

*Update: This letter was updated in August 2023 to correct Figures 1 and 2.
The total quantity of proposals changed, but the trend remained the same.*

February 22, 2022

Vanessa Countryman
Securities and Exchange Commission
100 F Street
Washington, DC, 20549-0609

Re: 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
Docket ID: Release No. 34-94062; File No. S7-02-22

Dear Ms. Countryman:

My name is Nicholas Anthony and I am the Manager of the Cato Institute’s Center for Monetary and Financial Alternatives. I appreciate the opportunity to provide input to assist the Securities and Exchange Commission (SEC) in its amendments regarding Regulation ATS. The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace, and the Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives to centralized, bureaucratic, and discretionary monetary and financial regulatory systems. The opinions I express here are my own.

There are many items to address in this proposal, but I will focus my comments on the specific challenges people are facing in regard to the proposed amendments and other recent SEC proposals.

The Issue in Addressing Regulation ATS

In a dissenting statement, SEC Commissioner Hester Peirce wrote,

The [proposed rule] weighs in at a hefty 650 pages, contains over 220 separate comment requests (with many requests containing multiple questions), and addresses about a dozen significant issues, several of which affect trading venues of all types (including currently unregulated communication protocol systems)... Notwithstanding the literal and figurative bulk of this release, the Commission has determined that it is appropriate to provide the public with 30 days to read, understand, consider, consult, identify, model,

assess, and discuss these rules... I cannot comprehend why we insist on blindfolding ourselves, rather than embracing the notice-and-comment process that has been so valuable in unearthing issues for our consideration.¹

Commissioner Peirce is right: at 650 pages, the proposal to address regulation ATS is no light read—and that weight combined with the short 30-day comment period will likely harm the public’s ability to provide substantive comments.² In total, the proposal contains approximately 190,248 words. Although the quality of the wording is often more important than the quantity, it’s important to take a moment to recognize the proposal’s wordcount because studies have found that the average adult reads 238 words per minute.³ With that in mind, one can estimate that it would take approximately 13 hours and 19 minutes for someone to read the proposal in one sitting. However, it’s unlikely that many people would tackle such an endeavor in just one sitting. While it’s hard to assess how long exactly it might take, research from the U.S. Bureau of Labor Statistics has found that the average American (ages 20-65) spent just 13 minutes a day reading in 2020.⁴ Therefore, one can estimate that it could take 61 days on average just to read the full proposal, let alone “understand, consider, consult, identify, model, assess, and discuss [it].”⁵

The task may not be impossible, but it is certainly impractical considering the SEC allotted just 30 days for the public to respond. The SEC should recognize this challenge and provide the public with an expanded comment period so it may better address the proposal.

Deviating from the Norm

Unfortunately, the issue is larger than the current proposal at hand. After reviewing the last decade of SEC proposals, I found a stark contrast between the current and historical trends. Namely, there have already been more 30- and 45-day comment periods during the last year under Chair Gary Gensler’s leadership than there were during the seven years under Chairs Jay Clayton and Mary Jo White (Figure 1). In fact, 30- and 45-day comment periods were rare exceptions between 2013 and 2020, but they seem to have become the rule under Chair Gensler’s leadership (Figures 1 and 2).

¹ Hester M. Peirce, “Dissenting Statement on the Proposal to Amend Regulation ATS,” Statement, January 26, 2022, <https://www.sec.gov/news/statement/peirce-ats-20220126>.

² Securities and Exchange Commission, “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,” <https://www.sec.gov/rules/proposed/2022/34-94062.pdf>.

