affect the operation and functioning of our capital markets. At best, the speculative and complex nature of the proposals makes it difficult for the public to meaningfully comment on the proposals. At worst, the proposals will irreparably harm investors and the markets by leading to overlapping and conflicting rules that will disrupt the operation and efficiency of the capital markets.

The Interconnected Rules also have serious procedural deficiencies. Across the Interconnected Rules, the Commission does not consider the effect of interconnected and interdependent proposals in its cost-benefit analyses. It fails to provide a meaningful analysis of the expected

[4] Comments of the American Investment Council (Aug, 8, 2023), ("AIC Letter"). The ICI agrees with the points found in the AIC Letter. As similar or identical problems with the Interconnected Rules apply to our members, we follow the general framework found in the AIC Letter. The Commission's failure to consider the Interconnected Rules holistically is a widespread concern among other market participants. *See, e.g.,* Comments of the Managed Funds Association, Rel. No. 34–93784 (File No. S7–32–10) (July 21, 2023).

effects of the Interconnected Rules as a unit on capital markets, market participants, or investors. All these rules will bring sweeping, fundamental and likely unexpected changes and new risks to the markets and market participants. And yet, the Commission has failed to consider how the proposals interact with one another, including from either an operational or compliance perspective.

The Commission should know that the capital markets, and the regulations that support the resiliency of the capital markets, do not operate in a disaggregated manner. Regulated Funds rely on strong capital markets. They are highly regulated, both as issuers and investors. Regulated Funds rely on registered investment advisers, brokers and dealers, and other market participants. By not considering in a formal and rigorous manner the costs and impacts of the Interconnected Rules, separately as well as in the aggregate, on the markets and participants, the Commission is not fulfilling its tripartite mission.

In order for the Commission to advance the best rules possible (to the extent the Commission first has assessed that those potential rules are necessary), the Commission must, in its proposals, provide a well-informed analysis of how markets, market participants, and intermediaries operate, the likely effects of the changes it is proposing, and why these changes are necessary and appropriate. The Interconnected Rules, if implemented in their current form, will disrupt U.S. capital markets, lead to poor regulatory outcomes, and fail to provide benefits that outweigh their cost to market participants and investors.

On behalf of our members who are fiduciaries to American investors and help them meet their most important financial goals, like a secure retirement, we request that the Commission (i) publish a thorough analysis of the cumulative effects of the Interconnected Rules that accounts for interconnections and dependencies among them and any other rules the Commission has proposed or intends to propose in the near term, (ii) reopen the comment periods for the Interconnected Rules to provide the public a fair and reasonable opportunity to understand and assess holistically the Commission's proposals (and its justification for the proposals as a package), and (iii) then, with the benefit of an appropriate analysis and public comment, finalize the rules holistically, not one at a time or in isolated series, taking into account not just the expected effects on investors and our capital markets but also practical realities such as implementation timelines as well as operational and compliance requirements. Further, we recommend that the Commission publish, for public notice and comment, proposed, phased multi-year implementation schedules that take into account the interconnections and dependencies among the Interconnected Rules. Many of the same systems and people will be called upon to implement all the Interconnected Rules, likely together and at the same, or close in, time, resulting in significant enhancements and changes to existing systems or the need to build new systems. The significant and real risks resulting from such a comprehensive and technical undertaking cannot be ignored with so much at stake. Failing to take this more deliberate and common-sense approach would be a violation of the Commission's obligations under the Administrative Procedures Act ("<u>APA</u>") and its mission.

