The SEC's Comment Periods for New Regulations

Center Forward Basics

March 2022

Overview

The Securities and Exchange Commission (SEC) is under increased scrutiny for breaking from bipartisan precedent by reducing public opportunities to comment on its proposals for major new regulations. Before a new rule can go into effect, federal agencies are required to provide the public with the opportunity to submit comments and analysis on the proposal. An agency publishes proposed rules in the Federal Register and includes specific questions on which the agency needs public guidance. This "notice-and-comment" process allows the agency staff charged with writing the new rules to hear directly from those who will be impacted by them. This process is meant to ensure that agency regulations accomplish their public-interest goals and avoid harmful unintended consequences.

In order to give the public enough time to conduct a substantive review of new proposed rules and provide meaningful input, presidential administrations from both parties have agreed that most comment periods should be at least 60 days. In addition, both Democratic and Republican members of Congress have called on regulators to provide 90 or even 120 days for public comment on particularly complex rules. However, the SEC has recently departed from this bipartisan precedent by limiting the comment period on many major proposed rules to only 30 days after publication in the Federal Register. In response to criticism, for 5 new rule proposals issued on February 9 and 10, the SEC limited the public comment period to "whichever is greater:" 30 days after publication in the Federal Register or 60 days after posting the notice of proposed rulemaking on the agency's website. However, the rule proposals with 30-day comment periods issued under SEC Chair Gary Gensler have been published in the Federal Register, on average, 13 days after being posted on the SEC website. Thus, applying the "whichever is greater" standard to those rule proposals would have resulted in only 17 additional days, on average, for public comment on each rule.

Most proposed rules from the SEC are highly complex and have far-reaching implications. They often run several hundred pages in length and ask for public input on hundreds of detailed questions. Curtailing the comment period limits the ability of commenters to warn regulators of potential adverse consequences of the rule and propose alternatives. It also favors organizations that have significant time and resources to invest in analyzing and commenting on proposed rules, while making it harder for smaller organizations, including those representing historically marginalized or underrepresented groups, to provide input and influence the final rules.

The APA, Executive Orders, and Comment Periods

The Administrative Procedures Act (APA) provides guidelines for federal agency

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Center Forward brings together members of Congress, not-for profits, academic experts, trade associations, corporations and unions to find common ground. Our mission: to give centrist allies the information they need to craft common sense solutions, and provide those allies the support they need to turn those ideas into results.

In order to meet our challenges we need to put aside the partisan bickering that has gridlocked Washington and come together to find common sense solutions.

For more information, please visit www.center-forward.org

Key Terms

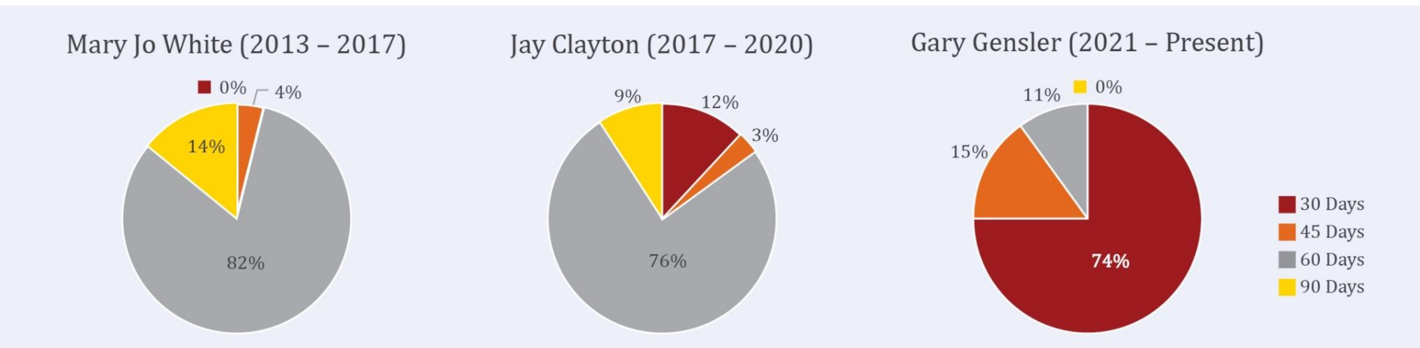
- **Rulemaking -** the process by which federal agencies formulate, amend, or repeal a rule.
- **Comment period** - the number of days the agency gives the public to provide comments on a proposed rule after it is published in the Federal Register.
    - The APA directs the agency to consider the "relevant matter presented" by the public during the comment period. The agency is required to include in any final rule a response only to those comments that the courts have characterized as "significant."