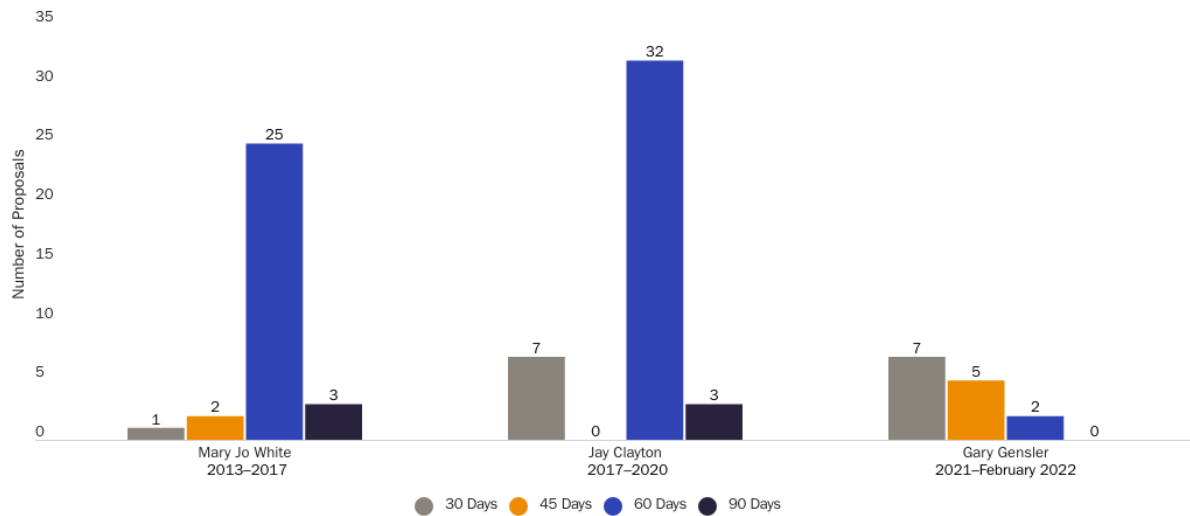
³ Marc Brysbaert, “Howe Many Words Do We Read Per Minute? A Review and Meta-Analysis of Reading Rate,” *Journal of Memory and Language*, December 2019, <https://www.sciencedirect.com/science/article/abs/pii/S0749596X19300786>.

⁴ U.S. Bureau of Labor Statistics, “Time Spent Reading For Personal Interest In 2020,” TED: The Economics Daily, August 19, 2021, <https://www.bls.gov/opub/ted/2021/time-spent-reading-for-personal-interest-in-2020.htm>.

⁵ Hester M. Peirce, “Dissenting Statement on the Proposal to Amend Regulation ATS,” Statement, January 26, 2022, <https://www.sec.gov/news/statement/peirce-ats-20220126>.

Figure 1

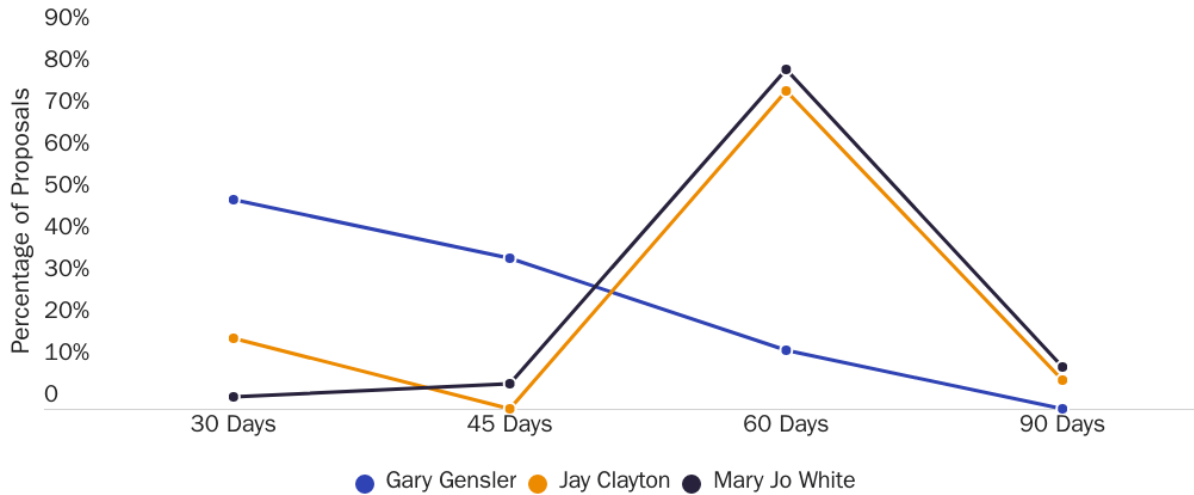
Time provided for public feedback.



Source: Compiled from SEC.gov and FederalRegister.gov. "Proposals" are strictly limited to the initially announced period for postings labeled "Proposed Rules" with the exception of RIN 3235-AL53 due to its multi-comment period.