We also submit that the Commission cannot seek to cure any APA deficiencies pertaining to the Interconnected Rules by just reopening comment files for a few more weeks.[5] First, the Commission has failed to provide appropriate notice and comment periods in the first instance. Reopening files *after* market participants have already submitted comments and moved on to the next set of rules is not consistent with an agency that values its obligations under the APA or the input of commenters. Second, reopening comment periods to ask commenters to analyze the interconnections in related rules results in the Commission inappropriately pushing its APA obligations onto the public and ignoring its statutory mission.[6] Third, reopening comment periods with an after-the-fact staff paper that attempts to cure the cost-benefit deficiencies in the Commission's proposals is procedurally inadequate.[7] Finally, reopening comment periods to superficially address the substantive errors raised in comment files is procedurally deficient and does not meet the APA's notice and comment requirements.[8] Many of these reopenings in fact should have been re-proposals.

We are confident that addressing the procedural and substantive deficiencies in the Interconnected Rules also will assist the Commission in better understanding the markets and participants it seeks to regulate and remedying the serious deficiencies of the Interconnected Rules. Hasty and uninformed changes to regulations underpinning capital markets and investor protection introduce risk to investors and other market participants.[9] Unfortunately, the

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[5] The number of times the Commission has reopened comment files is also unprecedented. This is a testament to its hasty and uninformed regulatory agenda.

[6] *See, e.g*., Reopening of Comment Period for "Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies," 88 Fed. Reg. 16,921, 16,922 (Mar. 15, 2023) (Commission reopening comment period for specific purpose of how the proposal interrelates with the Regulation SCI Release, the Regulation S-P Release, and Cybersecurity Release) ("The Commission is reopening the comment period for the proposed rules so that commenters may consider whether there would be any effects of the Related Proposals that the Commission should consider in connection with the proposed rules."). The ICI filed comments, including describing interconnections, on these cybersecurity program proposals for funds, advisers and brokers and other regulated entities, as well as on Regulation S-P proposal (File No. S7-04-22, File No. S7-06-23 and S7-05-23) *See*, ICI comments letters, available at https://www.ici.org/comment-letters.

[7] *See, e.g.,* Memorandum of the Division of Risk and Economic Analysis on Modernization of Beneficial Ownership Reporting, infra n. 13, at https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf. The rule was proposed on February 10, 2022, and the additional analysis was provided April 28, 2022, after the Commission reviewed comments provided and "additional data and existing research" that it had apparently not considered in the original rule proposal. Not only are interconnected rule proposals disaggregated, many of the proposals themselves suffer from this disaggregated pattern of analysis.

[8] *See, e.g.,* Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange." 87 Fed. Reg. 29448 (May 5, 2023). Chair Gensler noted with the reopening his belief that "this supplemental release will help address comments on the proposal from various market participants, particularly those in the crypto markets." *See* SEC press release at https://www.sec.gov/news/press-release/2023-77.

[9] The Commission's piecemeal approach also is inconsistent with the Commission's statutory mission. The Commission has a three-part mission: protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. *See* SEC, The Role of the SEC, https://www.investor.gov/introduction-investing/investing-basics/role-sec.

Commission appears determined to finalize its proposals as quickly as possible, without due consideration of the risks to investors and the markets.[10]

The heart of ICI's mission is to work for the benefit of the individual long-term investor, ensuring that Regulated Funds and other asset management products serve their needs. These investors rely on well-functioning and strong capital markets—markets that are fair, efficient and facilitate capital formation and growth. Our members manage over $31.2 trillion in funds registered under the Investment Company Act of 1940, serving more than 100 million investors—everyday Americans—that access our markets through these funds, as well as many others that invest with our members in their capacity as investment advisers to certain other investment products. We believe the Commission's current approach to the Interconnected Rules presents significant risk for these more than 100 million investors, adversely affecting their ability to achieve their financial goals. Unfortunately, the Commission has not done the necessary work to best serve our investors and markets, including engaging in informed dialogue with the public to understand and consider these risks.

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[10] The Commission recently finalized its Money Market rule, introducing significant departures from its prior proposal without providing sufficient notice and comment. *See* Money Market Fund Reforms, Rel. Nos. 33-11211; 34-97876; IA-6344; IC-34959; File No. S7-22-21 (July 12, 2023) ("Money Market Rule").

