

**OVERSIGHT OF THE U.S. SECURITIES AND
EXCHANGE COMMISSION**

HEARING
BEFORE THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE
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FIRST SESSION
ON
EXAMINING OVERSIGHT OF THE U.S. SECURITIES AND EXCHANGE
COMMISSION
SEPTEMBER 14, 2021

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OVERSIGHT OF THE U.S. SECURITIES AND EXCHANGE COMMISSION

TUESDAY, SEPTEMBER 14, 2021

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met at 10:06 a.m., via Webex and in room 538, Dirksen Senate Office Building, Hon. Sherrod Brown, Chairman of the Committee, presiding.

OPENING STATEMENT OF CHAIRMAN SHERROD BROWN

Chairman BROWN. The Senate Committee on Banking, Housing, and Urban Affairs will come to order. This hearing is in a, our first time, a hybrid format. Our witness is in person. Mr. Gensler is here in person. Thank you. Members have the option to appear both in person or virtually.

For those joining remotely, a few reminders. Once you start speaking there will be a slight delay before you are displayed on the screen. To minimize background noise, please click the Mute button until it is your turn to speak or ask questions. You should all have one box on your screens labeled "Clock" that will show how much time is remaining. For those of you joining virtually, you will hear a bell ring when you have 30 seconds remaining and then when time has expired. If there is a technology issue we will move to the next Member.

Our speaking order will be as usual, that is by seniority of the Members who have checked in before the gavel came down, either in person or virtually, and then by seniority of Members arriving, alternating between Democrats and Republicans.

Welcome, Chair Gensler, back to the Committee. Five months ago today, the Senate confirmed you as Chair of the Securities and Exchange Commission, one of the historically most important jobs in the Federal Government. I know you have already gotten to work for the American people, and you had your work cut out for you.

Over the past year-and-a-half, the disconnect between the stock market and most Americans' lives has never been more painfully clear. Most of the country has been devastated by this awful virus. Hundreds of thousands have lost loved ones. People lost jobs, lost family businesses. Mothers were forced to leave their paid jobs in droves. Millions today are at risk of evictions from their homes.

But you would never know any of that by looking at the stock market. It hits new records month after month. Listen to this: 53 records since the beginning of the year. Eye-popping gains in the

stock market and crypto assets attracted millions to start investing.

And like during past times of upheaval, the COVID crisis opened the doors for bad actors looking to seize upon people's fears and insecurity. Pandemic-related fraud, from Ponzi schemes to offers to invest in COVID-related medical care, skyrocketed last year.

The SEC stepped up to educate investors and to punish bad actors. The dedicated public servants at the Commission have continued to fight for all the Americans whose pensions and 401(k)s and college savings are at risk. Many have been enticed by dramatic jumps in the value of new digital assets. They have dreamed of riding the coattails of professional investors and celebrities in a new wave of public offerings of more speculative investments known as "special purpose acquisition companies," or SPACs.

Some professional investors and celebrities make earning millions look easy. But as we are reminded time and again through history, it is never that simple. Too often, someone's quick profit comes at the expense of workers, sometimes even entire communities.

Chair Gensler, it is your job to make sure that efficient markets are balanced with strong enforcement that protects Americans from the worst Wall Street greed and careless risk, even if that means challenging practices or shady investment products that previous chairs had ignored. It means working to increase transparency that the last Administration simply did not take seriously. We all know that on this Committee. For example, the SEC approved new human capital disclosure last year without requiring companies to provide even basic details or data. "Just give us some information," we almost disdainfully said. And let's remember, "human capital" is business school-speak for the tens of millions of Americans who work for these companies.

Despite the new standard and the investor demand for essential information used to judge how companies treat and manage these workers, most companies are barely providing any additional information.

My colleagues have been working to improve transparency. Senator Warner of Virginia introduced the Workforce Investment Disclosure Act to get companies to provide important information on how they pay, train, and invest in their workers. His bill will shed light on how companies outsource and subcontract their workers, such an important part of our economy now, and something he and I have jointly written to the GAO about.

Today's tech companies like to say they are more "efficient" than companies of the past, when in reality they hire the same number of workers. Half of them are just invisible to us under today's disclosure requirements.

Senator Warren of Massachusetts introduced the Climate Risk Disclosure Act, calling for significant new public disclosures from public companies regarding the risks climate change poses to their financial results and to their operations.

These bills are good policy. The largest investors have been calling for more of this kind of information. I am a cosponsor of both bills.

Of course this would be just a start. Transparency is only a first step to getting corporations and the biggest investors to behave better. There is much you already have the authority to do to make markets work better for the real economy, outside of investment firm and hedge fund board rooms.

For too long, the financial system has catered to the big guys, and left everyone else on their own. There are far too many stories of how insiders game the system. Big banks abuse customers while they make record profits. Brokers who have taken advantage of customers use the system to cover up and erase their misconduct. Private equity firms buy up companies and treat workers as a cost to be minimized. Workers as a cost to be minimized—where have we heard that before? They buy up houses, they raise rents, they evict families, even during a pandemic.

And of course no matter what happens to the workers at the companies they have raided for parts, or to the families in the mobile home complex where they have jacked up the rents, or to the larger economy, the big guys—the hedge funds, the SPAC sponsors, the big banks, the brokers—the big guys seem to do just fine.

That system is not sustainable.

Increasing people's trust and faith in the market and the financial system will lead to more saving and broader participation. Yet some of my colleagues say we should let the market sort it out. They want to tie the SEC's and other watchdogs' hands.

We know that is counterproductive. It is the same thinking that led to a market collapse 13 years ago, and that has led to decades of more and more investment flowing to a smaller and smaller share of the country.

The last Administration subscribed to that same always Wall Street-first view, and left this country worse off than they found it. The damage is too vast to measure. Our economy and markets were no exception.

Investors have fewer tools to hold management accountable; savers—and that means retirees, widows, families—have fewer protections. And corruption runs rampant; existing, serious conflicts of interest have too often been ignored.

