



January 14, 2021

Mr. Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: SEC Regulatory Agenda

Dear Chairman Gensler:

The American Securities Association (ASA)¹ writes to express some views on the regulatory agenda recently released by the Securities and Exchange Commission² (SEC). The ASA and the SEC share the passion and mission to enhance our markets while protecting investors. However, we are concerned the agenda does not reflect the full scope of the SEC's statutory mission, and undertaking certain policy decisions could entrench the SEC in highly polarized and political debates for years to come.

We are committed to being a helpful partner to advance rulemakings that are necessary to protect investors, maintain fair orderly and efficient markets, and facilitate capital formation. That's why we respectfully urge the SEC to focus on policymaking that can win the support of a broad spectrum of market participants.

Protecting the Privacy of American Investors

The SEC's regulatory agenda fails in protecting the personally identifiable information (PII) of American investors under the Consolidated Audit Trail (CAT). The ASA is alarmed the SEC continues to support a rulemaking³ that allows the CAT to collect "customer and account attributes" of American investors. This dangerous intrusion exposes millions of Americans to identity fraud and cyber-attacks perpetrated by state-sponsored cybercriminals, particularly those supported by the Chinese Communist Party.

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a diverse membership of almost one hundred members located in every geographic region of the United States.

² [Agency Rule List - Fall 2021 \(reginfo.gov\)](https://www.sec.gov/rules/proposed/2020/34-89632.pdf)

³ <https://www.sec.gov/rules/proposed/2020/34-89632.pdf>





Unless the SEC prioritizes a rule to eliminate the collection of *all* PII, the CAT will (1) collect the most sensitive, personal information of every individual that buys or sells stock on U.S. exchanges and (2) store that information in a centralized database in Washington, which will be a prime target for hackers.

The ASA has been the leading voice urging the Commission to avoid collecting *any* data that constitutes “customer and account attributes.”⁴ This information is not necessary to further the mission of the CAT.

In addition to the cyber threat, thousands of government and private actors will have access to the CAT database where they will have the ability to monitor the investment decisions of every American investor *without* the need for any suspicion of wrongdoing.⁵ This is a clear violation of the privacy of Americans and federal courts across the country have deemed such collection to be unlawful.

As we stated in a previous comment letter, the SEC should change its current approach to the collection of CAT data and prioritize the need to protect U.S. investors from unwarranted intrusions of their privacy.⁶

Rule 15c2-11

The ASA welcomed the recent “no-action” extension letter released by the Division of Trading and Markets regarding the application of Rule 15c2-11 to the fixed income markets.

The ASA previously wrote to the SEC regarding this application of 15c2-11 to fixed income and the need for relief from the SEC.⁷ While the no-action letter is helpful, it is not a replacement for a notice-and-comment rulemaking from the SEC to provide a fixed income exemption.

We echo the concerns recently raised by Commissioners Peirce and Roisman regarding this issue⁸ and urge the SEC to prioritize a rulemaking on this subject to avoid unintended consequences under Rule 15c2-11. There is a constructive way for the SEC to achieve transparency in these markets without unduly burdening or impairing how they function, and we stand ready to continue to provide solutions to that end.

⁴ <https://www.americansecurities.org/post/sec-s-cat-database-violates-constitutional-rights>

⁵ “Oversight of the Status of the Consolidated Audit Trail,” Senate Banking Committee (Oct. 22, 2019), <https://bit.ly/33nifqw>. The Chief Operating Officer of the CAT stated that about 3,000 individuals would have access to the confidential personal information collected by the CAT.

⁶ “ASA Comment to Letter to SEC regarding Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security” November 30, 2020. https://d1d329da-dbb0-4cc9-b461-d7bd4ad09b4e.usrfiles.com/ugd/d1d329_006f081561d640929c58f662a0d6ed5a.pdf

⁷ <https://www.americansecurities.org/post/asa-calls-for-fixed-income-exemption-to-sec-otc-rule-15c2-11>

⁸ <https://www.sec.gov/news/statement/peirce-roisman-falling-further-back-121321>





Capital Formation

The current regulatory agenda does not include any policies that would help small and mid-size businesses raise capital they need to grow and hire new employees, many of which receive strong bipartisan support on Capitol Hill. Capital formation initiatives at the SEC are particularly important as our economy continues to recover from the pandemic and the economic shock that came with it.