We have enjoyed constructive and productive dialogue with the Commission for decades and stand ready to work with the Commission and its staff on a holistic review of the Interconnected Rules. If you have any questions, please contact us at (202) 326-5824 or (202) 326-5813.

Sincerely,

/s/ Eric J. Pan	/s/ Susan Olson
Eric J. Pan President and CEO Investment Company Institute	Susan Olson General Counsel Investment Company Institute

cc: Hester M. Peirce, Commissioner
Caroline A. Crenshaw, Commissioner
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Appendix A

As the Commission considers our request to provide a notice and comment process for the Interconnected Rules that aligns with its mandate and obligations under the APA, please note the following examples of procedural and substantive deficiencies in the current process:

The Commission's haste and failure to analyze and consider the interrelated and cumulative impacts of the Interconnected Rules is without precedent and is not justified by any exigencies or Congressional mandate. The Commission has proposed forty-six rules in the first two years of Chair Gensler's tenure, and more have followed.[11] These rules are broad in scope and affect not only Regulated Funds and their investors and investment advisers, but also the entire investment ecosystem: public companies, audit firms, custodians, national exchanges, security-based swap dealers, broker-dealers, and many others. The Commission is not acting in response to or in anticipation of market events, and the Commission lacks any significant Congressional mandate for this series of new rules. We note that the Commission's rulemaking pace far outstrips its rulemaking when implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in the wake of the 2008 global financial crisis. With no exigencies or mandate, the Commission's "rapid-fire" approach to broad rulemaking includes deficient cost-benefit analyses and unacceptably and unnecessarily short comment periods.[12] The Commission has not identified any persuasive reasons for this manner of rulemaking.

The comment process is deficient when proposals that target the same or similar parts of the market do not acknowledge or analyze interconnections and dependencies. When the Commission's proposals are viewed as a whole, the problems in the Commission's rulemaking process are amplified. The Commission's proposals are deeply interconnected and impact interdependent aspects of the capital markets.[13] Prior Commissions have done holistic

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[11] By comparison, the Commission had proposed 19 rules during the first two years of Chair White's tenure and 24 rules during the first two years of Chair Clayton's tenure.

[12] The Commission has historically provided longer comment periods for rulemakings with material market impacts. The public under Chair Gensler has had an average of 38 days to review and comment on a rule proposal. The vast majority of comment periods under Chairs White and Clayton were over 60 days (96 percent and 85 percent of the time, respectively), while 82 percent and 76 percent of comment periods were over 90 days, respectively.

[13] For example, it is unclear how tightening spreads (from the Commission's proposed additions to equity core data and reductions to pricing increments in the NMS Proposals) would affect the number of orders sent to wholesalers subject to the Order Competition Proposal; how the proposed changes to tick sizes, access fees, and order routing requirements would impact the policies and procedures for determining best execution; how the recently adopted shortening of the standard settlement cycle to T+1 will impact intersecting portions of the Commission's numerous outstanding equity market proposals; or how the proposed rule on security-based swap large position reporting would interact with proposals related to expanded beneficial ownership reporting, reporting of short positions, and reporting of securities loans. *See* Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, 87 Fed. Reg. 80,266 (Dec. 29, 2022) ("Rule 610/612 Proposal"); Order Competition Rule, 88 Fed. Reg. 128 (Jan. 3, 2023) ("Order Competition Proposal"); Regulation Best Execution, File No. S7-32-22, 88 Fed. Reg. 5440 (Jan. 27, 2023) ("Best Execution Proposal"); Position Reporting of Large Security-Based Swap Positions, File No. S7-32-10, 87 Fed. Reg. 6,652 (Feb. 4, 2022); Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13,846 (Mar. 10, 2022); Short Position and Short Activity Reporting by

rulemakings that rightfully accounted for interconnections and dependencies including with respect to fund disclosure, proxy voting advice, standards of conduct for financial professionals, swaps, and market structure.[14] These complex, interrelated rules benefited from roundtables, thorough analysis of their interconnected nature, and robust comment periods. This Commission, however, has not undertaken a comprehensive evaluation of how its wave of proposed rules may collectively harm the functioning of the markets, market participants, and market beneficiaries. The Commission's piecemeal approach to altering the same aspects of the U.S. capital markets through disconnected rules is dangerous, posing risk to the markets, market participants, and