This Administration is taking a different view, thankfully. The economy and the markets should work for everyone, not just the well-connected. They should reflect the economy we all want, with broadly shared prosperity, and a growing middle class that all workers can join.

When that happens, people will have confidence that markets will actually work for them, not just Wall Street. And we will see more Americans save, and we will see more Americans invest for the future.

Chair Gensler, I look forward to hearing about the progress you are making toward those goals.

Ranking Member Toomey, welcome.

OPENING STATEMENT OF SENATOR PATRICK J. TOOMEY

Senator TOOMEY. Thank you, Mr. Chairman. Chair Gensler. Welcome back. It is good to see you, despite our significant disagreements. I do appreciate your dedication and enjoy working with you.

As you know, the SEC has historically administered securities laws on a bipartisan basis, generally. During your confirmation process, I expressed concerns that you might stray from this tradition and use the SEC to advance a liberal political agenda, such as combating global warming and advancing so-called social justice, and push the legal bounds of the SEC's authorities to pursue disclosures that are not financially material to the reporting companies. Unfortunately, this appears to be exactly what you are doing.

You have added mandatory disclosures on global warming and, quote, "human capital," end quote, such as board and employee racial and gender identity, to the SEC's agenda. You have essentially said that if large investment advisors and pension funds like BlackRock and CalPERS, who invest other people's money, if they want information about global warming or workforce diversity, it must be disclosed even if it is financially insignificant and irrelevant to a particular business.

Even President Obama's SEC Chair, Mary Jo White, opposed using the SEC's disclosure powers for the purpose of, quote, "exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions," end quote. That is exactly what you are doing, and you are also well on your way to politicizing the PCAOB after firing all of the existing board members.

See, it is not the SEC's role, nor its expertise, as an independent financial regulator with zero democratic accountability, to address these political and social issues.

Similarly, I have worried that you would favor the paternalistic push by some on the left to restrict investor freedom under the guise of protection, while actually harming retail investors. Such harm may result from your apparent opposition to payment for order flow, which helped allow brokers to offer commission-free trading. Payment for order flow allows a broker to keep a portion of the price improvement obtained by routing a transaction to a wholesaler. To my knowledge, the SEC has not demonstrated any failure or harm associated with payment for order flow, which the SEC has allowed for many years. Banning payment for order flow could very well have the effect of eliminating commission-free trading, which would be a grave disservice to average investors.

Likewise, you have criticized mobile apps that make investing easy and fun as, quote, "gamification," end quote. But in my view, delivering a product that customers like is not a bad thing.

And I worry that you are attempting to fix problems that do not exist. Today is the best time ever to be a retail investor in the United States of America. Retail investors receive the best execution. A person of modest means can share in the gains of stock market at negligible transaction costs. We see the tightest bid/offer spreads ever.

At least four major developments for retail investors made this all possible—commission-free trading, accounts with no minimum balances, low- or no-fee mutual funds and ETFs, and yes, user-friendly technology like mobile apps. Hence, investors can also voluntarily use a broker who declines payment for order flow but may, therefore, charge a commission.

Now despite decades of rapidly growing numbers of retail investors participating in stock market gains, and enjoying more product opportunities at lower costs, some of my colleagues suggest that the markets are somehow rigged against retail investors. I would like to hear how it is rigged. Don't retail investors receive dividends like institutional investors? Aren't retail investors entitled to best execution, like institutional investors? Don't the value of retail investors' shares and those of institutional investors both increase when a stock's price increases?

In my view, the SEC's job is not to make retail investing more expensive, or unpleasant, and difficult. In America, adults investing their own money should be free to decide how to do so.

Let me turn to cryptocurrency, which together with the blockchain technology is a very, very important and very promising new technology. As you know, cryptocurrencies are actively traded on many platforms. A really important question is whether a cryptocurrency is a security for regulatory purposes under Howey or some other test.

Now based on your public statements, it is pretty clear that you believe that some are securities but others are not. So, I am frustrated by the lack of helpful SEC public guidance explaining how you make this distinction. What makes some of them securities while others are not securities?

I understand that the SEC staff will privately provide feedback and analysis on whether a cryptocurrency is a security, but why keep this analysis private? Why not publicly announce what characteristics make a cryptocurrency a security or not a security? In other words, how do you apply Howey and the Reves tests to these new products? Why wait to make the SEC's views known only when it swoops in with an enforcement action, in some cases years after the product was launched?

This is regulation by enforcement, and it is extremely objectionable, and I am concerned it can stifle domestic innovation.

So, Mr. Chairman, I hope we will get a better understanding of your views on these and a number of other issues. There are many things on which you and I agree and where we could work together to protect investors, to ensure fair, orderly, and efficient markets, and facilitate capital formation. I hope that we can work together on these really important parts of the SEC's mission.

Chairman BROWN. Thank you, Ranking Member Toomey.

Today we will hear Securities and Exchange Commission Chair Gary Gensler, no stranger to this Committee. This is Chair Gensler's first appearance here in this role. Chair Gensler, please proceed.

STATEMENT OF GARY GENSLER, CHAIR, U.S. SECURITIES AND EXCHANGE COMMISSION

Mr. GENSLER. Good morning, Chairman Brown, Ranking Member Toomey, and Members of the Committee. I am honored to appear here before you today for the first time, as you said, as Chair of the Securities and Exchange Commission, and I would like to thank you all for your support in my confirmation this spring. I would also note I think, Chairman, you may be the eighth chairman that I have appeared before in this Committee. I am aging

myself a little bit, but I think Chair D'Amato might have been the first that I was in this Committee room.

As is customary, I should note that my views are my own. I am not speaking on behalf of my fellow commissioners or the staff.

The U.S., as Ranking Member Toomey said, is blessed with the largest, most sophisticated, and most innovative capital markets in the world. We actually represent 38 percent of the world's capital market, and that is when we are only about 23 percent of the world's economy. They are competitive. They are efficient. They are transparent.

