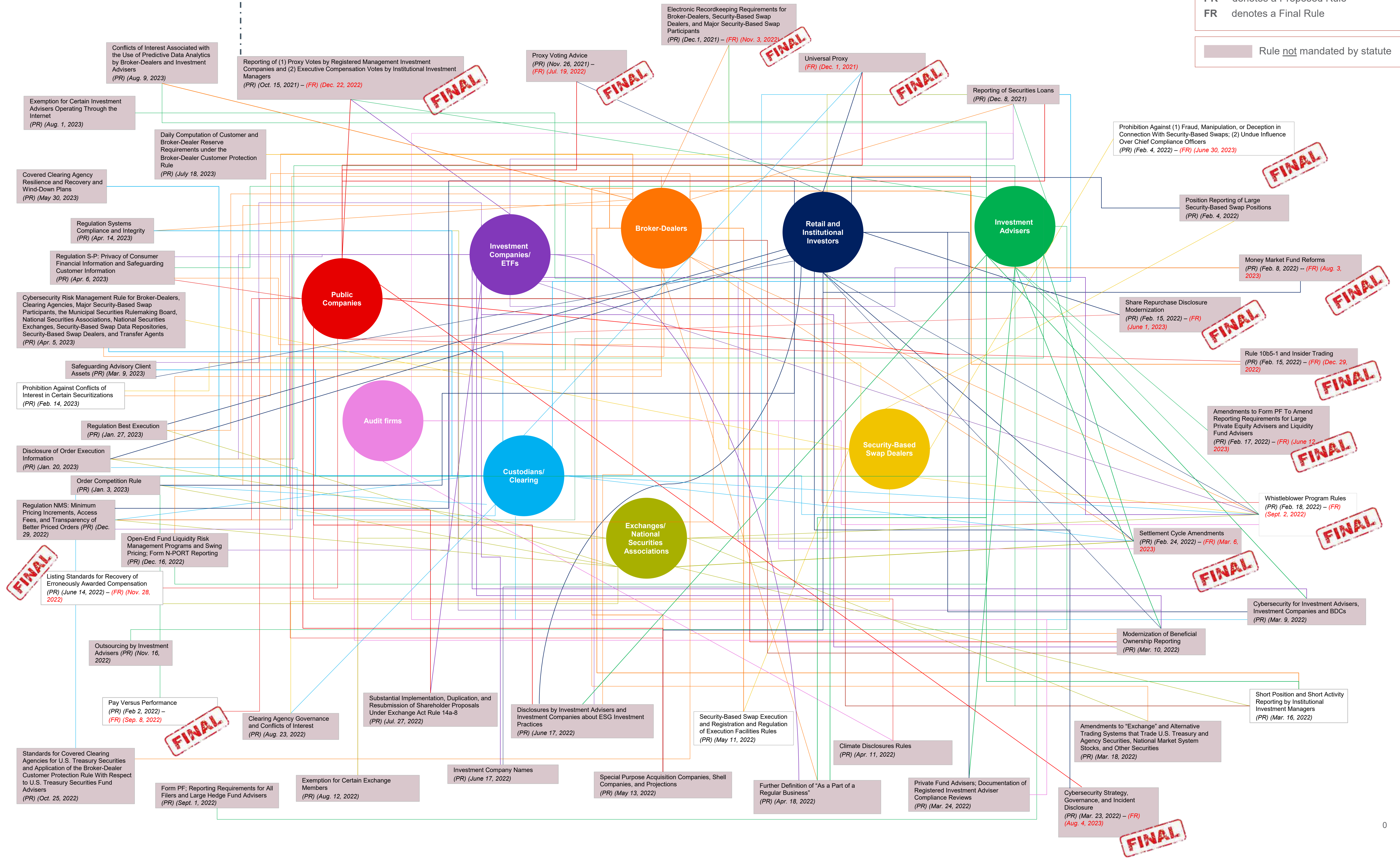


Regulatory Incidence of SEC Proposed & Final Rulemakings (Gensler Chairmanship, April 17, 2021 to August 15, 2023)

Substantive rulemaking activity presented clockwise in chronological order by Chair Gensler's first action on that rule

PR denotes a Proposed Rule
FR denotes a Final Rule

Rule not mandated by statute



The Unprecedented Pace of SEC Proposed and Final Rulemakings Continues

August 31, 2023

The Committee on Capital Markets Regulation (the “**Committee**”) today released its second annual visual diagram designed to track the unprecedented volume and complexity of rulemaking activity by the U.S. Securities & Exchange Commission (the “**SEC**”).

The Committee’s latest “**Rulemaking Incidence Diagram**” depicts proposed and final SEC rulemaking actions taken under SEC Chairman Gary Gensler. The diagram also shows the market participants most directly and significantly affected by each rulemaking action, including public companies, audit firms, investment companies, broker-dealers, investment advisers, security-based swap dealers, exchanges, custodians, and retail and institutional investors.