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Institutional Investment Managers, File No. S7-08-22, 87 Fed Reg. 14,950 (Mar. 16, 2022); Reporting of Securities Loans, File No., S7-18-21, 86 Fed. Reg. 69,802 (Dec. 8, 2021). The Commission also fails to adequately consider the implications among all its proposed fundamental changes that would affect the U.S. Treasury market. These changes would significantly expand the number of market participants deemed to be a "dealer," broadly expand the types of trading mechanisms and tools deemed to be an "exchange," and exponentially increase the volume of Treasury cash and repo transactions subject to central clearing via a mandate. The Commission issued these proposals in piecemeal fashion without assessing their collective impact, despite acknowledging that "confidence in the U.S. Treasury market, and in its ability to function efficiently, even in times of stress, is critical to the stability of the global financial system." *See* Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, 87 Fed. Reg. 23,054 (Apr. 18, 2022) (the "Dealer Definition Proposal"); Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, File No. S7-02-22, 87 Fed. Reg. 15,496 (Mar. 18, 2022) ("Reg ATS Re-Proposal"); 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, File No. S7-23-22, 87 Fed. Reg. 64610 (Oct. 25, 2022) (the "Treasury Clearing Proposal"). Another example is the Commission's proposals requiring extensive ESG disclosures for funds, advisers, and public companies, which were issued without analyzing interdependencies or whether the Commission's regulatory objectives could have been otherwise accomplished. The proposed disclosure by funds and advisers is dependent on public company disclosures. The proposed Fund ESG disclosure also must be considered alongside proposed amendments to the Names Rule. *See* Investment Company Names, 87 Fed. Reg. 36,594 (June 17, 2022) ("Names Rule Proposal"); Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies, 87 Fed. Reg. 36,654 (June 17, 2022) ("Fund ESG Proposal"); The Enhancement and Standardization of Climate Related-Disclosures for Investors, File No. S7-10-22, 87 Fed. Reg. 21,334 (April 11, 2022) (public company climate-related disclosure) and Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, SEC Release No. IC-33963 (August 5, 2020) (proposal for changes to fund prospectus and shareholder reports is now finalized, File No. S7-09-20)). As ICI commented, the Commission should evaluate the effect of multiple disclosure proposals, as the sequencing and interaction of these proposals is important and must inform significant changes to fund disclosure intended to improve investor understanding of funds. *See* Names Rule Letter, *supra* note 2, at 3.

[14] *See, e.g.*, Chairman Jay Clayton, Statement at Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors (June 5, 2019) (noting extensive review of data in promulgation of Regulation Best Interest); U.S. Securities and Exchange Commission, Comments on Proposed Rule: Regulation Best Interest (including transcripts from Investor roundtables, among other meetings with relevant market participants), Chairman Jay Clayton, Statement at Open Meeting on Commission Actions to Enhance Transparency for Investors and the Commission (August 5, 2020) (noting substantial feedback from investors and others regarding modernizing and improving disclosure).

ordinary investors.[15] Even the most thoroughly studied and carefully analyzed rules have unintended consequences after adoption and require significant resources to implement given the complexity and breadth of the U.S. capital markets. As a result, the Commission has not met its obligations under the APA.