Indeed, the SEC's own Office of the Advocate for Small Business Capital Formation recently released a report outlining several recommendations to help entrepreneurs access capital.⁹ As the Office noted in that report "...there are countless other entrepreneurs who are struggling to navigate the inside baseball world of capital raising, to bridge outside of their personal networks to sophisticated investors, to build a first-time fund in the middle of the country, or to determine which exit path makes the most sense for their company." The SEC's regulatory agenda unfortunately fails to acknowledge any of those challenges faced by entrepreneurs and businesses.

The SEC receives dozens of recommendations every year for ways to facilitate capital formation in our economy. The ASA reiterates the following recommendations we have previously provided to Congress and the SEC:

Improve research coverage for pre-IPO and small public companies

One of the more troubling developments in the public markets over the last two decades has been the collapse in research and analyst coverage of small issuers. Recent data shows that as many as two-thirds of companies with a market cap under \$100 million have no research coverage at all.¹⁰ While the shift towards index investing and away from individual stock selection may play a role in declining coverage, there are several regulatory issues that have contributed to this decline which should be addressed.

The ASA has previously called for the SEC to conduct a holistic review of this decline that will lead to policy recommendations that will help to increase analyst coverage of small public companies.

Potential reforms include:

⁹ <https://www.sec.gov/files/2021-OASB-Annual-Report.pdf>

¹⁰ CapitalIQ as of June 9th, 2017





- **Broker-dealers should be permitted to receive hard-dollar payments for research from clients without having to register as investment advisers.** Since the implementation of the EU's Markets in Financial Instruments Directive, there has already been a steep decline in the number of research analysts employed as well as the number of companies covered. There has also been a trend towards coverage of larger, more established companies at the expense of smaller ones, which further exacerbates the difficulties that small companies have in accessing the capital markets.¹¹ In addition to depriving money managers of valuable research, the continued decline of company-specific information in the marketplace can further accelerate the trend toward automated and passive investment strategies. While the SEC has issued limited no-action relief to allow broker-dealers to receive hard dollar payments for research, a permanent solution is necessary so that the drop in research coverage is not further exacerbated.
- **The SEC should produce a holistic report and recommendations to improve research of pre-IPO and small public companies.** The ASA strongly supported a previous Treasury Department recommendation for such a review and believe that a comprehensive review of the 2003 Global Research Analyst Settlement as well as SEC and Financial Industry Regulatory Authority (FINRA) rules should be conducted. While there have been rule changes made to encourage pre-IPO research, without a liability safe harbor it is unlikely that we will see a meaningful increase in pre-IPO research.

Secondary market trading reforms

Little has been done to improve the secondary market trading environment for small issuers. The SEC has missed several opportunities to implement reforms that have the longstanding support of a broad spectrum of market participants. This failure to act has preserved the status quo for those who benefit from the current trading regime, and continues to be a disincentive for growing small American businesses to complete an IPO. The SEC has an opportunity to reset the market structure debate and prioritize reforms that support small business capital formation and market stability.

Potential reforms include:

- **Suspending unlisted trading privileges (UTP) for small issuers with distressed liquidity.** UTP enables securities listed on an exchange to be traded on other national securities exchanges and is automatically extended to securities prior to their listing on an exchange. While UTP makes sense for larger companies with adequate liquidity and

¹¹ See e.g. Research Analysts' Existential Crisis Enters MiFID II Era (Bloomberg) January 3, 2019, available at <https://www.bloomberg.com/news/articles/2019-01-03/the-research-analyst-s-existential-crisis-enters-mifid-ii-era>; Why MiFID II Isn't Working as Intended and Investors are Losing as a Result (Melius Research) December 6, 2018, available at <http://www.integrity-research.com/mifid-ii-isnt-working-intended-investors-losing-result/>





significant trading volume, it simultaneously fragments liquidity and increases trading costs for thinly traded stocks, which tend to be smaller issuers. A 2018 joint trade IPO report (IPO Report) recommended that issuers with distressed liquidity be given the option to suspend their UTP, and Congress has also recently weighed in on this issue.¹²

