Statement

Rip Current Rulemakings: Statement on the Regulatory Flexibility Agenda

Commissioner Hester M. Peirce

June 22, 2022

Chair Gensler's Regulatory Flexibility Agenda[1] for the Securities and Exchange Commission sets forth flawed goals and a flawed method for achieving them. The agenda, if enacted, risks setting off the regulatory version of a rip current—fast-moving currents flowing away from shore that can be fatal to swimmers. Just as certain wave and wind conditions can create dangerous rip currents,[2] the pace and character of the rulemakings on this agenda make for dangerous conditions in our capital markets.

I. The Agenda Devotes the Agency's Limited Resources to Rulemaking Proposals Disconnected from our Core Mission

The Agenda continues to shun issues at the core of our mission in favor of shiny objects outside our jurisdiction. We used to focus on companies' disclosure of economically material information; we now focus on disclosure of hot-button matters outside our remit.[3] We once sought to protect retail investors; we now rush to the aid of professional investors.[4] We once worked to help small and emerging companies raise the funds that are their lifeblood; we now work to increase their costs and shrink their investor base.[5] We once hoped to increase the ranks of public companies by making it less costly and more beneficial to be public; we now look for ways to force companies to go public[6] since we are making it costlier to go public and be public.[7]

The Agenda does contemplate pursuit of some important mission-focused rules, such as updates to the investment adviser custody rules,[8] data security rules for the Consolidated Audit Trail,[9] updates to the electronic recordkeeping rules for broker-dealers,[10] and rules to shift from paper to electronic filings.[11] Yet, it drops or postpones indefinitely too many others, including transfer agent rules,[12] a joint project with the Commodity Futures Trading Commission to develop uncleared swap portfolio margining rules,[13] rules on investment company securities lending arrangements,[14] and rules to reform proxy plumbing infrastructure[15] and the fund proxy system.[16] Precious regulatory bandwidth is instead devoted to reopening rules that we only recently finished, such as the resource extraction,[17] proxy voting,[18] shareholder proposals,[19] and whistleblower rules[20]—even though we have no new information that could justify revisions so soon (less than two years) after we last considered these rules. Although the Agenda includes rules that might regulate crypto protocols or platforms through an unmarked backdoor,[21] it does not appear to include any rules primarily intended to grapple with the main regulatory questions that have arisen around these assets.[22]

II. The Agenda Breaks with the Commission's Longstanding Tradition of Deliberative Rulemaking that Facilitates Broad Participation by Affected Market Participants

Compounding the substance concerns are process concerns. We have abandoned our careful and considered approach to altering regulation in favor of effecting hasty and sweeping change.

The Agenda's timetables reveal that the rush of radical rulemakings remains relentless, despite pleas from almost every type of market participant and other interested party that the Commission slow down so that the public can catch up and provide meaningful input on our outstanding proposals.[23] These rules contemplate far-reaching changes to our regulatory regime, the breadth of which is hard to glean from merely reading their titles.[24] The Agenda plans to rush to completion proposals in which commenters have identified deep flaws.[25] Implementation of these rules presumably will also be on the fast track, which suggests that market participants will have to implement multiple complex rulemakings simultaneously.

Intensifying the problem, as the Agenda reveals, more proposals are on the way. The Commission plans to propose many new rules, contemplating further extensive changes within the next five months.[26] Even rules on the Agenda that are important to our mission stand no chance of receiving comprehensive public feedback. Issuing 3-5 rule proposals per month is not consistent with affording the public time to thoughtfully consider (let alone cogently comment on) how such changes will affect investors, markets, or day-to-day business operations of market participants. I also have concerns that the volume of comment requests will give even greater weight to the views of bigger players and mute the voices of retail investors, smaller advisers, broker-dealers, mutual funds, and companies, which lack the resources necessary to give each of these proposals the attention they deserve. Even if commenters are able to provide us careful feedback on individual rules, the rulemaking volume impedes the provision of data, the preparation of in-depth analyses, and the consideration of how these rules will interact with one another.

