



Lowered Expectations

Even After Trimming Its Agenda, Securities and Exchange Commission Is Missing Its Marks on Public Safeguards

Acknowledgments

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More than six years after the financial crash of 2008 and four years after Congress responded with the Dodd-Frank Wall Street Reform Act, the Securities and Exchange Commission is well behind in its task to implement the law.

The agency is both failing to meet own deadlines and also compares unfavorably to the Commodity Future Trading Commission (CFTC), a sibling of SEC with similar responsibilities.

For example, through October 2014, the CFTC has finalized 80 percent of the Dodd-Frank rules under its purview, according to Davis Polk, a law firm that issues monthly progress reports. At the SEC, this figure is 60 percent.¹ Of the Dodd-Frank rules under its jurisdiction, the SEC has only finalized five so far in 2014. At its current pace, the SEC will not complete promulgating the Dodd-Frank rules it was assigned until the year 2020. Without these safeguards, Wall Street may run off the same rails as in the financial crash of 2008.

SEC Chair Mary Jo White pledged in her confirmation hearings to get the rules “done.”² She described herself as an “efficiency nut.”³ Yet, since becoming chair of the SEC in 2013, White has postponed many rules. A Public Citizen analysis published in June found that the SEC moved back the deadlines for more than half of the rules on its agenda released in the Spring of 2014 from those previously established in its Fall 2013 agenda.⁴

This Spring 2014 agenda left a much shorter list of rules for action in 2014. The SEC justified this winnowed agenda as one that “represents our best estimate as to what would be ready for Commission consideration by fall of 2014.”⁵

¹ *Dodd-Frank Progress Reports*, DAVIS POLK, available at: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/>.

² Testimony, U.S. Senate Banking Committee (March 12, 2013) available at: http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=619e5603-c2c8-4085-98c6-0014ce29bde7.

³ Mary Jo White Defies Political Meddling, BLOOMBERG (April 2014), available at: <http://www.bloomberg.com/news/2014-04-11/sec-s-mary-jo-white-defies-political-meddling-in-year-one.html>.

⁴ BARTLETT NAYLOR ‘EFFICIENCY NUT,’ PUBLIC CITIZEN (June 2014), available at: <http://www.citizen.org/documents/sec-rulemaking-efficiency-report.pdf>.

⁵ Dina ElBoghdady, SEC Drops Disclosure of Corporate Political Spending From Its Priority List, THE WASHINGTON POST (Nov. 30, 2013), http://www.washingtonpost.com/business/economy/sec-drops-disclosure-of-corporate-political-spending-from-its-priority-list/2013/11/30/f2e92166-5a07-11e3-8304-caf30787c0a9_story.html.

SEC Progress on Meeting Its Deadlines Remains Poor

In this Public Citizen analysis, we examine the SEC's level of success at meeting deadlines for this reduced number of items. Our analysis shows that the agency is not faring well under its less ambitious agenda.

Public Citizen examined the Spring 2014 "Agency Rule List" published on May 23, 2014, by the Office of Information and Regulatory Affairs (OIRA), a division of the Office of Management and Budget.⁶ OIRA is obliged to publish these agendas, which consists of submissions from agencies, in the spring and the fall of each year. The agendas cover the expected milestones pursuant to the development of regulations.⁷

The items included in the agendas primarily concern rules for which agencies intend to issue an Advance Notice of Proposed Rulemaking (ANPRM), a Notice of Proposed Rulemaking (NPRM), or a Final Rule within the next 12 months. The SEC lexicon is slightly different. Its agendas include items in a "Proposed Rule Stage" (meaning that it intends to propose a rule and request public comment on it by a certain date) and items in a "Final Rule Stage" (those that it has already proposed and it intends to finalize by a certain date).

In its Spring 2014 agenda, White's SEC rolled back its expected deadlines on more than half of the rules listed in its Fall 2013 agenda.⁸ This left 25 rules that the agency expected to propose or finalize by various deadlines between May 2014 the end of October 2014. The agency met only three of these deadlines.