rulemakings, including requirements for publishing notices of proposed and final rulemakings and providing opportunities for the public to submit written comments on rule proposals. To foster robust public input in rulemakings and encourage extensive deliberation by agency staff, presidents from both political parties have signed executive orders directing federal agencies to provide a meaningful amount of time for public comment on new rule proposals. For example, President Obama's 2011 Executive Order 13563 reaffirmed the long-standing principle that "regulations shall be adopted through a process that involves public participation" and "shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole." To promote that open exchange of ideas, President Obama directed agencies to provide comment periods for new proposed rules "that should generally be at least 60 days."

Also, historically Congress has recognized that complex rulemakings need extended comment periods. For example, in 2019, all Democratic members of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs sent a letter requesting "a public comment period of no less than 120 days for substantive review and comment" on any potential rulemakings under the Community Reinvestment Act (CRA).

SEC Rulemaking Comment Periods - Past and Present

Consistent with the bipartisan historical commitment to meaningful comment periods, the vast majority of notices of proposed rulemaking issued by the SEC under the prior two Chairs included 60-day comment periods. The chart below details the evolution of the formal comment periods under the last three SEC Chairs.



Source: Data assembled from www.sec.gov and www.federalregister.gov

Complex Rulemakings

While the shortened formal comment periods are notable, prior SECs typically provided much more extensive pre-Federal Register publication periods for complex rulemaking to help facilitate stakeholder engagement. With both the informal periods and comment periods combined, complex rulemakings typically exceeded 120 days (e.g. Investment Advisers Act's Regulation Best Interest rulemaking and the Investment Company Act's Fund of Fund rulemaking were nearly 120 and 150 days, respectively).

Given the breadth and pace of recent complex rulemaking at the SEC, stakeholders could be constrained in their efforts to provide fulsome feedback to the SEC. In December 2021, Chair Gensler announced his biannual regulatory agenda that plans to enact 54 new rules. The new rules proposed under Chair Gensler recommend significant changes to complicated securities laws and complex financial markets. These proposals deal with issues including digital engagement practices, private fund advisors, reporting of securities loan proposals, insider trading, and more. These rules alone have abbreviated comment periods that are less than 60 days post publication in the Federal Registrar, total nearly a 1000 pages of text, ask commenters to answer nearly 1000 separate questions, and share many of the same shared stakeholders (e.g. consumer and investor advocates, pension funds and other institutional investors, mutual funds, private funds, investments banks, etc.).

Several policymakers have raised concerns about the SEC's recent pattern of shortening the public comment periods. SEC

Commissioner Hester Peirce stated that “thirty days is typically not enough time to get feedback on a rule proposal” and that “for complicated rulemakings or at times when we have many rulemakings outstanding simultaneously, 90-day comment periods are likely more appropriate.” Similarly, in a letter to Chair Gensler, Congressman Patrick McHenry, Ranking Member of the House Committee on Financial Services, and Senator Pat Toomey, Ranking Member of the Senate Committee on Banking, Housing, and Urban Affairs, noted that “unreasonably short comment periods” will “harm the quality of public comment and may run afoul of the Administrative Procedures Act.” Rep. McHenry and Sen. Toomey asked Chair Gensler to extend all comment periods for proposed rules to at least 60 days and reopen comment periods for rules that had already closed.

Links to Other Resources

- CATO Institute - The SEC Short-Changes Public Comment
- Congressional Research Service - A Brief Overview of Rulemaking and Judicial Review
- National Archives - Improving Regulation and Regulatory Review
- National Archives - Executive Order 12866 of September 30, 1993 Regulatory Planning and Review
- U.S. Securities and Exchange Commission - SEC Announces Annual Regulatory Agenda
- U.S. Securities and Exchange Commission - Rat Farms and Rule Comments - Statement on Comment Period Lengths
- U.S. House Committee on Financial Services - Waters, Brown, and Meeks Lead House and Senate Committee Democrats in Letter to Regulators on Proposed CRA Changes
- U.S. House Committee on Financial Services - McHenry, Toomey Blast Chair Gensler for Limiting Public Input on SEC Rulemakings