

Rapid Pace of SEC Rulemakings Continues & Litigation Ramps up to Historic Highs

October 30, 2024

The Committee on Capital Markets Regulation (the “**Committee**”) today released its third annual “Regulatory Incidence of SEC Proposed & Final Rulemakings” diagram (“**Regulatory Incidence Diagram**”), which tracks the unprecedented volume and complexity of substantive rulemaking activity by the U.S. Securities & Exchange Commission (the “**SEC**”) in recent years.¹

Our report makes three key findings:

1. **SEC Chair Gary Gensler’s count of 34 final substantive rules exceeds that of his three most recent predecessors by 36% on average.** Chair Gensler’s rulemaking activity is only matched by Chair Schapiro, whose brisk rulemaking pace was motivated primarily by congressional mandates under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.
2. **The incidence of “voluntary” rulemaking actions—i.e., rules not mandated by statute—under the Gensler chairmanship also exceeds his predecessors, by 48% on average.** By the Committee’s count, fully 82% of Gensler rulemakings were not statutorily mandated.
3. **Nine substantive final rules adopted under Chair Gensler have so far been subject to legal challenge. This is more than the combined totals of legal challenges against final rules under Chair Schapiro (2), White (2), and Clayton (3).** Moreover, three of the four rules litigated to conclusion under Gensler have been vacated by the reviewing court, with five rules still pending litigation.

Regulatory Incidence Diagram

The Committee has updated its annual Regulatory Incidence Diagram (attached as **Appendix 1**), which lists all substantive proposed and final SEC rulemaking actions taken from the beginning of the Gensler chairmanship through October 15, 2024. The diagram is a visual representation of the overall effect of Chair Gensler’s rulemaking agenda on U.S. capital markets, showing that the SEC has proposed or finalized 49 substantive rulemakings over the approximately 42 months since Chairman Gensler assumed office on April 17, 2021. Of these rulemakings, 40 (or 82%) were *not* required by congressional statute, meaning that the overwhelming majority of the SEC’s rulemaking agenda has been voluntarily undertaken.

¹ Several types of SEC actions are styled as a “notice of proposed rulemaking” or “final rulemaking” in the Federal Register but do not rise to the level of materiality appropriate for inclusion as “substantive” rulemakings. Types of “non-substantive” or “procedural” rulemakings that we have excluded are: internal SEC procedural rules, administrative procedure rulemakings, error corrections of prior releases, EDGAR-related rulemakings, temporary, interim, and emergency rules, technical amendments to existing rules, multi-agency Dodd-Frank rules in which the SEC was not the primary regulator, and bespoke/adjudicatory actions that take the form of a rulemaking.

COMMITTEE ON CAPITAL MARKET'S REGULATION

The Regulatory Incidence Diagram also depicts 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. For example, 14 rulemakings apply to public companies and 12 apply to investment companies. The diagram further shows that a single rulemaking typically affects multiple market participants.

Comparing the Gensler Agenda to Prior Chairmanships

The Committee has compared the volume of rulemaking during Chair Gensler’s term to the rulemaking agenda over the comparable time period for each of the past three chairs—Mary L. Schapiro, Mary Jo White, and Walter “Jay” Clayton. As set forth in **Table 1**, Chair Gensler has so far overseen the issuance of 49 proposed and final substantive rulemakings. By contrast, over the comparable periods of their terms, Schapiro, White, and Clayton issued 67, 37, and 42 proposed and final substantive rulemakings. Although Gensler trails Schapiro through this point in their respective terms, the data reveal that Schapiro was operating under a direct congressional mandate with respect to 36 rules (54% of her total), whereas only 9 of Chair Gensler’s rules are due to a Congressional mandate (approximately 18%).

Table 1
Substantive Proposed and Final Rulemakings by Recent SEC Chairs

(First 1,277 days of term)

SEC Chair	Covered Dates	Proposed Rules	Final Rules²	Total Substantive Rulemakings	Number of Voluntary Rules	Federal Register Page Count³
Gensler	April 17, 2021 to October 15, 2024	15	34	49	40 (82%)	4,586
Clayton	May 4, 2017 to November 1, 2020	16	26	42	35 (83%)	3,001
White	April 10, 2013 to October 8, 2016	22	15	37	16 (43%)	3,396
Schapiro	January 27, 2009 to July 27, 2012	33	34	67	31 (46%)	3,083

² For each Chair, this figure excludes Final Rules that were proposed during the immediately preceding Chair or Interim Chair.

³ 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.

Comparing the Gensler Litigation Record to Prior Chairs

Several of Chair Gensler’s rulemakings have resulted in litigation challenges in federal district and circuit court, often on grounds of violation of the Administrative Procedure Act or exceeding the SEC’s statutory authority.