Figure 2

Time provided by the SEC for public feedback (percentage terms).



Source: Compiled from SEC.gov and FederalRegister.gov. "Proposals" are strictly limited to the initially announced period for postings labeled "Proposed Rules" with the exception of RIN 3235-AL53 due to its multi-comment period.

Worse yet, many of these comment periods coincided with holidays. The SEC closed 2021 with three separate 30-day requests for comment that were due in the days leading up to and immediately following Christmas—one of the busiest travel holidays of the year.⁶ It may not be

⁶ Securities and Exchange Commission, "Proxy Voting Advice," Federal Register, November 26, 2021, <https://www.federalregister.gov/d/2021-25420>; Securities and Exchange Commission, "Updating EDGAR Filing Requirements," Federal Register, November 22, 2021, <https://www.federalregister.gov/d/2021-24523>; and Securities and Exchange Commission, "Electronic Submission of Applications for Orders Under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F," Federal Register, November 19, 2021, <https://www.federalregister.gov/d/2021-24522>.

feasible to completely avoid federal holidays, but *clustering* comment periods around the holidays is something one may absolutely avoid.

When Jennifer Schulp and I wrote about this issue in January,⁷ we were not the first to take notice. Senator Patrick Toomey (R-PA) and Representative Patrick McHenry (R-NC), SEC Commissioner Peirce, and industry participants had all voiced their concerns as well.⁸ In particular, Commissioner Peirce illustrated the importance of the issue well when she wrote, “The notice and comment process is intended to be a dialogue. The regulatory conversation flows only when the Commission affords the commenting public sufficient time both to review and analyze proposals thoroughly and to formulate fully articulated opinions and suggestions.”⁹

However, it appears that Chair Gensler’s statements present the issue differently. It’s been reported that, at a private club meeting, Chair Gensler responded to the issue by stating, “Congress weighed in on comment periods with the Administrative Procedure Act. Congress is pretty straight forward; they said 30 days.”¹⁰ With all due respect, the Administrative Procedure Act says, “not less than 30 days.”¹¹ Therefore, 30 days should be considered the minimum and not necessarily the norm. Former President Barack Obama offered additional guidance to that effect when he issued an executive order stating,

To promote [an] open exchange... [and to] the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.¹²

⁷ Jennifer Schulp and Nicholas Anthony, “The SEC Short-Changes Public Comment,” Cato Institute, January 14, 2022, <https://www.cato.org/blog/sec-short-changes-public-comment>.

⁸ Patrick McHenry and Pat Toomey, Letter to Gary Gensler, January 10, 2022, https://republicans-financialservices.house.gov/uploadedfiles/2022-01-10_pmc_toomey_letter_gensler_sec_comment_period.pdf; Hester M. Peirce, “Rat Farms and Rule Comments – Statement on Comment Period Lengths,” Statement, December 10, 2021, <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021>; John L. Thornton, Hal S. Scott, and R. Glenn Hubbard, “Reporting of Securities Loans,” Committee on Capital Markets Regulation, December 6, 2021, <https://www.sec.gov/comments/s7-18-21/s71821-9420335-263469.pdf>; Christopher A. Iacovella, “Comment Period Extension,” American Securities Association, December 3, 2021, <https://www.sec.gov/comments/s7-18-21/s71821-9418382-263333.pdf>; and Kenneth E. Bentsen, Jr., “Reporting of Securities Loans,” SIFMA, January 7, 2022, https://www.sifma.org/wp-content/uploads/2022/01/SIFMA-Comment-Letter_Proposed-Exchange-Act-Rule-10c-1.pdf.

⁹ Hester M. Peirce, “Rat Farms and Rule Comments – Statement on Comment Period Lengths,” Statement, December 10, 2021, <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021>.

¹⁰ Soyoung Ho, “Gensler Defends 30, 45-Day Comment Period for SEC Rulemaking Proposals,” Thomson Reuters, January 24, 2022, <https://tax.thomsonreuters.com/news/gensler-defends-30-45-day-comment-period-for-sec-rulemaking-proposals/>; Mark Schoeff Jr., “Gensler Defends 30-Day Comment Periods for SEC Proposals,” Investment News, January 19, 2022, <https://www.investmentnews.com/gensler-defends-30-day-comment-periods-for-proposals-216018>.