The Commission's artificial separation of interconnected proposals in time and analysis not only renders the comment process deficient, it signals that the Commission will take the same approach on adoption. If the Commission adopts rules without evaluating their effect on subsequent rules *and* the cumulative effects of related rules, it may cause undue harm to markets and investors. Past Commissions have approached many proposed rulemakings holistically to address the very concerns presented by the Commission's isolated treatment of the Interconnected Rules. Whether or not this has been a conscious decision on the part of the Commission to avoid dealing with the complexity of its overall regulatory approach or an oversight because it has failed to recognize interconnections, the Commission has failed to meet its obligations under the APA. The artificial separation of Interconnected Rules is not only a violation of the APA, it also flies in the face of the Regulatory Flexibility Act ("RFA") and the Commission's semi-annual obligation to publish a regulatory flexibility agenda listing its expected rulemakings. At a minimum, under its enabling legislation, the APA and RFA, the Commission's core responsibilities require the Commission to understand the functioning of capital markets and the participants that it regulates, propose a near-term agenda, and study the expected effects of that agenda on the markets, market participants, and investors.

The Commission fails to understand or misunderstands the markets and participants it seeks to regulate, leading to unnecessary, flawed, or disruptive proposals. Contrary to its obligations under the APA, the Commission has eschewed rigorous analyses in favor of unsupported assertions, qualitative speculation, and conclusory statements.[16] Across the spectrum of proposed rules, the Commission's inadequate approach to analysis seems to stem from its failure to understand—or its misunderstanding of—the markets and participants it seeks to regulate.[17]

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[15] The Commission itself has started to realize the importance of this analysis. However, a reopening of a set of rules for the public to undertake the Commission's responsibility—analyzing the collective impact—is not adequate. *See* supra nn.5-8 and accompanying text.

[16] Unsupported assertions are found throughout the Commission's rule proposals. For example, the Commission asserts that "mandatory swing pricing *could* benefit markets overall because it *may* reduce the first-mover advantage that arises from dilution associated with trading costs … the proposed amendment *may* mitigate the risk of runs on mutual funds and *may* decrease the risk of fire-sales for the funds' underlying investments." Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, 87 Fed. Reg. 77,172, 77,257 (Dec. 16, 2022) ("Fund Liquidity Proposal") (emphasis added).

[17] For example, the Money Market Rule requires money market funds (MMFs), which generally do not sell portfolio securities to meet redemptions, to come up with hypothetical costs based on a sale of a vertical slice of the portfolio to calculate a liquidity fee. This not only ignores the fact that MMFs use cash to satisfy redemptions, but also the rolling maturity nature of a MMF's portfolio. In the Money Market Rule's proposing release, the Commission noted that economic concerns surrounding the COVID-19 pandemic in March 2020 led investors to reallocate their assets into cash and short-term government securities, though the Commission cited few examples of MMFs that approached or breached the 30% liquid assets threshold during this period. Money Market Fund Reforms, 87 Fed. Reg. 7,248, 7,298 (Feb. 8, 2022). In another example, the Fund Liquidity Proposal fails to understand how open-end funds actually process trades

Unsurprisingly, the Commission's failure has led to proposals that are not appropriately tailored and threaten to create unnecessary costs and regulation and serious unintended consequences for the U.S. capital markets, market participants, and the American investors that depend on these markets to achieve their important investment goals.[18] Further, the Commission's speculative approach to substance, where it posits an uninformed and off-base theory of market and participant realities and dynamics that requires the public to educate and correct the Commission during the comment process (as the comment files across the Interconnected Rules demonstrate), does not provide an adequate basis for notice and comment rulemaking. It is the Commission's