But I think we cannot take our remarkable capital markets for granted. New technologies continue to change the face of finance for investors and businesses, and more retail investors than ever are accessing our markets. Our country and other countries are also developing deep competitive capital markets as well. And though I provide greater detail in the written technology, I would just like to flag three areas for now.

First is market structure. Market structure is fundamental to our mission, to protect investors, on the other side, facilitate capital formation, that which is in the middle, fair, orderly, and efficient markets. How do we do that? It is through transparency and competition in those markets.

So I have asked staff to take a look at a number of market structures. The Treasury market, that is the base of all other fixed income markets. The non-Treasury fixed income markets, corporate bonds and municipals, which, by the way, in the U.S. are twice to 2.5 times the lending out of banks are loaned through our capital markets. Our equity markets and securities-based swaps as well. In each of these crucial markets I think companies and investors alike benefit if we can increase competition, lower costs, and bring more transactions out of the dark.

Second is a rapid change in technology. We are living in a transformational time, perhaps as transformational as the internet itself. Now I expect some Members might ask a question or two about crypto, but actually the first thing I just want to mention is artificial intelligence. AI, predictive data analytics, and machine learning are shaping and will continue to shape many parts of our economy, and while these developments, I believe, can increase access, increase choice, and lower costs, they also raise new questions about potential conflicts, biases in the data, and yes, even systemic risk.

And now, for the crypto, because I know that you are all, you know, keenly interested. We just don't have, I believe, enough investor protection in crypto—finance, the issuance of these tokens, the trading, and particularly the lending. Frankly, as I have said before, I think it is more like the Wild West. I have asked the SEC staff, working with our fellow regulators—the Commodity and Futures Trading Commission, the bank regulators, the Treasury as well—using our current authorities, how can we best bring investor protection to these markets? I stand willing also to work with this Committee and other committees of Congress if you take up any legislative initiatives.

And then third, issuer disclosure. You see, since the 1930s, we have had a basic bargain. Investors get to decide what risks they

take. That is up to the investors. But Congress said that it should be based on full and fair disclosure of the issues. Over the decades we have updated what those disclosures are, and today's investors are increasingly looking for consistent, comparable, and decision-useful disclosures around climate risk, so-called human capital, cybersecurity, and other areas.

So I have asked staff to develop proposals for the Commission to consider these potential disclosures, and yes, put these proposals out to public comment, put rigorous economic analysis again, and what it is that investors want to see and have the public comment.

Beyond these policy areas, the SEC employees oversee 28,000 registered entities, more than 3,700 broker-dealers, and 24 national security exchanges. You have got the picture. A lot going on in our capital markets—\$110 trillion capital markets.

Last month, we authorized voluntary return to work, but we have been largely remote for 18 months now. This speaks to the dedication of the SEC staff. I cannot compliment them enough. And while capital markets have grown, the SEC has not grown to meet the needs of the 2020s, though. Over 5 years ago we were about 4 or 5 percent bigger, and so I just think that it would be helpful to be a little bit wise and add to our staff. I hope that you can agree with me on that.

Thank you. I look forward to your questions.

Chairman BROWN. Thank you, Chair Gensler. How a company—as we have discussed, privately, and you have spoken publicly—how a company treats its employees matters. The SEC can require companies to disclose that information, but instead of crafting a rule that would provide information and data that could give real insight, the last SEC chair wrote a vague rule that companies can interpret to require as much or more of, and as little information as they like. That lets companies say they pay their workers a living wage with ample paid leave and retirement contributions while subtracting out half their workforce while subcontracting out half their workforce to companies that pay lower wages with stingy benefits. We know that is a business model for many companies.

Why is it important to have disclosures standards that are consistent and comparable across companies?

Mr. GENSLER. I think that investing in a company, the human capital, the workforce, is a key asset. I remember when I started on Wall Street at Goldman Sachs and we used to sell companies. And when we sold companies we would always have a section in that private offering memo about the employees—what they are paid, how many part-time and how many are full-time, where they are located, retention, and the like. It is even more important in the 2020 than when I was young on Wall Street because it is so critical to the valuations of the company.

Now again, we will put to this out—if my fellow commissioners concur, we will put it out to public comment and see what investors have to say, and then their feedback is going to guide us on any final rulemaking.

Chairman BROWN. I think it is pretty clear investors are going to want more information, like you suggest, in your Goldman days.

We have talked before about how Wall Street has treated the markets as a game for decades, a game they always seem to win

at the expense of pretty much everyone else, including communities in Wyoming and Louisiana and Rhode Island and Ohio and Pennsylvania. SPACs, for instance, draw in companies that want to please Wall Street, sometimes make promises that they cannot deliver on. Look at Youngstown, Ohio. There is a lot to unpack with what is happening at Lordstown Motors, whether or not the company is only able to succeed, and I hope it does. It seems clear there were outside investors looking at this not as a long-term investment in a community with a proud manufacturing heritage and a talented workforce but as a way to make a quick buck with no follow-through.

There will always be people, of course, like that, but that does not mean we need to encourage risky financial mechanisms to encourage speculation over a long-term investment.

In a situation like that one, investors make their money and pull out, companies break promises, and workers and community pay the price. What are the risks, Chair Gensler, that the SPAC market has highlighted over the last year and what can we do about it?

Mr. GENSLER. I think the special purpose acquisition companies, these blank check companies, the risks are to investors and the disclosure to the investors. I have asked staff to serve up recommendations that we could consider as a Commission. But in essence there are a lot of costs in these, and second, they usually have a 2-year fuse, and in that 2-year fuse they try to go out and buy something. And a lot of the institutional investors, when that happens, sell—it is called a “redemption right”—and retail investors are often left holding the dilution or the significant cost of the bankers and the promoters.

So we are looking at greater disclosure and also looking at if there are inherent conflicts along the way, and then again, try to put this out to notice and comment and rulemaking.