The Commission recently extended or reopened the comment periods for some proposed rules[27] and afforded longer comment periods for two recent rulemaking proposals.[28] I commend Chair Gensler for appreciating the need for more time on these matters. I urge the Commission for all rules to build in more reasonable comment periods *at the time* we propose new rules. Commenters need time to read our lengthy releases, decide which of the many questions to answer, gather the information necessary to answer them, and synthesize the information into a comment letter. If commenters think that a proposal's comment period will be only thirty or sixty days, they may not invest in gathering data or performing economic analysis for submission to the comment file. Why undertake a costly study or data collection exercise that may not be ready before the comment period is up? Providing more reasonable comment periods up front would better help the public understand how to spend their time and resources providing us with feedback. I hope that the Commission will embrace both longer comment periods and reasonable implementation periods.

III. Conclusion

When the Commission attempts rapidly to write and implement myriad rules, many of which are outside our longstanding mandate, it sets up conditions that could roil the markets. We can avoid creating regulatory rip currents by recalibrating our agenda to focus on issues core to the protection of investors and operation of our markets and by slowing down the pace to ensure that we and the public can think about what we are doing.

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[1] Securities and Exchange Commission (SEC), Agency Rule List (Spring 2022),Agency Rule List - Spring 2022 (reginfo.gov) [hereinafter Agenda].

[2] *See Rip Current Hazards (General Information)*, National Weather Service, https://www.weather.gov/mhx/RipCurrentsInfo.

[3] *See, e.g.*, Agenda, *supra* note 1, stating that: "The Division is considering recommending that the Commission propose rule amendments to enhance registrant disclosures about the diversity of board members and nominees"; "The Division is considering recommending that the Commission adopt rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities."; "The Division is considering recommending

that the Commission propose rule amendments to enhance registrant disclosures regarding human capital management."

[4] *See, e.g.*, *id.* ("The Division is considering recommending that the Commission adopt rules under the Advisers Act to address lack of transparency, conflicts of interest, and certain other matters involving private fund advisers."). These retail-like rules for private fund advisers will necessitate the expenditure of Commission resources to examine and bring enforcement actions against advisers that serve highly paid institutional investors, rather than retail investors.

[5] *See, e.g.*, *id.* ("The Division is considering recommending that the Commission propose amendments to Regulation D, including updates to the accredited investor definition, and Form D to improve protections for investors.").

[6] *See, e.g.*, *id*. ("The Division is considering recommending that the Commission propose amendments to the 'held of record' definition for purposes of section 12(g) of the Exchange Act.").

[7] *See, e.g.*, Proposed Rule No. 34-94546, Special Purpose Acquisition Companies, Shell Companies, and Projections (Mar. 30, 2022), https://www.sec.gov/rules/proposed/2022/33-11048.pdf [hereinafter SPAC and Shell Company Proposal]*; see also* Agenda, *supra* note 1 ("The Division is considering recommending that the Commission adopt rule amendments to better inform investors about a registrant's cybersecurity risk management, strategy and governance, and to provide timely notification of material cybersecurity incidents. The Commission proposed rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and cybersecurity incident reporting by public companies that are subject to the reporting requirements of the Exchange Act."); *see also id.* ("The Division is considering recommending that the Commission adopt rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities.").

[8] *See* Agenda, *supra* note 1 ("The Division is considering recommending that the Commission propose amendments to existing rules and/or propose new rules under the Investment Advisers Act of 1940 to improve and modernize the regulations around the custody of funds or investments of clients by Investment Advisers.").

[9] *See id.* ("The Division is considering recommending that the Commission adopt amendments to the National Market System Plan Governing the Consolidated Audit Trail regarding data security.").

[10] *See id.* ("The Division is considering recommending that the Commission propose rule amendments that would require the electronic submission to the Commission of certain filings by broker-dealers, security-based swap entities, self-regulatory organizations and clearing agencies. Most of these reports are currently filed with the Commission in paper form.").