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through intermediaries and recordkeepers; many retail mutual fund investors may face trading cut-offs as early as 10:00am ET if such investors wish to receive same-day pricing in the event that swing pricing is adopted, while direct-at-fund investors may continue to place orders much later in the day while still receiving same-day pricing. Fund Liquidity Letter, *supra* note 2, at 6, 55–60. The Fund Liquidity Proposal also fails to appreciate that many highly liquid funds would run afoul of the proposed 15% illiquid limit unless the funds make substantial changes to investment strategies or cap their size. *Id.* at 22. The Dealer Definition Proposal fails to understand that common activities undertaken by investment advisers, including managing distinct client accounts that follow similar investment objectives and strategies, could subject those accounts to treatment as "dealers" under the Exchange Act without considering how those accounts could, from a practical or common-sense standpoint, satisfy the requirements applicable to dealers. *See* Dealer Definition Letter, *supra* note 2. The Dealer Definition Proposal also fails to address how designating client accounts as dealers would interact with key customer protections that owners of these client accounts otherwise would be entitled to under SEC and FINRA regulations and, conversely, regulatory restrictions to which broker-dealers are subject that do not make sense to apply to customers. In yet another regulatory context, the Commission fails to understand how order flow works in the equity markets. Institutional investors and retail investors generally trade different securities and execute trades at different times of the day, which would affect the functioning of the Order Competition Proposal's auction system. *See* Order Competition Rule Letter, *supra* note 2, at 15. As another example, the Names Rule Proposal fails to provide evidence supporting the proposed fundamental revisions to Rule 35d-1 and fails to consider significant adverse impacts of the proposed amendments. *See* Names Rule Letter, *supra* note 2, at 43-60. Additionally, the Commission fails to understand or recognize that a significant majority of fund investors consider information beyond a fund's name in making investment decisions, including a fund's performance and fees, and also fails to take into account that the Commission was, at the time it proposed the Names Rule, considering two other disclosure proposals with interactions with the Names Rule Proposal: the Fund ESG Proposal and another proposal revamping the shareholder report (now finalized). *See id.* at 2, 4. In another example, in its proposal relating to Outsourcing by Investment Advisers, File No. S7-25-22 ("Outsourcing Proposal"), the Commission failed to consider existing law and rules which obviate the need for a new prescriptive rule. In fact, the Commission acknowledged that advisers are currently required to oversee their service providers and are doing so. *See* Outsourcing by Investment Advisers, 87 Fed. Reg. 68,816 (Nov. 16, 2022); *see also* Comments of the Investment Company Institute, Rel. No. IA-6176; File No. S7-25-22 (Dec. 23, 2022), at 3-5. The Outsourcing Proposal lacked an adequate study and understanding of adviser and service provider relationships. *See, id.* at 5-6. If adopted, the rule would adversely and greatly disrupt fund and advisory operations. *See, e.g., id.* at 8-10. In another example, the Commission fails to address the conflicts between its proposed rule on Treasury clearing and the custody and diversification requirements of the Investment Company Act of 1940. *See,* Comments of the Investment Company Institute, Rel. No. 34-96763; File No. S7-23-22, at 15-16, 22-26 (Dec. 23, 2022).

[18] For example, while proposing to inexplicably seize regulatory authority over all assets held on behalf of clients, the Commission fails to perform the analysis necessary to understand that many types of assets will be unduly burdensome or impossible to custody, including certain derivatives currently traded through futures commission merchants and cash deposits maintained with banks. In addition, the proposal threatens to completely shut down the prime brokerage market, as it would prohibit rehypothecation of collateral by broker-dealers acting as qualified custodians, even when rehypothecation is otherwise permitted under applicable SEC regulations. *See* Safeguarding Client Assets, File No. S7-04-23, 88 Fed. Reg. 14,672 (Mar. 9, 2023) ("Custody Proposal").

obligation at the proposing stage to come forward with well-informed analyses of how markets and participants operate, the likely effect of the changes it is proposing, and why such changes are necessary and appropriate. Instead, the Commission simply ignores the substantive work required, which compounds deficiencies under the APA. As is readily apparent in the recently finalized Money Market Rule, the Commission has finalized rules on the basis of speculation and assumption without providing the public a meaningful opportunity to comment on key provisions of the rule, predictably leading to bad policy.[19]