Chairman BROWN. Thank you. My last question. It has been 11 years since we passed Dodd-Frank. The rules and executive compensation, as you know, remain unfinished. We have seen executive compensations soar. We have watched executives leave with huge bonuses after presiding over fraud and scamming customers. The phrase “golden parachute” has become a cliché. It is that commonplace.

Why is it important to have strong rules to claw back incentive-based compensation when executives got that compensation by breaking the rules, and disclose the relationship, how important it is to disclose the relationship between executive pay and financial performance?

Mr. GENSLER. Let me break it in two things. For the SEC, it is important to move forward because this Committee and then the whole Congress, with the President, put it in law, and it is a mandate that we shall follow. I remember being a staffer, sitting on the other side for Senator Sarbanes. I know that that is how he felt.

But too, in terms of the substance, I think why Congress addressed this and put it into law is that if there a material misstatement or omission in the financials, and those financials need to be restated, then the executives should not benefit. And there is a certain number of years, a lookback period, a clawback

period that Congress said, well, then you should give up the performance-based compensation, if it was based upon faulty numbers.

Chairman BROWN. Thank you. Senator Toomey.

Senator TOOMEY. Thanks, Mr. Chairman. Chairman Gensler, one area that appears to have nearly universal agreement is the benefit of a faster settlement cycle for equities securities. As you know, market participants seem to be confident in a T+1. My understanding is that you support these efforts. I appreciate that. I would just encourage the SEC to move ahead as quickly as reasonably possible so that that can proceed.

I also think there is widespread support for fixing the money market fund rule by removing the link between the 30 percent weekly average liquidity and the possibility of imposing fees and gates. You and I have discussed this. I do not think there is a need for regulatory reforms that would eliminate or reduce the viability of money market funds as an investment, but improving this regulation would reduce the risk that I think the regulatory regime imposes now.

I am concerned about the SEC not adequately fulfilling its capital formation mission. Last year's appropriation law instructed the SEC to deliver two reports to Congress by the end of June, which would help benefit small public companies. These reports are now past due. I certainly hope the SEC will submit those reports promptly.

And you testified to the House that the SEC would have a report on GameStop and Robinhood by this summer. That report has not been produced yet. We have got a week left in the summer. I do certainly hope that we will see it soon.

Now let me turn to cryptocurrencies, and my time is limited so I am going to try to do this as efficiently as I can, Mr. Chairman. But I think I know your position, among other things, is that not all cryptocurrencies are inherently securities. Right? That is true.

Mr. GENSLER. There are a small number that are not, but I think that as Chair Clayton said when he was in front of Congress, I think very many of these facts and circumstances are investment contracts.

Senator TOOMEY. So here is my concern. So some are and some are not, is basically what you are saying, and I am concerned that the SEC has not provided sufficient definition and explained how it would apply the Howey test, which I think is the court standard for determining when something is an investment contract.

So, for instance, stablecoins do not have an inherent expectation of profit. They are just linked to the dollar. Now you might use them in an attempt to make a profit, but that is a second-order activity. Is it your view that stablecoins themselves can be securities?

Mr. GENSLER. I think, Senator, they may well be securities. As Thurgood Marshall wrote in the Reves opinion, in defining the scope of the market that it, Congress, wished to regulate, Congress painted a broad brush. And it actually included about 35 different things inside the definition of a security in the 33 Act.

Senator TOOMEY. OK. I have just got limited time here, so I acknowledge that. Here is my problem, though. I think what you just said was that they may be securities, or that some are securities. To me, a stablecoin does not meet the second prong of the Howey

test, that there has to be an expectation of profits from the investment. And so if it does not meet the Howey test it looks to me like it is not a security.

Now maybe you have got a good argument for why some are and some are not. My whole point is I think we need to have clarity on this. I think you should publicly disclose this. Apparently, there are private conversations where you work with people who are proposing particular structures and you give them advice, your staff gives them advice. I just think we ought to have that publicly, and we certainly should not be taking enforcement action against somebody without having first provided that clarity.

Mr. GENSLER. Well, Senator, this Congress could change the laws, but the laws that we have right now have a very broad definition of security, including a note, including an investment contract and the like. And my predecessor, Chair Clayton, and others actually put out a lot of guidance with regard to the Howey.

Senator TOOMEY. I have just got to push back a little bit on that. It is broad but it is well defined. There is a very specific litany of the instruments that constitute securities, and you know this better than I do. Investment contract is one of them. And there is a court decision that lays out the prongs for what constitutes an investment contract.

I am just saying, as a layman who can read English, when I read those tests, stablecoins do not seem to meet that test, to me. Maybe I am wrong, but if I can misinterpret this I think others could too, and some clarity, public clarity I think would be helpful.

Mr. GENSLER. I see the red light, but I agree with you that some of these tokens have been deemed to be commodities. Many of them are securities. And the Supreme Court has weighed in a number of times. You noted the Howey test. We have talked about the Reves test, which was in the 1990s, as well, as weighed in. And I think that there is a fair amount of clarity.

Over the years, the SEC has even found, believe it or not, whiskey caskets, and the courts agreed, in the 1960s, were investments. And I think at the heart of our securities laws was protecting investors against fraud. They get to decide. They get to take the risk. You will find I am not negative or a minimalist about crypto. I just think it would be best if it is inside the investor protection regime that Congress laid out.

Senator TOOMEY. I see my time has expired, Mr. Chairman.

Chairman BROWN. Thank you, Senator Toomey. Senator Reed from Rhode Island is recognized.

Senator REED. Thank you, Mr. Chairman, and welcome, Mr. Chairman. Cybersecurity is one of the greatest threats that we face, both as a national security threat and also as an economic threat. And in 2018, the SEC issued guidance with respect to public companies. I have been trying, over the last several years, to enact legislation. Senate 808, the Cybersecurity Disclosure Act, was very simple. It would require a public company to disclose whether they have a cyber expert on their boards, and if not, why not, i.e., they have other means to compensate.

In fact, we did precisely that when it came to financial experts. We do require a financial expert on the audit committee or an explanation why they do not have one.