[11] *See id.* ("The Division is considering recommending that the Commission adopt amendments to rules and forms to require that the following types of filings be submitted electronically: (1) applications for orders under any section of the Investment Advisers Act of 1940, (2) confidential treatment requests for filings made under section 13(f) of the Securities Exchange Act of 1934, and (3) ADV-NR.").

[12] *See id.* (stating that the next action date for the Division to recommend transfer agent rule proposals is "undetermined").

[13] *See id.* (stating that the next action date for the Division to recommend proposed amendments in this area is "undetermined").

[14] *See id.* (withdrawing this item from the Agenda).

[15] *See id.* (stating that the next action date for the Division to make a recommendation in this area is "undetermined").

[16] *See id.* (withdrawing this item from the Agenda).

[17] *See id.* ("The Division is considering recommending that the Commission review the rules under Section 1504 of the Dodd-Frank Act to determine if additional amendments might be appropriate."). These rules were last amended in December 2020. *See* Final Rule No. 34-90679, Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020), https://www.sec.gov/rules/final/2020/34-90679.pdf (previously amending the rules under Section 1504 of the Dodd-Frank Act).

[18] *See* Agenda, *supra* note 1 ("The Division is considering recommending that the Commission adopt rule amendments governing proxy voting advice."). These rules were adopted in July 2020. *See* Final Rule No. 34-89372, Exemptions from the Proxy Rules for Proxy Voting Advice (Jul. 22, 2020), https://www.sec.gov/rules/final/2020/34-89372.pdf (adopting the rules governing proxy voting advice).

[19] *See* Agenda, *supra* note 1 ("The Division is considering recommending that the Commission propose rule amendments regarding shareholder proposals under Rule 14a-8."). These rules were adopted in September 2020.*See* Final Rule No. 34-89964, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Sep. 23, 2020), https://www.sec.gov/rules/final/2020/34-89964.pdf (adopting the rules regarding shareholder proposals under Rule 14a-8).

[20] *See* Agenda, *supra* note 1 ("The Office of the Whistleblower is considering recommending that the Commission adopt additional amendments to the rules governing the Whistleblower Program established by Section 922 of the Dodd-Frank Act."). These rules were adopted in September 2020. *See* Final Rule No. 34-89963, Whistleblower Program Rules (Sep. 23, 2020), https://www.sec.gov/rules/final/2020/34-89963.pdf (adopting the rules governing the Whistleblower Program).

[21] *See, e.g.*, Proposed Rule No. 34-94062, 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 (Jan. 26, 2022), https://www.sec.gov/rules/proposed/2022/34-94062.pdf [hereinafter Amendments to Exchange Act Rule 3b-16]. Numerous commenters have responded to this rulemaking with questions about its application to crypto.

[22] Areas where regulatory clarity would be appreciated include: when is a crypto asset a security; how should crypto asset trading platforms and broker-dealers engage in crypto securities transactions alongside transactions in non-crypto securities and non-security crypto assets; how can regulated entities experiment with distributed ledger technology to enhance the efficiency and reliability of the execution, clearance, and settlement of securities transactions; and issues around the custody of crypto assets including the implications of Staff Accounting Bulletin No. 121. *See* SEC, Staff Accounting Bulletin No. 121 (Apr. 11, 2022), https://www.sec.gov/oca/staff-accounting-bulletin-121.

