

## SEC Chair Gensler’s Rulemaking Pace: A Comparison of Methodologies

November 14, 2024

On October 30<sup>th</sup>, the Committee on Capital Markets Regulation (the “Committee”) released its third annual analysis of the pace of rulemaking by the U.S. Securities & Exchange Commission (the “SEC”) under Chair Gensler as compared to Chairs Clayton, White, and Schapiro. The Committee’s analysis finds that Chair Gensler’s pace of final rulemakings exceeded the prior Chairs by 36% on average.<sup>1</sup>

The Committee’s analysis has since drawn comparison<sup>2</sup> to an earlier analysis performed by Harvard Law School Professor John Coates, which reached the contrary conclusion that the SEC was “not adopting rules at a faster pace [under Chair Gensler] than ... prior SECs.”<sup>3</sup> The Committee’s staff has therefore conducted a comparative analysis between the Committee’s analysis and Professor Coates’s work. A closer look at the methodologies behind the two analyses indicates that Chair Gensler has indeed been pushing his own agenda at a much greater rate than his predecessors.

### Background

The Committee’s third annual analysis covered the first 1,277 days of Chair Gensler’s term (through October 15, 2024), while Professor Coates’s analysis covered the first 1,008 days (through January 20, 2024). To put the analyses on the same footing, the Committee rolled back its analysis to the same point in time as Professor Coates’s, with a comparison between the two presented in **Table 1** on the next page.

Critically, both Professor Coates and the Committee’s analysis remove final rules considered to be procedural and “of limited general interest.”<sup>4</sup> In Professor Coates’s case, what remains are rules he considers to be “non-technical,” which does not include, for example, updates to the SEC’s EDGAR manual.<sup>5</sup> In the Committee’s case, the remaining rules are those considered to be “substantive,” which similarly excludes technical rules.<sup>6</sup>

However, we believe there are two differences in the methodology of the Committee and Professor Coates that likely explain the contrary conclusions.

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<sup>1</sup> COMMITTEE ON CAPITAL MARKETS, *Rapid Pace of SEC Rulemakings Continues & Litigation Ramps up to Historic Highs* (Oct. 30, 2024), <https://capmktreg.org/wp-content/uploads/2024/10/CCMR-Pace-of-SEC-Rulemaking-Unprecedented-Litigation-10-30-24-FINAL.pdf>. A list of final rules included in the Committee’s analysis is available here: <https://www.dropbox.com/scl/fi/vfgyrf65hylj3wuqu74dp/Rulemaking-List-Oct-2024-Release-11.14.2024.pdf?rlkey=7q99sjxcznxhcwfo4hqwxgifv&st=phfcw71f&dl=0>

<sup>2</sup> CAPITOL ACCOUNT, *New Study: Gensler Rules -- and Litigation -- Hit ‘Historic Highs’* (Oct. 30, 2024), <https://www.capitolaccountdc.com/p/new-study-gensler-rules-and-litigation>.

<sup>3</sup> John Coates, *SEC Rulemaking and Litigation in Chair Gensler’s First 1000 Days* (Feb. 14, 2024), <https://clsbluesky.law.columbia.edu/2024/02/14/sec-rulemaking-and-litigation-in-chair-genslers-first-1000-days/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See COMMITTEE ON CAPITAL MARKETS, *supra* n.1.

First, the Committee removes rules from a Chair’s count of final rules if the final rule had been proposed by a prior Chair.<sup>7</sup> Professor Coates does not claim to exclude such rules. The Committee excluded such rules because these final rules do not reflect the agenda of the existing Chair. Instead, they reflect the agenda of the prior Chair. The goal of the Committee’s analysis is to determine whether Chair Gensler’s agenda has been more aggressive than prior Chairs, not whether Chair Gensler has finalized the agenda of the prior Chair. If a Chair sought to make major changes to a rule proposed by the prior Chair then the Chair seeking to finalize the rule would be required by the Administrative Procedure Act to re-propose the rule.<sup>8</sup> In that event, the final rule **would** be included in the Committee’s count for the Chair that finalized the rule.