Among the 12 items in the "Proposed Rule Stage," the SEC said it would issue by no later than October, it met its deadline on three. Among the 13 items in the "final rule stage," it did not meet its deadline on any. Overall, Chair White's SEC failed to meet its self-imposed deadlines in 88 percent of these cases. [See Table, below]

⁶ Katie Weatherford, *Spring 2014 Unified Agenda: Agencies Expect Lengthy Delays of Critical Safeguards in Year Ahead*, CENTER FOR EFFECTIVE GOVERNMENT (May 30, 2014), <http://www.foreffectivegov.org/blog/spring-2014-unified-agenda-agencies-expect-lengthy-delays-critical-safeguards-year-ahead>.

⁷ Since 1978, federal agencies such as the SEC have been required by executive orders to publish agendas of regulatory and deregulatory activities twice a year. The Regulatory Plan is published as part of the fall edition of the Agenda with detail about the most important significant regulatory actions that agencies expect to take in the coming year. The plan is updated in the spring as part of a corresponding requirement in the Regulatory Flexibility Act. This requires that agencies publish semiannual regulatory flexibility agendas identifying those rules that may have a significant economic impact on a substantial number of small entities. Agencies meet that requirement by including the information in their submissions for the Unified Agenda.

⁸ Agency Rule List, Spring 2014, Office of Information and Regulatory Affairs (Visited October 2014), available at:

http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&Image58.x=20&Image58.y=22.

Security and Exchange Commission Progress on Rulemakings in Progress

| | Number of Rules Listed in Spring 2014 for Action By Some Date Between Spring and October 2014 | Number of Items Accomplished by Deadline | Pct. Delayed |
|---------------------|--|---|---------------------|
| Proposed Rule Stage | 12 | 3 | 75% |
| Final Rule State | 13 | 0 | 0% |
| Total | 25 | 3 | 88% |

Some of the SEC's accomplishments in the past six months do not fit within the scoring system used in this review. It is worth noting that the SEC did report progress on more than just the three rules for which it met the deadlines it laid out in its Spring 2014 agenda. In one case, the SEC advanced a final rule that was not included in this review because the agency had set a deadline far beyond October 2014. The agency proposed to finalize its rule governing what it calls "Regulation of Cross-Border Security-Based Swap Activities" by March 2015. In fact, the agency finalized an important element governing definitions within this important financial arena on June 25, 2014.

In another case, the agency proposed a temporary rule "regarding principal trades with certain advisory clients" on August 12, 2014. Its agenda posted this item not as a "temporary" rule but as a rule it expected to propose by December 2014.⁹

In a third case, the SEC finalized a rule it called "Credit Risk Retention."¹⁰ This rule had not appeared on the Agency's Spring 2014 agenda. It is an interagency rule and was adopted along with the other agencies, including the Federal Reserve Board, the Federal Deposit Insurance Corp. and the Comptroller of the Currency.

In sum, the agency issued a total of five final rules by October 2014. In three cases, the Commission acted after its posted deadline. In the fourth case, the Agency had set a deadline later than October. In the fifth case, the agency had not listed the rule at all on its agenda.

Within the items listed in the proposed stages in its Spring 2014 report, it issued three proposed rules for which it missed its deadlines in addition to the three for which it met

⁹ See OMB, regulatory agenda (Spring 2014), available at: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3235-AL56>.

¹⁰ Credit Risk Retention, a joint agency rule (Oct. 22, 2014), available at: <http://www.sec.gov/rules/final/2014/34-73407.pdf>.

deadlines. Within the proposed rules, it also re-opened or extended the comment period on two others, indicating at least renewed attention.

‘Complexity’ Does Not Excuse Glacial Pace of SEC’s Rulemakings

White has frequently mentioned “complexity” as a persistent challenge to rule-making.¹¹ Yet some rules the SEC has yet to complete are not complex. For example, Dodd-Frank requires that corporations list their CEO’s pay as a multiple of the median-paid employee at the firm. This may be the simplest of all the Dodd-Frank rules. After many years of study, the SEC proposed this rule in 2013, which means that it has already hurdled whatever complexity may be involved. But a year after proposal, the SEC has yet to issue a final rule.

Many of the rules involving financial derivatives are more complex than the pay ratio rule. Yet the CFTC, which deals with nearly identical issues and struggles with a budget and staff roughly 20 percent the size of the SEC’s, has completed most of its rule-making obligations relating to derivatives.

Another reason for delay may be that some rules require coordination with other agencies. For example, six regulators must adopt rules to prevent pay incentives from promoting inappropriate risk taking by bankers. All of the other regulators list this rule making in the proposed rule stage. The SEC does list this rule anywhere on its agenda.