¹¹ 5 U.S. Code Section 553 (d), <https://www.law.cornell.edu/uscode/text/5/553>.

¹² Barack Obama, “Executive Order 13563 – Improving Regulation and Regulatory Review,” The White House, January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

The SEC may have an ambitious agenda,¹³ but that alone is not a sufficient reason to cut the public out of the process and “move on.”¹⁴ In fact, as William Yeatman noted on the subject, “Agencies in the past have cited genuine emergencies that would compel a shorter notice and comment period... [However, an ambitious agenda is] not a very reasonable explanation or justification for shortcutting all these procedural safeguards.”¹⁵

Although the SEC at large has not addressed the issue in a formal capacity (i.e., through a dedicated press release or statement), it does seem that it has taken steps to defend its position online. Early in February, the SEC added the following language to all of its new proposed rules, “30 days after publication in the *Federal Register* or April 11, 2022 (which is 60 days after issuance), whichever is later” (see Figure 3).¹⁶ I’ll set aside that there are actually 61 days between February 9, 2022 and April 11, 2022 even though this small oversight seems to lend additional evidence to the rushed approach that has characterized the agenda at large. What’s more important is that the SEC has chosen to invent a new system for public comment without engaging with the public.

Figure 3: Screenshot of the SEC’s proposed rules on February 9, 2022.



Source: The Internet Archive’s Wayback Machine¹⁷

Instead of following the Administrative Procedure Act where a comment period’s official start is its publication in the *Federal Register*,¹⁸ the SEC has decided to treat press releases on SEC.gov as the “official issuance” of the proposals. Advanced notice is helpful, but most commenters expect the period to begin with the publication in the *Federal Register* considering this has been a long-

¹³ Bob Pisani, “SEC Chairman Gary Gensler Embarks on Ambitious Regulatory Agenda. What It Means for Investors,” CNBC, February 4, 2022, <https://www.cnbc.com/2022/02/04/sec-chair-gary-gensler-embarks-on-ambitious-regulatory-agenda-what-it-means-for-investors.html>. For the SEC’s Fall 2021 agenda, see: <https://tinyurl.com/SECagenda2021/>.

¹⁴ Soyoung Ho, “Gensler Defends 30, 45-Day Comment Period for SEC Rulemaking Proposals,” Thomson Reuters, January 24, 2022, <https://tax.thomsonreuters.com/news/gensler-defends-30-45-day-comment-period-for-sec-rulemaking-proposals/>.

¹⁵ William Yeatman, Jennifer J. Schulp, and Caleb O. Brown, “SEC Moves to Curtail Public Input on Regulation,” Cato Daily Podcast, February 18, 2022, <https://www.cato.org/multimedia/cato-daily-podcast/sec-moves-curtail-public-input-regulation>.

¹⁶ The addition of the new language in the SEC’s proposed rules can be compared via the Internet Archive’s Wayback Machine: <https://web.archive.org/web/20220131172312/https://www.sec.gov/rules/proposed.shtml> and <https://web.archive.org/web/20220209220819/https://www.sec.gov/rules/proposed.shtml>.

¹⁷ The full page may be accessed on via the Internet Archive’s Wayback Machine here: <https://web.archive.org/web/20220209220819/https://www.sec.gov/rules/proposed.shtml>.

¹⁸ 5 U.S. Code Section 553, <https://www.law.cornell.edu/uscode/text/5/553>.

held norm. The SEC may not need to issue a “proposal for shorter comment periods,” but a press release or speech from the chair specifically addressing the new practice would have been immensely helpful for informing the public.

Yet with that said, instead of trying to create loopholes in the process, the SEC should simply return to the historical practice of having 60 days on the Federal Register as the norm with exceptions made both for greater and lesser periods when the facts and circumstances justify it.

Thank you for the opportunity to share my perspective regarding the proposed amendments regarding Regulation ATS and the SEC’s approach to rule proposals. I hope the SEC seriously considers returning to treating 60 days as the norm so the public may have adequate time to read, assess, and respond to proposed rules. If the SEC is going to speak for investors, it’s just as important that it listens to them.

Sincerely,

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