The Commission has issued numerous proposals with material effects on investors, market participants, capital formation, and market function without adequate cost-benefit analysis. As a result of the Commission's failure to properly understand the markets and participants it seeks to regulate, the proposals' cost-benefit analyses are fundamentally off course. They do not adequately assess the current vulnerabilities (if any) of the affected markets[20] or reasonably estimate the effects on investors,[21] market participants,[22] market function,[23] or capital formation

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[19] After rejecting the imposition of liquidity fees as an alternative to swing pricing as it would "give rise to several sets of operational concerns," the Commission now argues in its Money Market Rule that the imposition of a liquidity fee in lieu of swing pricing would meet its policy objectives but without grounding its conclusion in data, empirically analyzing its potential effects on normal market operations, or subjecting this critical portion of the rule to notice-and-comment. The rule's ultimate effect on money markets remains uncertain.

[20] The Commission has used one-off (*e.g.*, market dislocation due to meme stocks) or exogenous market events (*e.g.*, a global pandemic) to justify costly and unnecessary wholesale changes to U.S. markets. For example, the Commission has proposed significant reforms for open-end funds and uses the onset of the COVID-19 crisis to justify the proposed changes, ignoring the functioning of funds before the government shutdown of the economy during the COVID-19 crisis and since the reopening of the economy. An identical rationale was used for the recent hasty adoption of the Money Market Rule. Moreover, there is no convincing quantitative analysis that the proposed open-end fund reforms will address the risks identified by the Commission or that the costs of the complex structural changes necessary to effectuate the changes and the potential loss to investors and the markets of certain product offerings do not outweigh the benefits. *See* Fund Liquidity Proposal.

[21] The Fund Liquidity Proposal would alter the management and operation of funds and how investors purchase and sell funds. American investors could also lose access to certain funds and strategies that have served their financial needs for decades. Retirement savers may be particularly disadvantaged by the hard-close concept: investors who trade directly with a fund's transfer agent will have a significant advantage over retirement plan participants, whose trades are typically placed through record-keepers.

[22] The SEC's recent proposal on conflicts of interest associated with the use of predictive data analytics by broker-dealers and investment advisers would affect every broker-dealer and adviser registered with the SEC, as well as their associated persons, imposing costly, burdensome, duplicative, and conflicting obligations on these firms and their staffs. These unnecessary rules, rather than helping the retail investors the Commission purports to protect, would instead likely result in affordable financial advice no longer being within reach of smaller retail investors. *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File No. S7-12-23, 88 Fed. Reg. 53960 (Aug. 9, 2023).

[23] For example, the Commission proposed three separate amended rules that would radically alter equity market structure without any meaningful discussion in its cost-benefit analyses of how the rules, if implemented together, would alter such cost-benefit analyses and how such rules would cumulatively affect the equity market. *See* Rule 610/612 Proposal; Order Competition Proposal; Best Execution Proposal. Notably, the U.S. Department of Justice commented on this deficiency. Comment Letter, Antitrust Division of the U.S. Department of Justice, File Nos. S7-29-22; S7-31-22; and S7-32-22 (Apr. 11, 2023) at 6 ("The

of the proposed changes. They pay short shrift to analyzing and examining alternatives that could support the Commission's purpose. They ignore the impact on smaller market participants.[24] And they will have an outsized chilling effect on potential market entrants. Analysis of impact, required by law, is critical in order for the Commission to balance regulatory changes and for commenters to provide reasoned comment. The proposals are, therefore, deficient and warrant a reopening accompanied by appropriately rigorous analyses and description of the current state of the affected markets and the effects of the proposals on investors, market participants, capital formation, and market function. The public cannot fairly and reasonably comment without such efforts from the Commission. The Commission cannot disregard its obligations under the APA.[25]

The Commission's aggressive regulatory agenda places unreasonable compliance burdens on market participants that will likely harm investors and increase risk. The resources of market participants are not infinite. We believe unnecessary and aggressively timed regulatory changes will impact costs, complexity, competition and the ability of smaller market participants to enter into or remain in the markets. The Commission has not identified or analyzed these issues (and many others) adequately, placing an additional burden on the public in an already compressed timeframe. The Commission's hasty change for the sake of change approach adds and creates wholly unnecessary risk, will reduce competition, harms investors, and will adversely affect capital formation.[26]