[23] For example, twenty-five trade associations, representing financial services firms whose businesses span the entirety of the securities markets wrote a letter to this effect. *See* Letter from Alternative Credit Council et al., to Gary Gensler, Chairman, SEC (April 5, 2022), https://www.sifma.org/wp-content/uploads/2022/02/SEC_Joint-Trades_Comment-Period-Letter_4-5-2022.pdf (concerning the "Importance of Appropriate Length of Comment Periods"). Also, in early April, a bipartisan group of 47 members of Congress signed a letter urging the agency to increase the comment period to 90 days, noting the importance of allowing stakeholders enough time to examine and respond to such complex proposed rules as the agency's Private Fund Adviser and Form PF proposals. *See* Letter from Bill Foster et al. to Gary Gensler, Chairman, SEC (April 13, 2022), https://www.investmentcouncil.org/47-bipartisan-lawmakers-urge-the-sec-to-increase-comment-periods/ (concerning "Private Fund Advisers; Documentation of Registered Investment Companies Compliance Reviews").

[24] To name a few examples: the Special Purpose Acquisition Companies rule applies to a broader set of business combinations than just de-SPAC transactions and would expand underwriter liability. *See* SPAC and Shell Company Proposal, *supra* note 7. Similarly the rule to expand the definition of "exchange," could draw in numerous communication protocol systems from both the traditional and decentralized finance worlds. *See* Amendments to Exchange Act Rule 3b-16, *supra* note 21. Also, the proposed rule outlining parameters of when

large traders in government securities would have to register as broker-dealers could reach certain private funds and investment advisers. *See* Proposed Rule No. 34-94524, Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (Mar. 28, 2022), https://www.sec.gov/rules/proposed/2022/34-94524.pdf.

[25] One example is the recently proposed rules governing public companies' share repurchases (or "buybacks"). *See* Tom Zanki, *SEC's Stock Buyback Proposal Ignites Pushback*, Law360 (Apr. 22, 2022), https://www.law360.com/articles/1485912/sec-s-stock-buyback-proposal-ignites-pushback. Despite widespread criticism, the Agenda notes the Commission is considering a recommendation to adopt the rule within the next few months. *See* the Agenda, *supra* note 1 (noting a timetable for action of October 2022). Other examples include our reforms to the Money Market Fund rules, changes under Section 10B of the Exchange Act to require certain disclosures in connection with security-based swap positions, and Securities Lending Disclosure rules. *See* Agenda, *supra* note 1 (targeting April 2023 for adoption).

[26] Within the next five months, the Agenda contemplates the Commission proposing new rules in the following areas:

1. digital engagement practices of investment advisers;
2. digital engagement practices of broker-dealers;
3. broker-dealer cybersecurity obligations;
4. fund fee disclosure;
5. public issuers' disclosure of human capital management information;
6. shareholder proposals under Rule 14a-8;
7. the Rule 144 safe-harbor;
8. Form D and the accredited investor definition;
9. the definition of "held of record," which affects the number of shareholders a private issuer can have before it must publicly register its securities;
10. open-end fund liquidity and dilution management;
11. investment adviser custody;
12. third-party services providers hired by investment advisers;
13. electronic submission of forms by broker-dealers;
14. conflicts of interest in certain securitization transactions, under Section 621 of the Dodd-Frank Act;
15. equity market structure;
16. clearing agency conflicts of interest; and
17. clearing requirements for trades in government securities.

[27] *See* Proposed Rule No. 34-94868, Reopening of Comment Periods for "Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews" and "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" (May 9, 2022), https://www.sec.gov/rules/proposed/2022/34-94868.pdf?utm_medium=email&utm_source=govdelivery; *see also* Proposed Rule No. 34-94867, The Enhancement and Standardization of Climate-Related Disclosures for Investors (May 9, 2022), https://www.sec.gov/rules/proposed/2022/33-11061.pdf?utm_medium=email&utm_source=govdelivery.

[28] Commenters will have 60 days from publication in the Federal Register to comment on the recently proposed fund names rule and investment adviser/investment company environmental, social, governance rule. *See* Proposed Rule No. 34-94981, Investment Company Names (May 25, 2022),

https://www.sec.gov/rules/proposed/2022/33-11067.pdf; Proposed Rule No. 34-94985, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (May 25, 2022), https://www.sec.gov/rules/proposed/2022/33-11068.pdf.