Of the 34 rules Chair Gensler had finalized through October 15, 2024, fully 9 (26%) have been challenged in court. As set forth in **Table 2**, this far surpasses the litigation rate of rulemakings under the other three chairs (12% for Clayton, 13% for White, and 6% for Schapiro).⁴ Of the 4 challenges of Gensler rulemakings concluded so far, 3 (75%) have resulted in vacatur and remand by the court of the SEC’s rulemaking, with an additional 5 rulemakings pending litigation as of this writing. **Appendix 2** lists the rulemakings and legal challenges for each Chair. By contrast, the loss rate for Clayton was 33% and 50% for each of White and Schapiro.

Table 2
Litigations of Final Rulemakings by Recent SEC Chairs

SEC Chair	Final Rules	Final Rules Litigated	Rules Overturned
Gensler	34	9 (26%)	3 (75%)
Clayton	26	3 (12%)	1 (33%)
White	15	2 (13%)	1 (50%)
Schapiro	34	2 (6%)	1 (50%)

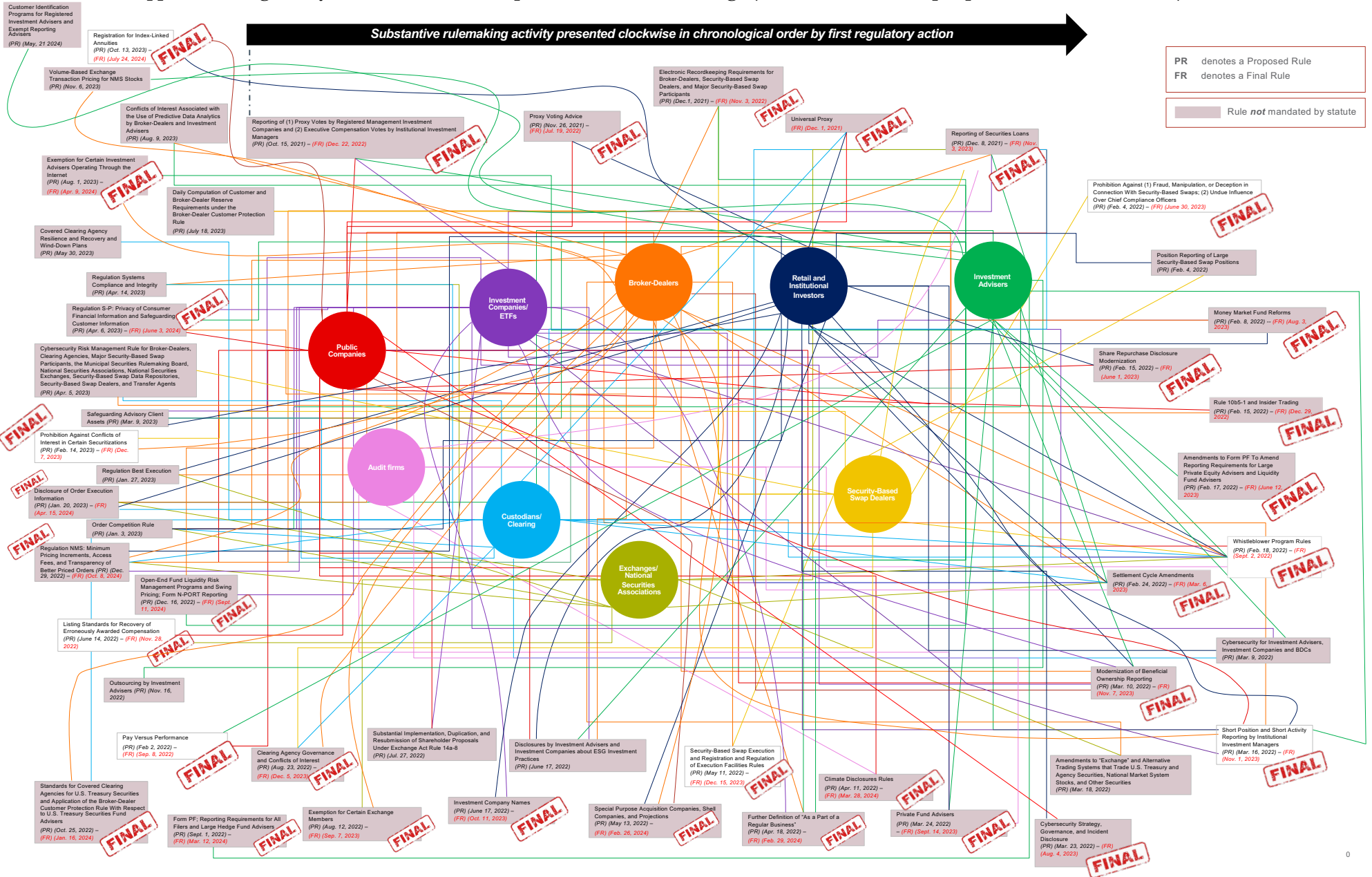
Hal S. Scott, President of the Committee and Emeritus Professor at Harvard Law School, commented:

Under Chair Gensler’s leadership, the SEC has engaged in a rulemaking agenda whose scope, scale, and speed are wholly unwarranted by any congressional mandate or financial crisis. As our previous analyses have warned, these actions pose a serious threat to the competitiveness of U.S. capital markets as they fundamentally alter the ways in which they operate.

The rate at which Chair Gensler’s final rulemakings have been successfully challenged in court is reflective of these risks that the Committee has long warned about and serves to underscore the unprecedented and unnecessary nature of Chair Gensler’s rulemaking agenda.

⁴ Legal challenges against rules finalized during the 1,277 day review period for each Chair are included.

Appendix 1: Regulatory Incidence of SEC Proposed & Final Rulemakings (Gensler Chairmanship, Apr. 17, 2021 – Oct. 15, 2024)



Appendix 2 – List of Rulemakings and Legal challenges by SEC Chair

Chair Gary Gensler (April 17, 2021, to October 15, 2024)

1. Proxy Voting Advice
 - *Nat'l Ass'n of Mfrs. v. SEC*, No. 7:21-cv-183-DC (W.D. Tex. 2021)
 - *Nat'l Ass'n of Mfrs. v. SEC*, No. 22-51069 (5th Cir. 2022)
 - *Chamber of Commerce of the USA v. SEC*, No. 23-5409 (6th Cir. 2023)
2. Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers
 - *Texas v. SEC*, No. 23-60079 (5th Cir. 2024)
3. Share Repurchase Disclosure Modernization
 - *Chamber of Commerce of the USA v. SEC*, No. 23-60255 (5th Cir. 2023)
4. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews
 - *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 23-60471 (5th Cir. 2023)
5. Short Position and Short Activity Reporting by Institutional Investment Managers
 - *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 23-60626 (5th Cir. 2023)
6. Reporting of Securities Loans
 - *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 23-60626 (5th Cir. 2023)
7. Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer in Connection With Certain Liquidity Providers
 - *Nat'l Ass'n of Private Fund Managers v. SEC*, No. 4:24-cv-250 (N.D. Tex. 2024)
 - *Crypto Freedom Alliance of Tex. v. SEC*, No. 4:24-cv-361 (N.D. Tex. 2024)
8. The Enhancement and Standardization of Climate-Related Disclosures for Investors
 - *Iowa v. SEC*, No. 24-1522 (8th Cir. 2024)
 - *Liberty Energy Inc. v. SEC*, No. 3:34-cv-739 (N.D. Tex. 2024)
9. Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced orders
 - *We the Investors v. SEC*, No. 24-1319 (D.C. Cir. 2024)

Former Chair Jay Clayton (May 4, 2017, to November 1, 2020)

1. Transaction Fee Pilot for NMS Stocks
 - *N.Y. Stock Exch. LLC v. SEC*, No. 19-1042 (D.C. Cir. 2019)
2. Regulation Best Interest: The Broker-Dealer Standard of Conduct
 - *XY Planning Network, LLC v. SEC*, No. 19-2886-ag(L) (2nd Cir. 2019)
3. Exemptions From the Proxy Rules for Proxy Voting Advice
 - *Institutional S'holder Servs., Inc. v. SEC*, No. 19-cv-3275-APM (D.D.C. 2019)
 - *Interfaith Ctr. on Corporate Responsibility v. SEC*, No. 21-cv-1620-RBW (D.D.C. 2021)

Former Chair Mary Jo White (April 10, 2013, to October 8, 2016)

1. Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)
 - *Lindeen v. SEC*, No. 15-1149 (D.C. Cir. 2015)
2. Disclosure of Payments by Resource Extraction Issuers
 - *Am. Petroleum Inst. v. SEC*, No. 12-1668 (JDB) (2012)

Former Chair Mary L. Schapiro (January 27, 2009, to July 27, 2012)

1. Political Contributions by Certain Investment Advisers
 - *N.Y. Republican State Comm. v. SEC*, No. 14-1345 (D.D.C. 2014)
2. Facilitating Shareholder Director Nominations
 - *Bus. Roundtable v. SEC*, No. 10-1305 (D.C. Cir. 2010)