



CFA Institute

THE IMPORTANCE OF COMMENT LETTERS TO OUR ADVOCACY WORK

A Better Yardstick: Tracking SEC References to Our
Comment Letters

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ISSUE

One of the most effective advocacy tools of the CFA Institute Washington office is to write comment letters on regulatory proposals and then leverage those letters for blogs and for conversations with regulators, Hill staffers, and the media. This memo describes what we do, why it is important, and how to measure our impact.

Comment letters contribute to, and can help shape, the public debate on proposals by the US Securities and Exchange Commission (SEC), the Department of Labor, and other regulatory agencies and standard-setters. Specifically, comment letters can have an impact in the following ways:

- Impact on the stakeholder community: Other stakeholders typically read the comment file carefully. They may draw from our arguments in their own comment letters.
- Impact on SEC deliberations: Our arguments can influence the deliberations of the Commission, even if it ultimately chooses a different approach from ours.
- Impact on the public debate: Comment letters establish a record of our views. Importantly, the document is often a living record. That is especially important now, because the incoming Biden administration is expected to review and possibly reverse a number of high-profile policies enacted during the Trump administration, especially those adopted in the past year.
- Impact of our presence and branding: Our comment letters showcase our advocacy engagement. They keep our name, and the quality of our work, in public view.

Occasionally, the SEC makes reference to our comment letters or repeats particular arguments attributed to us. Such references have a multiplier effect, magnifying our influence in the following ways:

- They show that the regulator takes our position seriously and considers it in its rule-making deliberations.
- They signal to the public the quality and intellectual rigor of our work.
- They give us an important metric by which to measure our impact.

This last point is especially important, given the inherent challenges of measuring the success, effectiveness, and efficiency of our advocacy work. We face these challenges whether or not our position prevails in the final rule. Even if it does, the victory is not ours alone. We are typically one of many stakeholder groups advocating for or against a given rule proposal. It is usually impossible to disentangle our specific contribution from the efforts of other stakeholder groups. Conversely, if the SEC adopts a position we had opposed, it would be wrong to count that simply as a defeat for our efforts.

Measuring our impact should not be reduced to a binary choice between victory and defeat. Indeed, given the ideological makeup of SEC commissioners over the past four years, and the deregulatory zeal of a majority of commissioners (including the chairman), we should expect a split SEC to favor rules that we would oppose on investor protection and transparency grounds. Arguably, our voices are needed all the more when the majority of commissioners espouse and adopt approaches that conflict with our advocacy principles.

But if we shouldn't take the ultimate regulatory outcome as the litmus test of our advocacy efforts, how can we measure the impact of our work with greater accuracy and precision? This is the advantage of tracking SEC references to our comment letters. This yields a more accurate, realistic, and nuanced measure of the quality and impact of our work. Related metrics would track follow-up activities generated by our comment letters, such as meetings with individual commissioners and key staff, or placement of blogs or other articles.

To illustrate the role of comment letters, we offer a recent case study involving a high-profile and controversial SEC rule to expand private markets.

Appendix I offers a more detailed background of the Notice and Comment rulemaking process followed by the SEC and other federal regulators and standard-setters. Appendix II offers specific details on the SEC references to our comment letters in its adopting release of the final rule expanding private markets.

RULE

On 2 November 2020, a split SEC voted 3–2 to adopt the Final Rule on *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*. This multifaceted rulemaking significantly expands (1) the framework for private offerings that are exempt from public company requirements and (2) retail investor access to private markets. We had opposed the rule, among other reasons, because it would weaken investor protection and would exacerbate the existing imbalance between public and private markets.

As expected in light of the majority philosophy of the current five-member Commission, our arguments did not prevail in the Final Rule. We were pleased to note, however, that the Adopting Release prominently cited our arguments.

ANALYSIS

The Adopting Release cited our letter 26 times in 22 footnotes. Going beyond a mere citation to our comment letter, the release summarized or paraphrased a particular remark attributed to our comment letter nine times (seven in the footnotes and two in the main body of the text). Moreover, out of 175 unique comment letters (plus 286 form letters), we were the only commenter to make one particular observation, as the Adopting Release pointed out.