Do you believe that the framework in S. 808 would be appropriate for dealing with cyber?

Mr. GENSLER. Senator, I thank you for highlighting that and our conversations over the last couple of months. I have asked staff to take up two initiatives on cyber, one, company disclosure and one with regard to funds, the investment funds. And on the company disclosure side I have asked them to look very closely at your bill and see whether we would not only potentially include that as a recommendation but also some other issues around, I will call it, cyber hygiene, and then second, incident reporting. When you do have an event or pay ransomware, for instance, when does one report. And that is in the, you know, 6,000 or 7,000 public companies, and then separately we are looking something around funds, the cybersecurity of the investment management field.

Senator REED. Thank you, Mr. Chairman, and I would encourage you to continue to pursue this, and would very much like to see my legislation become law and your regulations become adopted. So thank you.

Another issue that has come up, we are all very happy about the increased retail participation in the stock market. There are a lot of people who never owned stocks before that are buying stocks. And some of it is the result of discount brokers offering zero commissions, aggressively marketing, et cetera.

But there is another aspect of this, and that is the payment for order flow issue, where a lot of these brokers have essentially deals with high-frequency trading firms in exchange for rebates, and they will send their orders to these firms. And the question is, is the owner of the security getting the best deal, or is the intermediary getting a lot of money? And it looks like there is a disconnect there, an inherent conflict of interest, I think you described it recently.

So are you trying to move forward efforts to evaluate this practice of payment and see if it is fair to the consumer?

Mr. GENSLER. We are. I have asked staff to take a look at this. It has been about 16 years since we did a major rewrite of the national market structure, and I think the inherent conflicts of payment for order flow and rebates on the stock exchanges both may make our markets less efficient. And this is important for capital formation and it is important for the retail investors, that all three Senators have already raised, is that retail investors may not be getting best execution, even if they get a price improvement, but there it is price improvement versus sort of an out-of-date measuring rod. And if you measure against the wrong measurement stick it does not mean you are getting best execution.

So we are looking out for retail investors. If anybody on this Committee or staff, legally, traded in the retail markets, there is like a 97 percent chance that it does not go to a transparent exchange. It goes to the dark markets or the wholesalers. And so it is harder to get best execution when you are not competing order to order.

So I am like deeply a markets person and believe in the competition of markets to bring those orders in competition.

Senator REED. Well, thank you, Mr. Chairman. You mentioned in your opening remarks that one area you are looking at is the

Treasury market, and I think that is critical. As you know, in March 2020, there was a free seizure of the market, not by opponents but the whole market sort of seized up for a moment. And a volatility in the Treasury market is very much a danger to the entire economy.

And so I would ask that you continue to look very closely at the Treasury markets. I know we have tried to learn lessons from March 2020, but I do not think we fully learned all the lessons and incorporated them in action.

Mr. GENSLER. I agree with you, and it is one place I hope that there is maybe even more bipartisanship. I am working closely with Chair Powell at the Federal Reserve, closely with Secretary Yellen and her team to try to bring more resiliency, safer Treasury market, but also more competitive, that we might lower the cost to all of us, the taxpayers. Because we are the issuer in that sense.

Senator REED. Thank you, Mr. Chairman. Thank you, Mr. Chairman.

Chairman BROWN. Senator Kennedy is recognized.

Senator KENNEDY. Thank you, Mr. Chairman. I read your editorial in the *Wall Street Journal* today about the Holding Foreign Countries Accountable Act. For what it is worth, I agree with most of it. It is a damn good bill, by the way, if I may say so.

Mr. GENSLER. I want to thank you. I think it helps us do our job, both at the SEC and at the Public Company Accounting Oversight Board.

Senator KENNEDY. I appreciate that. I agree with you, obviously.

There was a 3-year implementation period, as you know. Foreign companies, including our friends in China, have 3 years to comply. The Senate has passed a bill reducing that to 2 years. We are having a little trouble getting the House to take it up. Would you be willing to contribute your considerable efforts to encouraging the House to take it up?

Mr. GENSLER. Senator, I have already had some discussions and expressed to some of the leadership over there that I support that.

Senator KENNEDY. OK. Who pays corporate income taxes?

Mr. GENSLER. Senator, it is the corporation that pays the taxes, of course, then ultimately the owners of those corporations are the shareholders.

Senator KENNEDY. Corporations just is not a payer. It is a tax collector, isn't it?

Mr. GENSLER. Well, I am not here as an expert on the tax code. I think the corporation literally—

Senator KENNEDY. But you are an expert on corporations. I think economists are generally in agreement that the corporation is not a payer. It is a tax collector. The owners and the customers and the workers that Chairman Brown spoke so eloquently about actually pay the tax, don't they?

Mr. GENSLER. Well again, I never want to mince words but I think that the corporation, of course, is paying, and then the shareholders have less net income.

Senator KENNEDY. Don't the workers pay it too?

Mr. GENSLER. I think that it is a cost of the corporation. Like all costs of the corporation those costs compete with each other. Even the cost of the real estate—

Senator KENNEDY. Yeah, but do the workers pay it? I am just trying to—I do not have much time. Sorry about that.

Mr. GENSLER. I am not—the workers pay individual income tax, workers pay Social Security tax, and all that.

Senator KENNEDY. I just want to be sure I understand your testimony, Mr. Chairman. You are saying that the workers are not impacted at all by the corporate income tax?

Mr. GENSLER. I am sorry. I thought you were asking a different question. All costs in a company compete with each other, whether it is the real estate costs—

Senator KENNEDY. I get that, but—

Mr. GENSLER. —or any other costs.

Senator KENNEDY. But are the workers impacted negatively by corporate income tax? It is a real simple question.

Mr. GENSLER. No, I understand it but I think it is best, as the head of the Sec, to leave—

Senator KENNEDY. You do not want to answer it.

Mr. GENSLER. —debates about taxes to Congress. I really do think that that is—

Senator KENNEDY. I understand why you do not want to answer it. I get it.

