

Congress of the United States
Washington, DC 20515

June 28, 2023

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Chairman Gensler:

We write regarding your failure to adequately respond to our letter dated November 1, 2022, addressed to the Securities and Exchange Commission (“SEC Off-Platform Letter”). In our letter, we requested information related to your and the SEC’s compliance with federal recordkeeping requirements based on, among other things, “evidence uncovered during Freedom of Information Act (“FOIA”) litigation suggest[ing] the SEC is failing to identify and produce records of official business conducted on non-email or ‘off-channel’ platforms, such as Signal, WhatsApp, Teams, and Zoom—regardless of whether the communication took place on a personal or business device.”¹ While your response letter refers to the operations of the SEC’s Records and Information Management Program and FOIA Office, the SEC’s regulations, guidance, and training, and the SEC’s general commitment to complying with federal recordkeeping obligations, you failed to respond directly to the five clear requests set forth in the SEC Off-Platform Letter. This includes providing the specific *certifications* regarding the SEC’s and your personal compliance with federal recordkeeping requirements.

In addition, we are concerned that the SEC may be failing to meet its recordkeeping obligations in connection with the Administrative Procedure Act’s (“APA”) notice and comment rulemaking process. More specifically, we question whether the SEC has documented all feedback on its proposed rules in relevant comment files as required, including any and all meetings you had with external parties that may have covered rule proposals that were pending at the time. As you know, documenting all comments received from the public – whether that feedback is received in writing through comment letters or orally through in person meetings with SEC

¹ See https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2022/11/2022-11-01-JDJ-JC-PM-TE-to-Gensler-re-Recordkeeping-Laws-1.pdf.

representatives – is critical. Documentation ensures that the SEC formulates and adopts rules based on a full and complete record in compliance with the APA.²

Release of your public calendars suggests you met with CalPERS individually, or together with other groups, 13 times since you became Chairman in April 2021. Seven of those meetings occurred *after* March 21, 2022, the date on which the SEC issued its rule proposal to “Enhance and Standardize Climate-Related Disclosures for Investors” (“Climate Proposal”). CalPERS has generally supported the SEC’s radical climate disclosure rule proposal. Moreover, according to a publicly available CalPERS document released in November 2022:

CalPERS staff have met with the SEC chair and staff *several times over the last two years to discuss the climate-related disclosures*. Guided by extensive research, we have and continue to advocate for sound public policy and corresponding high-quality standards for mandatory climate risk reporting, which is consistent, comparable, and reliably assured.³

Yet our review of the Climate Proposal comment file as of the date of this letter shows only two meetings between you and CalPERS.

Similarly, according to your public calendars, you met with Better Markets individually or together with other groups nine times since you became Chairman in April 2021. You also met with Healthy Markets individually or together with other groups eight times during that same period. Nine of the total 13 meetings you had with Better Markets and/or Healthy Markets (individually or together with other groups), occurred after the release of the Climate Proposal. Two occurred after the release of your equity market structure rule proposal on December 14, 2022. Both Better Markets and Healthy Markets have generally supported your Climate Proposal and your similarly radical rule proposals to reform the structure of the U.S. stock market.⁴ Yet our review of the Climate Proposal comment file, and the four equity market structure rule proposal comment files as of the date of this letter, shows no record of any meetings between you and Better Markets or Healthy Markets in either of those files.

² See https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf; <https://www.sec.gov/oig/reportspubs/aboutoigaudit347finhtm>; https://www.sec.gov/oica/investor-alerts-and-bulletins/ib_seculemaking.

³ See CalPERS’ Response to the Taskforce on Climate Related Financial Disclosure (TCFD) and Senate Bill 964 (Nov. 2022) (emphasis added), <https://www.calpers.ca.gov/docs/climate-related-financial-disclosure.pdf>. The document further states, “In 2022, the SEC issued proposed rules for The Enhancement and Standardization of Climate-Related Disclosures for Investors, and in June 2022, CalPERS provided a comment letter reflecting on the proposed rules and providing support to the SEC for taking steps forward that CalPERS, and many investors, have called for.”

⁴ See <https://bettermarkets.org/newsroom/we-support-the-secs-climate-risk-disclosure-proposal-a-very-strong-measure-that-can-be-made-even-better/>; <https://bettermarkets.org/analysis/sec-market-structure-reforms/>; <https://www.americanprogress.org/article/sec-broad-authority-require-climate-esg-disclosures/>; <https://healthymarkets.org/wp-content/uploads/2023/03/Market-Structure-Comment-Ltr-to-SEC-3-31-23-Final.pdf>.

Your failure to adequately respond to the SEC Off Platform Letter, combined with the potential recordkeeping matters described above, continue to raise troubling questions about the SEC's compliance with applicable federal laws. They also raise disturbing questions regarding your own commitment to holding the SEC accountable to the same standards you seek to impose on the individuals and entities you regulate.⁵ The American public deserves a capital markets regulator that plays by its own rules, not one that acts above the law.

Please provide complete and accurate responses to the following requests no later than July 17, 2023:

1. Certify that the SEC is following all applicable federal record-keeping and transparency requirements;
2. Certify that you have never used a private email account or “off-channel communications” for official SEC business;
3. Certify that since your swearing in, you and your direct reports—including all SEC division and office heads and all employees in the Chair's office—have never used private email accounts or “off-channel communications” for official SEC business;
4. Explain how the SEC defines “off-channel communications” for purposes of responding to FOIA requests and other federal transparency requirements; and
5. Explain whether any SEC employees, including yourself, have used “off-channel communications” to conduct official SEC business. If so, provide a list of all such platforms and all SEC employees who have used “off-channel” communications for official business.
6. If you do not intend to comply with any or all of the above requests #1-5, describe the factual and legal basis for your noncompliance.

⁵ In addition to the enforcement actions you have taken against financial services firms for violating applicable recordkeeping requirements, in January 2022, you stated that you had “directed [SEC] staff to make recommendations up and down the capital markets about how we can drive towards greater efficiency through competition and transparency.” See <https://www.sec.gov/news/speech/gensler-dynamic-regulation-20220119>. As one press report claimed, “[I]f you needed one word to sum up Gensler's regulatory kink, it would be ‘Transparency.’” See <https://www.marketwatch.com/story/gary-genslers-campaign-for-market-transparency-is-getting-more-transparent-11644531875>.

7. Conduct an audit of all rulemaking comment files that were opened during the period from April 17, 2021, to the present, certify that such files are complete and accurate, and provide the audit report to Congress.

8. Conduct an audit of your official calendars during the period from April 17, 2021, to the present, certify that such calendars are complete and accurate, and provide the audit report to Congress.

We appreciate your prompt attention to this matter.

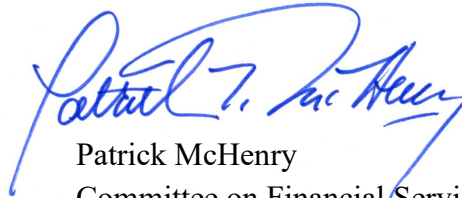
Sincerely,



Jim Jordan
Chairman
Committee on the Judiciary



James Comer
Chairman
Committee on Oversight and
Accountability



Patrick McHenry
Committee on Financial Services

Cc: The Honorable Jerrold L. Nadler, Ranking Member, Committee on the Judiciary
The Honorable Jamie Raskin, Ranking Member, Committee on Oversight and
Accountability
The Honorable Maxine Waters, Ranking Member, Committee on Financial Services