The second likely difference between the two methodologies is that the Committee also excludes multi-agency rules where the SEC was not the lead agency. Again, Professor Coates does not claim to exclude such rules. For example, during Chair White’s term, the banking agencies established credit risk retention rules for banks and the SEC joined the banking agencies in issuing these rules as they would also cover SEC-regulated entities like broker-dealers.<sup>9</sup> We thus exclude this rule as its primary drafters were the banking agencies.

**Table 1** below provides a side-by-side comparison of the Committee’s findings and Professor Coates’ findings. The Committee and Professor Coates are generally in agreement on the number of rules finalized by Chairs Gensler and Schapiro but differ greatly on those attributed to Chairs Clayton and White. For example, the Committee’s analysis attributed 14 rules to Chair Clayton whereas Professor Coates’ analysis attributed 30 rules to Chair Clayton, as of 1,008 days of each of their terms. Similarly, the Committee’s analysis attributed 9 rules to Chair White whereas Professor Coates attributed 24 rules to Chair White.

**Table 1  
Comparison of Final Rules Attributed to SEC Chairs in Their First 1,008 Days**

SEC Chair	Coates’s “Non- Technical Rules”	The Committee’s “Substantive Rules”
<b>Gensler</b>	24	24
<b>Clayton</b>	30	14
<b>White</b>	24	9
<b>Schapiro</b>	32	26

<sup>7</sup> COMMITTEE ON CAPITAL MARKETS, *The Unprecedented Pace of SEC Proposed and Final Rulemakings Continues* (Aug. 31, 2023), <https://capmktreg.org/wp-content/uploads/2024/03/CCMR-Statement-on-SEC-Agenda-Mapping-08.31.2023.pdf>.

<sup>8</sup> 5 U.S.C. §§ 551(5), 553.

<sup>9</sup> See OFF. OF THE COMPTROLLER OF THE CURRENCY, BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP., U.S. SEC. & EXCH. COMM’N, FED. HOUS. FIN. AGENCY, and DEP’T OF HOUS. & URBAN DEV., *Credit Risk Retention*, 78 FED. REG. 57,928 (Sept. 20, 2013), <https://www.federalregister.gov/documents/2013/09/20/2013-21677/credit-risk-retention>; OFF. OF THE COMPTROLLER OF THE CURRENCY, BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP., U.S. SEC. & EXCH. COMM’N, FED. HOUS. FIN. AGENCY, and DEP’T OF HOUS. & URBAN DEV., *Credit Risk Retention*, 79 FED. REG. 77,602 (Dec. 24, 2014), <https://www.federalregister.gov/documents/2014/12/24/2014-29256/credit-risk-retention>.

We cannot fully explain the difference between the Committee’s analysis and Professor Coates’ analysis as Professor Coates’ list of rules is not public. However, upon closer review of the differences between the total number of rules for each Chair we believe that the difference is primarily driven by the fact that the Committee excluded final rules proposed by prior Chairs and Professor Coates likely did not. For example, as demonstrated by **Table 2**, the Committee’s analysis finds 16 fewer rules were finalized by Chair Clayton than Professor Coates’ analysis finds. However, 12 rules were excluded by the Committee on the grounds that they were proposed by the prior Chair (Chair White). Similarly, the Committee’s analysis finds 15 fewer rules finalized by Chair White than Professor Coates’ analysis. However, 10 rules were excluded by the Committee on the grounds that they were proposed by the prior Chair (Chair Schapiro). Thus, the primary driver of the difference between the Committee’s findings and that of Professor Coates is likely the exclusion of final rules proposed by prior Chairs. Another likely driver of the difference between the Committee’s findings and that of Professor Coates is the exclusion of multi-agency rules by the Committee where the SEC was not the lead agency, as also demonstrated by **Table 2**.

**Table 2**  
**Comparison of Final Rules Attributed to SEC Chairs in Their First 1,008 Days**

<b>SEC Chair</b>	<b>Coates’s “Non- Technical Rules”</b>	<b>The Committee’s “Substantive Rules”</b>	<b>Rules Excluded by the Committee as Proposed by a Prior Chair</b>	<b>Rules Excluded by the Committee as SEC Not Lead Agency</b>
<b>Gensler</b>	24	24	3	1
<b>Clayton</b>	30	14	12	3
<b>White</b>	24	9	10	3
<b>Schapiro</b>	32	26	3	0