Look, I do not mean any disrespect to you. I followed your career. You have had quite a career in public service. You have made a lot of money on Wall Street. I respect that. I honor that. But as to the people and the companies that you regulate, as Chairman of the SEC, do you consider yourself to be their daddy?

Mr. GENSLER. No. No.

Senator KENNEDY. Then why do you act like it?

Mr. GENSLER. I try to take the oath of office seriously, that the SEC is set up to promote investor protection and facilitate capital formation, and that which is in the middle.

Senator KENNEDY. Yeah, but why do you impose your personal preferences about cultural issues and social issues on companies, and, therefore, their customers and their workers, like climate change and the Second Amendment? I mean, I am sure you have personal feelings about abortion. Do you have plans to implement or impose those values on companies?

Mr. GENSLER. So I want to thank you for the compliment you gave me, and I have followed your career and have the deepest respect for you too, sir. I think that I am not doing that. I think what I have been trying to do is say if investors want information about climate risk, and it looks like tens of trillions of dollars of assets under management are asking, we at the SEC have a role to put something out to notice and comment, do the economic analysis, and really see what investors are saying. It is really in that narrow set of chalk lines that we are operating.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Kennedy. Senator Tester from Montana is recognized.

Senator TESTER. Thank you, Mr. Chairman, and I want to thank Chairman Gensler for being here today. I have just got to say one thing really quickly. I have got a farm. My wife and I have a farm. We have a corporation. That corporation pays the taxes, we do not, and we are the only stockholders of that corporation. And that cor-

poration exists, over the last 30 years or so, has, quite frankly, helped us financially as we move forward. So just a different perspective.

I want to talk about Citizens United decision, which I believe is one of the worst decisions that has ever come down from the Supreme Court. Incredibly detrimental. It has ended up with literally hundreds of millions of dollars, billions of dollars, flowing into our political system in an untransparent way. I do not think it helps with our democracy.

That being said, the SEC has the power to require companies to disclose corporate political spending. Now the money that these companies put into campaigns may or may not be determined as being materially important, but nonetheless it depends on who you are talking about. If somebody throws a million dollars at me in a campaign it is materially important for me in that campaign. It may not be materially important to that corporation.

Right now, the current appropriations bill prevents the SEC from doing anything about these contributions. Do you believe shareholders should have access to that material information about how companies, who these shareholders own, spend their money?

Mr. GENSLER. Senator, I thank you, and as you noted there is the appropriations rider. But putting that to the side—

Senator TESTER. Yep.

Mr. GENSLER. —you are asking, similar to the other issues around climate risk and human capital, to the extent that investors want to see that information, and it looks like an increasing number of investors do—

Senator TESTER. Yep.

Mr. GENSLER. —I mean, we see that each of the shareholder voting periods, there have been petitions on this to the SEC, and so forth, I think the SEC has a role, similarly, putting out to notice and comment and see what the process brings.

Senator TESTER. Thank you. Thank you for that answer. I have talked about this in this Committee before. I think we really need to take a strong look at extreme weather events. As a farmer this year, for example, this is my wife and my 44th harvest, it was the worst one, by far, ever, due to drought and due to extreme weather conditions.

If you take a look at the amount of money that the American taxpayer is putting out for extreme weather events in this country, it is billions and billions and billions of dollars, and it may even be trillions and trillions and trillions of dollars. I think it is irresponsible for us not to look at the impacts that climate has had on our lives and on our economy, because this ain't going away, and it is getting worse.

And so as Chairman of the SEC, how do you view your work in considering the impacts of climate change as they pertain to your role as a regulator?

Mr. GENSLER. So again, as I have said to other Senators, our role is prescribed by Congress about the issuing companies, these 7,000 or so companies, and the investing public, and to bring consistent comparable disclosure where investors want it. So in climate risk, investors have been asking for it, and hundreds of companies—amongst the 500 largest I think it is 80-plus percent—disclosed

something. But we can bring consistency, comparability, and make the decision useful information.

Senator TESTER. For the investor.

Mr. GENSLER. For the investor, and it would be regarding to some of the physical risks that you mentioned, but also the transition risk over time.

Senator TESTER. OK. Senator Reed talked to you a little bit about cybersecurity. Could you briefly, in the next minute, talk about the list of cybersecurity requirements that the SEC is looking at implementing?

Mr. GENSLER. I am willing to meet with you or your staff to go through.

Senator TESTER. I should have prefaced this by saying, not unlike climate change, this problem is going to continue to get worse.

Mr. GENSLER. I could not agree with you more. So there are two lists we are looking at. One is those activities, how are you managing your cyber risk, because it is a real risk. How are you governing and managing it, and what are your sort of I will call cyber hygiene?

Second is incident reporting. If you have a breach and you are paying ransomware and the like, what are you saying to the public when this occurs, especially if you have private information. Some companies have tens of millions, sometimes hundreds of millions of the American public's confidential information, then taken by the bad actor who has just breached the wall.

Senator TESTER. So it would be—your work is going to be in the realm of hygiene and reporting the attacks.

Mr. GENSLER. That is correct.

Senator TESTER. And the system they have in place.

Mr. GENSLER. Yeah, the system they have and incident reporting, but any advice you have, and your staff, we would look forward to having good conversations.

Senator TESTER. We look forward to it. Thank you. Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Tester. Senator Lummis of Wyoming is recognized.

Senator LUMMIS. Thank you, Mr. Chairman, and thank you for joining us, Chair Gensler. It is nice to see you.

I have two questions. One is specific and the other very, very general. So I will start with the specific. In your previous tenure at the Commodity Futures Trading Commission you were an advocate of providing no-action relief to regulated financial entities within your jurisdiction. Now over the last few years the SEC has not provided no-action relief to innovators in my opinion nearly enough. The SEC has also provided 21(a) investigatory reports on matters of general interest under the Exchange Act.