In July 2018, the U.S. House of Representatives passed the “Main Street Growth Act,” which would create the legal framework for venture exchanges in the United States. Included in that legislation (which had earlier passed the House Financial Services Committee by a vote of 56-0) was an important provision that would prohibit venture exchanges from extending UTP to issuers that chose to list on a venture exchange.¹³

- **Permit certain issuers to determine their own intelligent tick sizes.** The IPO Report also recommended that issuers become eligible to determine their own “tick-size” to improve the liquidity of thinly traded or lower priced stocks. The SEC’s 2000 decimalization order transitioned the trading of stocks – regardless of stock price or market capitalization – to penny increments. While decimalization may make sense for large capitalization, highly traded stocks, narrow trading spreads can serve as a disincentive for market makers to trade the shares of EGCs or other small issuers. A 2019 report from Nasdaq, done in collaboration with a diverse group of market participants and academics, proposes a set of six different tick increments.¹⁴

Stocks would be categorized based upon their duration-weighted average quoted spread over a certain period of time. Importantly, a tick increment for a company would not be static as it could transition to a different increment after a data-driven review of how the security trades. In other words, objectivity, not subjectivity will drive the outcome. ASA supports the concepts included in the Nasdaq proposal and we believe it is time for Congress or the SEC to act upon such initiatives.

Scaling regulatory requirements for small issuers

Also noted in the IPO Report, some of the more significant costs that fall on smaller issuers are related not to the IPO process but rather involve the cost of *being* public. The 1930’s-era reporting regime is not fully equipped to handle the speed at which information flows today. Moreover, as disclosure and financial reporting requirements have steadily increased over the years, small issuers find the cost of annual and quarterly reporting to be a major hindrance to going public. While the SEC has made some recent strides in reforming the corporate disclosure

¹² <https://www.centerforcapitalmarkets.com/resource/expanding-the-on-ramp-recommendations-to-help-more-companies-go-and-stay-public/>

¹³ H.R. 2889 / S. 2306, 116th

¹⁴ Intelligent Ticks: A Blueprint for a Better Tomorrow, available at <https://www.nasdaq.com/docs/2019/12/16/Intelligent-Ticks.pdf>





regime, there is much more that should be done to help small issuers and investors navigate these often-burdensome regulations.

Potential reforms include:

- **Allow EGCs to file short-form 10Qs with full negative assurance comfort from auditors on all (from SAS 72 standpoint) financial statements with limited MD&A.** The IPO Task Force of 2011 – whose recommendations informed much of what ultimately became the JOBS Act – noted that 92% of public company CEOs reported the “administrative burden of public reporting” was a major challenge to becoming a public company.¹⁵ Legislation directing the SEC to examine the costs of quarterly reporting for EGCs was included as part of the JOBS and Investor Confidence Act.¹⁶
- **Explore allowing all issuers the ability to use S-3 shelf registration forms.** Form S-3 is the most simplified and cost-effective form that issuers can file with the SEC. It allows them to pursue follow-on offerings by pulling already filed forms off the “shelf.” Unfortunately, EGCs and small issuers remain prohibited from using such forms without the SEC providing any evidence that such restrictions put investors at risk. S-3 eligibility should be expanded to all issuers, and the “baby-shelf” restrictions that limit the amount an issuer can raise should also be eliminated. Legislation to implement these reforms has been introduced and considered in the House of Representatives for several years.¹⁷

Conclusion

The SEC has an opportunity to advance bipartisan policies that enhance our markets while protecting every American investor. We are hopeful the Commission reviews its priorities prior to releasing its rulemaking agenda in Spring 2022. The ASA looks forward to working collaboratively with Commissioners and staff to help the SEC fulfill each leg of its critical statutory mission.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

¹⁵ Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth – IPO Task Force (October 20th, 2011) Available at https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf?mod=article_inline

¹⁶ H.R. 4076, 116th *Modernizing Disclosures for Investors Act*

¹⁷ Accelerating Access to Capital Act – H.R. 4529, 115th)