We followed up our comment letter by engaging in direct conversations with three commissioners, key staff members of the Chairman's office, and a group of staffers who had drafted the rule. We also used our position as material for conversations with key congressional staff. Finally, we posted a blog explaining our views on the topic.

Both our comment letter and references to it in the Adopting Release stand as a public record in a continuing public debate. A reconstituted Commission under a new Chairman may well seek to roll back this particular rule. More generally, the balance between public and private markets is likely to remain a high priority for both the Commission and key congressional committees.

CONCLUSION

This particular rulemaking illustrates the role of comment letters in our advocacy work. SEC citations to our arguments multiply the effect of our influence in the public debate. In addition, our comment letters give us a reason to engage in conversations with commissioners, key SEC staff, and key congressional staff. As this example shows, the comment letter allows us to stake out a position that not only is relevant at the time but also is likely to continue to be a priority issue, even after the SEC's adoption of the Final Rule.

The SEC references to our comment letter, meanwhile, serve as a metric of the quality of our advocacy, the cogency of our arguments, and the visibility that our comment letters achieve. This provides a more accurate measure of our work than a binary approach that looks only at the final position adopted by the regulator.

APPENDIX I

The SEC’s rulemaking process affords the public the opportunity to comment on all proposed rules. This is called the Notice and Comment process. The process begins when the Commission votes to publish a proposed rule or a concept release. A proposed rule announces and explains the agency’s plan to address a problem or accomplish a goal. Sometimes the SEC chooses instead to publish a concept release. A concept release solicits the public’s views on securities issues to evaluate the need for future rulemaking. The SEC may follow up with a Proposed Rule and, eventually, a Final Rule. Typically, both the Rule Proposal and the Adopting Release are divided into at least two parts: a discussion of the issue, including specific questions for which the SEC solicits public comment; and the actual text of the proposed rule.

For example, on 18 June 2019, the SEC published a *Concept Release on Harmonization of Securities Offering Exemptions*. The 211-page concept release solicited public comment on 138 questions, many of them multipart questions. On 4 March 2020, the SEC followed up with the Proposed Rule, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*. The 341-page Proposed Rule recapitulated comments received from the Concept Release and posed 123 new questions. On 2 November 2020, the SEC voted 3–2 to adopt the Final Rule. The 388-page Adopting Release contained the Final Rule as well as a discussion explaining the Commission’s views and summarizing public comments it had received.

As this example shows, concept releases and rule proposals are typically lengthy documents, often hundreds of pages long and containing hundreds of questions. It can be time-consuming and challenging just to get through the document, to gain an informed understanding of the regulations and the policy issues involved, and to articulate an informed and reasoned position that reflects our advocacy principles and represents our CFA Institute members. But that is an essential part of our overall advocacy efforts. The comment process allows us to have a voice, both by submitting comment letters and by discussing the issues individually with commissioners and key SEC staff.

APPENDIX II

The Adopting Release on the Final Rule of the Exemptive Framework made reference to our comment letter in the following ways:

1. **Citations.** The Adopting Release cited our letter 26 times in 22 footnotes.
2. **Summaries of Our Arguments:**
 - a. **In Footnotes.** The footnotes included eight summaries of particular arguments we had made.
 - b. **In Main Text.** Twice, the main body of the Adopting Release singled out arguments attributed specifically to us. In one case, we opposed the proposed rollback of an audit requirement for financial statements in Rule 506(b) offerings under \$20 million. We argued that this would deprive investors of critical information. In the other case, we expressed concern over the negative effects of increasing the use of Regulation A for unsophisticated nonaccredited retail investors because of a market history of the lower quality of Regulation A issuers and increased risks of investor losses.
3. **Unique Contributions:** Out of 175 unique comment letters (plus 286 form letters), we were the only commenter to make one particular observation, as the Adopting Release noted. The rule would raise the dollar limit on the type of exemptive offering known as a Regulation A Tier II offering. We observed that this type of offering has been used almost exclusively by a single industry—the real estate industry, which has experienced particularly high levels of volatility and riskiness. Although the Adopting Release did not accept our argument against raising the offering limit, it did acknowledge our unique contribution in making this point.

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