What would you say to innovators who are nervous about approaching the SEC, and how can you improve the use of no-action relief and other public statements, like 21(a) reports?

Mr. GENSLER. Senator, I thank you for that question, and thank you for our continuing dialogue about innovation. I do think that Congress gave the SEC important authorities, not only to do what you call no-action letters but exemptive authorities and the like. And so I have said come in, whether it is in the cryptocurrency

space or in other innovative spaces, come in, talk to us, and see if our rules for custody, for instance, which I know we have talked about, or transfer agents or something, do not quite fit because they were written in a bricks-and-mortar time and now we are in a digital time. Let's talk about that, and if we need to go to Congress, go to Congress. But maybe we can cobble together something.

We did this in money markets in the 1970s. Good people in the State of Pennsylvania, Senator Toomey's State, came into the SEC and sought authorities to do money markets, and that is now a \$5 trillion asset class.

So I think there is room here to sort things out and try to figure it out, to keep things investor protection-focused, but to sort out the new innovations.

Senator LUMMIS. And my adjunct question is the general question, just about innovation. Do you support responsible innovation?

Mr. GENSLER. Oh, my gosh, yes. It has brought us these lights in the room. It has brought us this ability to have a hybrid hearing with your fellow Members. I mean, innovation is what supports access, economic activity, and gives so much of us better opportunities in life.

Senator LUMMIS. So given that, how do you right-size the protections that are within your ambit to innovation, generally?

Mr. GENSLER. It is an excellent question that I am sure this Committee grapples with decade after decade. I think it is the core public policy framework around ensuring that the public is not defrauded, that somebody is not misleading them and lying to them. To ensure that if you hold somebody's asset you do not misuse it or abuse it, so to speak, the physical asset.

And then on trading platforms, at the heart of our 1934 act, was that competition basically drives to more efficient market and people do not manipulate that market, do not front-run, for instance, in those markets. And I think that these basic tenets of antifraud, antimanipulation, but procompetition, lower the cost of capital for companies raising money and innovators and entrepreneurs, even if they are using, for instance, cryptocurrencies and the like.

But I think that inside that policy envelope that we have is a great deal of opportunity. I think it is at the heart of our economic success these last 90 years, that we have deeply market-based economy. We have the largest capital markets in the world, almost 70 percent greater than our economic share, 38 points versus 23 points. There is a reason, and I think it helps our economy. But it is also because it is regulated, antifraud, antimanipulation.

Senator LUMMIS. So what gaps do you think exist, and what additional regulatory authority would be useful, both at the CFTC and at the SEC, specifically with regard to digital assets?

Mr. GENSLER. I think that we have a great deal of authority. I think there is more clarity than some Members on this Committee—I mean, I know we are maybe a little bit different on that. But I think that in terms of the gaps, we have a great deal of clarity on, I think, what is a security, but the gaps is the coordination amongst our agencies. So, for instance, the coordination with the banking agencies on stable value coins, that Senator Toomey raised earlier. The coordination with my sibling agency that I was hon-

ored to chair, the Commodity Futures Trading Commission, on the tokens themselves and the platforms. Because to the extent that something is a commodity, even the CFTC does not have regulatory authority. They have enforcement authority, a wonderful piece that Dawn Stump wrote recently that I thought was worth reading.

But working together with the CFTC in how to coordinate, and then in the, I would say, infrastructure side, things around transfer agents, custody, and the like, that I think we could work with Congress to help clarify.

Senator LUMMIS. Thank you very much.

Chairman BROWN. Thank you, Senator Lummis. Senator Warner from Virginia is recognized.

Senator WARNER. Thank you, Mr. Chairman, and thank you for your comments, in your opening comments, about my legislation that deals with disclosure around the workforce. I want to come to that topic but I want to quickly, Chair Gensler, respond to a couple of my colleagues' comments. One, I want to agree with Senator Reed. This payment for order flow, we have been talking about for close to a decade, and we need to sort through it. I think there would be broad bipartisan agreement about that. Let's make sure we make that happen.

On incident reporting, in terms of cyber, I think the Intelligence Committee probably has as much visibility into that space as anyone, anywhere. We have virtually every member of the Intelligence Committee, Democrat and Republican, together on a bipartisan mandatory incident reporting bill for critical infrastructure, for Federal contractors. We are trying to work through details. My hope is we can work with you. If you are going to have a mandatory reporting requirement you have got to have a penalty or it is toothless. But we are trying to work with industry to make that happen, because I think, echoing Senator Tester, it is only going to get worse.

And, you know, as someone who shares some of your concerns about crypto, I will acknowledge that you have only put one "wild" in front of "West," as opposed to two, Wild, Wild West. And as somebody who has worked with Senator Toomey and Senator Lummis, and somebody who managed to do pretty well financially because of innovation, I am all in. But we do need some guidance. We do need some direction. I would go to the two wilds in terms of the description of this area, as good as some of the innovation is. Some of the things that I see from the intel side scare the dickens out of me. So we need to figure out a way to, you know, maybe I ought to join the caucus, because we have got to find a way to come together on this area of innovation but also area where I can assure you of abuse.

I will give the industry one credit here. When we were going through this definitional process, I heard from more newspapers, newsletters, entities. For a group that says they are not very well organized, I have never seen a group that has got as many publications as the cryptoworld already has.

Let me get to my last, two-and-a-half minutes, get to the topic I wanted to address, which is human capital investment. I think we have all acknowledged that every CEO says, "My biggest asset walks out the door each day—human capital." Yeah, we do not

have virtually any reporting. I agree with the Chairman. You know, when companies offload their workers as contractors, they are really not putting their money where their mouth is.

So I think our Workforce Investment Disclosure Act, which passed the House, I hope will be part of the guidance of what kind of activities you take. We have got to make sure we have ways, because I believe employers—I am sorry, investors, want to know employee retention. They want to know what kind of skills and training is taking place. As a matter of fact, I hope that you will also go beyond workforce and really look at the whole realm of ESG reporting. Investors want this, yet there are no standards at this point. I am not saying we need to move to mandatory across the board, but we really need some more look there.