In one case, the SEC acted only after pressure from the Financial Stability Oversight Council. This is the uber-regulatory body composed of the leaders of nine financial regulatory agencies, including the SEC as well as the Federal Reserve, Comptroller of the Currency, and Federal Deposit Insurance Corp. In 2012, this group called on the SEC to reform the money market industry.¹²

Public Citizen believes that complexity, volume and interagency coordination may partly explain but do not justify the SEC’s slow pace. The SEC bears the responsibility to complete rules for which Congress has mandated and to look ahead to new aspirational topics demanded by investors. Americans who have suffered the ravages of unbridled Wall Street recklessness deserve no less.

¹¹ See, for example, Testimony Before U.S. Senate Banking Committee (Sept. 9, 2014), available at: <http://www.sec.gov/News/Testimony/Detail/Testimony/1370542893146#.VEUYkRCs -p>.

¹² Proposed Recommendations Regarding Money Market Fund Reform, FINANCIAL STABILITY OVERSIGHT COUNCIL, (November 2012), available at: <http://www.treasury.gov/initiatives/fsoc/rulemaking/Documents/Proposed%20Recommendations%20Regarding%20Money%20Market%20Mutual%20Fund%20Reform.pdf>. See also: Jesse Eisinger, *Blackrock Doesn’t Need a Scarlet Letter*, PROPUBLICA (June 16, 2014), available at: <http://www.propublica.org/thetrade/item/blackrock-doesnt-need-a-scarlet-letter>.

Appendix A: Rules the Agency Intended to Propose by October 2014

| Rule Subject | Expected Date for Rule Proposal | Delayed? |
|---|---------------------------------|------------------------------------|
| Compensation Clawback | October 2014 | Yes |
| Pay for Performance | October 2014 | Yes |
| Implementation of Titles V and VI of the JOBS Act | October 2014 | Yes |
| Treatment of Certain Communications Involving Security-Based Swaps That May be Purchased Only by Eligible Contract Participants | May 2014 | Yes. Proposed September 8, 2014. |
| Disclosure of Hedging by Employees, Officers and Directors | October 2014 | Yes |
| Exchange-Traded Funds | October 2014 | Yes |
| Investment Company Advertising: Target Date Retirement Fund Name and Marketing | April 2014 | No. Rule re-proposed April 3, 2014 |
| Form N-SAR and Portfolio Holdings Reporting Reform | October 2014 | Yes |
| Reporting and Recordkeeping Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants | May 2014 | No. Rule proposed May 2, 2014 |
| Standards for Covered Clearing Agencies | March 2014 | No. Rule proposed March 12, 2014 |
| Broker-Dealer Leverage Ratio | October 2014 | Yes |
| Exchange-Traded Products | May 2014 | Yes |

Appendix B: Rules the Agency Intended to Finalize by October 2014

| Rule Subject | Expected Date for Rule Finalization | Delayed? |
|---|-------------------------------------|----------------------------------|
| Asset-Backed Securities | May 2014 | Yes. Finalized September 4, 2014 |
| Rules Governing the Offer and Sale of Securities Through Crowdfunding Under Section 4(a)(6) of the Securities Act | October 2014 | Yes |
| Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act | October 2014 | Yes |
| Amendments to Regulation D, Form D and Rule 156 Under the Securities Act | October 2014 | Yes |
| Pay Ratio Disclosure | October 2014 | Yes |
| Money Market Fund Reform; Amendments to Form PF | May 2014 | Yes. Finalized July 23, 2014 |
| Reporting of Proxy Votes on Executive Compensation and Other Matters | October 2014 | Yes |
| References to Credit Ratings in Certain Investment Company Act Rules and Forms | October 2014 | Yes |
| Security-Based Swap Data Repository Registration, Duties, and Core Principles | October 2014 | Yes |
| Regulation SBSR--Reporting and Dissemination of Security-Based Swap Information | October 2014 | Yes |
| End-User Exception to Mandatory Clearing of Security-Based Swaps | October 2014 | Yes |
| Rules for Nationally Recognized Statistical Rating Organizations | May 2014 | Yes. Finalized August 27, 2014 |
| Regulation Systems Compliance and Integrity | October 2014 | Yes |