The Rulemaking Incidence Diagram represents the overall effect of the SEC’s rulemaking agenda on U.S. capital markets, showing that the SEC has proposed or finalized 47 substantive rulemakings over the approximately 28 months since Chairman Gensler entered office on April 17, 2021. Of these rulemakings, fully 39 (or 83%) were *not* required by congressional statute, meaning that the overwhelming majority of the SEC’s rulemaking agenda has been voluntarily undertaken. Moreover, the SEC’s latest Regulatory Flexibility Agenda continues to chart an ambitious course toward additional rulemaking activity to come, including rules on matters as varied as corporate board diversity, human capital management disclosure, incentive-based compensation arrangements, credit rating agencies, proxy process amendments, index providers, and a host of other substantive areas.¹

The Rulemaking Incidence Diagram demonstrates the impact of the SEC’s rulemaking agenda on each type of market participant. For example, 14 rulemakings apply to public companies and 13 apply to investment companies. The diagram further shows that a single rulemaking typically affects multiple market participants. For example, the proposal on minimum tick sizes² would have a direct and significant impact on exchanges, broker-dealers, investment companies, custodians, clearing systems, and retail and institutional investors.

The Committee has also compared the overall incidence of rulemaking during Chairman Gensler’s term to the rulemaking agenda over the comparable time period for each of the past three chairs, i.e., Mary L. Schapiro, Mary Jo White, and Walter “Jay” Clayton. As set forth in **Table 1**, Chair Gensler has thus far overseen the issuance of 47 proposed and final substantive rulemakings. By contrast, over the comparable periods of their terms, Schapiro, White, and Clayton issued 59, 22, and 25 proposed and final substantive rulemakings, respectively.

¹ See OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *Agency Rule List - Spring 2023 (Securities and Exchange Commission)* (last accessed Aug. 10, 2023), available at [this link](#); OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *Agency Rule List (Securities and Exchange Commission) for Long-term Actions* (last accessed Aug. 10, 2023), available at [this link](#).

² See U.S. SEC. & EXCH. COMM’N, *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*, 87 FED. REG. 80266 (Dec. 29, 2022), <https://www.federalregister.gov/documents/2022/12/29/2022-27616/regulation-nms-minimum-pricing-increments-access-fees-and-transparency-of-better-priced-orders>.

Chairs often finalize rules that were proposed by the prior Chair. In order to better reflect the scale of rulemaking initiated by each SEC Chair, we exclude such final rules from our count of final rules. For example, Chair Gensler finalized a rulemaking on shareholder reports for mutual fund fees that was proposed by Chair Clayton. We exclude that final rule from our count of Chair Gensler’s final rules. However, in the event that a Chair finalizes a rule that was proposed long ago by a prior Chair that did not immediately precede them, then we include that final rule in our count when the rule substantially differs from the long ago proposal. For example, Chair White proposed a universal proxy rule in 2016 and Chair Gensler finalized that rule in 2021—five years later with substantial changes. We therefore include that final rule in our count. Doing so better reflects the scale of rulemaking effectively initiated by each SEC Chair.

It is instructive to compare the Gensler period with the tumultuous Schapiro term—which began in the immediate aftermath of the 2008 Lehman shock, covered the early years of a generational financial crisis, and culminated in the passage of the Dodd-Frank Act. The Gensler chairmanship is roughly comparable in terms of total rulemaking actions—despite the absence of any crisis or congressional mandates warranting such a torrid pace—and substantially higher (40%) in total regulatory page count as measured by entries in the *Federal Register*. The Gensler period also notably exceeds the regulatory activity of the White term, despite the fact that White was charged with implementation of the Dodd-Frank Act mandates as well as the Jumpstart Our Business Startups Act of 2012.

Table 1
Substantive Proposed and Final Rulemakings by Recent SEC Chairs
(for each, the first 850 days of their term)

| SEC Chair | Covered Dates | Proposed Rules | Final Rules ³ | Total Substantive Rulemakings | Number of Rules Mandated by Statute | Federal Register Page Count⁴ |
|------------------|-----------------------------------|-----------------------|---------------------------------|--------------------------------------|--------------------------------------------|------------------------------------------------|
| Gensler | April 17, 2021 to August 15, 2023 | 33 | 14 | 47 | 8 (17%) | 3,765 |
| Clayton | May 4, 2017 to September 1, 2019 | 15 | 10 | 25 | 5 (20%) | 1,746 |
| White | April 10, 2013 to August 8, 2015 | 15 | 7 | 22 | 13 (59%) | 2,547 |
| Schapiro | January 27, 2009 to May 27, 2011 | 41 | 18 | 59 | 27 (46%) | 2,681 |

³ For each Chair, this figure excludes Final Rules that were proposed during the term of the Chair and the Interim Chair that immediately preceded them.

⁴ For each Chair, this figure includes the number of pages in the Federal Register attributable to the Final Rules and the Outstanding Proposed Rules included in that Chair’s count of Total Substantive Rulemakings.

Hal S. Scott, President of the Committee and Emeritus Nomura Professor of International Financial Systems at Harvard Law School, commented: “The SEC has embarked on a rulemaking agenda whose scope, scale, and speed are wholly unwarranted by any congressional mandate or financial crisis. These actions threaten to transform the U.S. capital markets in fundamental ways, to the detriment of our competitiveness in the global market. Given the complex interrelationship between these various rulemakings, there is considerable risk that neither the SEC nor the market can fully understand their combined effect before they are adopted and implemented. Moreover, there are serious concerns that some of these proposals run counter to existing law and exceed the SEC’s legal authority.”