The Commission's rapid-fire and truncated approach damages fulsome and beneficial cooperation between the Commission and the asset management industry. During the COVID-19 crisis, members engaged with the Commission in an effort to share critical market insights on

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Antitrust Division encourages the Commission to carefully consider potential interactions among the Proposed Rules when preparing their final versions, planning for the rules' implementation timelines, and evaluating the actual effects of the rules once they go into effect."). *See* Comments of the Investment Company Institute, Rel. Nos. 34-96495 and 34-96496; File Nos. S7-31-22 and S7-32-22 (Mar. 31, 2023).

[24] Lack of adequate (or worse, at times unrealistic) cost-benefit analyses on an individual and cumulative level ignores the attendant compliance costs and their disproportionate impact on smaller market participants. *See, e.g.*, Comments of the Investment Company Institute, Rel. No. IC-34441; File No. S7-22-21 (Apr. 11, 2022) at 21 (noting that even if funds could accommodate the operational challenges of swing pricing, only the largest funds would likely survive because the costs would be substantial and prohibitive for smaller funds).

[25] *See, e.g.*, Chairman Jay Clayton, Remarks at the Economic Club of New York (July 12, 2017) ("the SEC . . . is committed to performing rigorous economic analyses of our rules"); Chair Mary Jo White, "The SEC after the Financial Crisis: Protecting Investors, Preserving Markets", Remarks at the Economic Club of New York (Jan. 17, 2017) (noting that the SEC undertakes exhaustive economic analysis); Chair Mary Schapiro, Speech by SEC Chairman: Applying the Lessons (Nov. 9, 2009) (remarking that comment period is a "vital" phase in rulemaking process as it "makes our rules all the more better").

[26] For example, the Custody Proposal for no reason upends Rule 206(4)-2 (the "Custody Rule") and does so in a manner that will likely shrink the number of entities willing to be qualified custodians. Highlighting the serious flaws of the Custody Proposal, the chairs and ranking members of the Senate Agriculture Committee and House Agriculture Committee sent a bipartisan letter to the Commission requesting that the Commission withdraw the proposal. *See* Letter to the Honorable Gary Gensler from Senate Agriculture Committee Chairwoman Stabenow (D-MI) and Ranking Minority Member Boozman (R-AR), and House Agriculture Committee Chairman Thompson (R-PA) and Ranking Minority Member Scott (D-GA) (July 20, 2023). In another example, the Fund Liquidity Proposal will unjustifiably limit the availability of certain strategies for retail investors.

fast-moving market conditions. These conversations have subsequently been mischaracterized and become a basis for regulatory action.[27] Beyond representing anecdotal evidence, the Commission confuses a willingness to engage with requests for regulatory change. In addition, because much of the Commission's analysis is qualitative and conclusory, the public does not have the appropriate opportunity or context to address the Commission's selective use and mischaracterization of industry comments. Ultimately, taking real-time market information out of context and then cutting off substantive dialogue during rulemaking will make it more difficult for the Commission to voluntarily receive real-time information from active market participants, thereby damaging the Commission's ability to respond to market events as they unfold and meet its mission.

27 *See* Remarks of Chair Gary Gensler at https://www.sec.gov/news/speech/gensler-remarks-investment-company-institute-05252023 ("I'm not going to name any names, but you in the industry who called the Commission and other agencies know who you are"); Fund Liquidity Proposal at 77,182. Notably, the relief that funds received is publicly available at https://www.sec.gov/sec-coronavirus-covid-19-response. The Commission ignores, when latching on to the COVID-19 crisis as an excuse to reshape mutual funds which are the backbone of retail investor portfolios, that market stress was caused by a global pandemic that led governments around the world, including here in the United States, to shut down their economies.