And I do want to make sure I get a question in here, and this is, again, a topic you and I have talked about in the past. I have got other legislation that would create the equivalent of an R&D tax credit, which was a radical notion, as you know, in the accounting world back in the 1970s and early '80s, to create an R&D tax credit type equivalent for companies that invest in upskilling particularly low- and moderate-paid workers. I think creating an asset class around human capital make some sense, or at least is worthy of a discussion, and I hope you will be willing.

You can pick any of those items along the way, Chair Gensler and comment back, but I hope you will focus on the workforce piece.

Mr. GENSLER. Senator, I thank you on cyber. I look forward to working further with your staff, and I share your view. In the cryptospace there is an intersection that it is almost—it a way to subvert our current anti-money laundering laws and subverts various things within the intelligence community, and we are all trying to protect on.

I did not use that term. I want to be respectful. I mean, I just used one “wild.” Also, I do look forward to getting out to your great State of Wyoming with all these masks go away and everything.

But on the workforce, just to say we have looked closely at your bill and other Committee Members. It is like ultimately what investors tell us during the notice and comment period too. So when we put something out, hopefully that you will weigh in also, all of the Members will weigh in and say, do investors really want this information? I have always found that if you are going to buy a company, or sell a company, when I was doing that at Goldman Sachs, that people really wanted to have a thorough review of that workforce and its ups and downs. It is an asset, and it is a critical asset. So I could not agree with you more on that, sir.

Chairman BROWN. Thank you, Senator Warner. Senator Tillis of North Carolina is recognized.

Senator TILLIS. Thank you, Mr. Chairman. Chair Gensler, thank you for being here.

Are you familiar with Rule 17j-1 under the Investment Company Act of 1940, and Section 10(b) of the Securities Exchange Act of 1934?

Mr. GENSLER. Yes, generally, sir. Yes.

Senator TILLIS. Just for others' edification, 17j-1, under the Investment Company Act of 1940, and Section 10(b) of the Securities

Exchange Act of 1934, are the two provisions used by the SEC, combined with judicial precedent, to prosecute individuals for the practice of frontrunning. This prohibition on frontrunning includes any efforts to do so, including via information obtained through payment for order flow.

So is the practice of frontrunning already illegal?

Mr. GENSLER. The practice of frontrunning is against the rules that you said but also the exchanges. A number of the exchanges, self-regulated organizations, have that, and it is really to protect the public, that if I put an order in that I can get that inside the market and somebody is not going to take that and use it in front of me.

Senator TILLIS. I know that you have been critical of payment for order flow, contending that it presents conflicts of interest for broker-dealers, and that retail customers are harmed through inferior execution quality. Do you still stand by that?

Mr. GENSLER. I think that we need to take a look at this whole market structure, because many orders are not competing with other orders. If you placed an order to an exchange—with a broker, I am sorry—if you placed an order it might be bought by one party, and has been publicly disclosed there is one wholesaler that has 50 percent of their market share in the retail market.

And so it is really about are the orders competing with other orders. So I am procompetition, and I am not sure that this payment order flow system really is the best competitive landscape.

Senator TILLIS. Is it accurate to say there is another safeguard designed into the system, this one by retail brokers, to cure potential conflicts of interest for payment for order flow arrangement from all of their execution partners? In other words, this means that the execution partners will pay the same rate and act within the same system, essentially putting all execution partners in competition with one another on execution policy and not payment for order flow.

Mr. GENSLER. I think the challenge is, if a party is buying all the order flow, or a bulk of the order flow, then the order-by-order competition does not exist, so the retail public does not benefit from that competition. When I was growing up you had competition. It was not modern technology but it was competition on the floor of the New York Stock Exchange, and brokers could scream and yell at each other about what they were going to pay. Now if one party is buying literally half the retail flow in America of these market orders, that could actually have diminished competition in the marketplace.

Senator TILLIS. Do you think the retail brokers should route orders to the market center where they have the highest likelihood of obtaining the most favorable execution for their customers? Why or why not?

Mr. GENSLER. I have asked staff to consider the economic analysis and really think about the whole market structure. How can we lower the cost of capital formation and raise the returns for the retail public, and the institutional public? And we have not updated, in 16 years, that national market structure.

So I think it is really—it is almost like a sweater where everything is knitted together. I was quoted recently about if something

was on the table, and I said, “Yes, because I think in this area, kind of it is all on the table,” to think about the rebates at the exchanges, what is called the tick size, the national best offer, all with one goal—competition the marketplace to lower the cost and raise the efficiency. That helps capital formation and it helps investors.

Senator TILLIS. Thank you. I will probably add a couple of questions for the record to expand on that, but thank you for your answers.

I want to talk a little bit, in my remaining time, about the gamification of retail investing. How would you describe gamification?

Mr. GENSLER. It is a term that I must admit I had only heard in the last year or so, but if I can broaden it out, it is—

Senator TILLIS. And do you think Governments should prevent gamification?

Mr. GENSLER. I think the role of the SEC is about protecting investors, so I think the question is are there conflicts that arise by doing behavioral prompts to encourage Senator Lummis to trade and sending Senator Lummis a different prompt than Senator Warner or Warren. And they have sort of differentially marketed to the three.

Senator TILLIS. If we go down that path—and I want to be respectful of time—but if we go down that path, in States like mine that have an educational lottery—I think in Maryland you have a similar lottery—if we go down that path and we look at possible restrictions or eliminating gamification in the investment sector, why wouldn’t we apply that same logic to lottery systems across the Nation, or any publicly gamified ventures?

Mr. GENSLER. I think what I am interested in learning, and we just put out a public comment, a request for comment, not even a rule, to ask could you help us, the public comment on if a platform is maximizing to revenues by marketing to each of these Senators in this room differently, could there be a conflict rather than considering what is best for each of you in your families for your investment needs.

And so it is that. These platforms are now optimizing based upon our Fitbit, based upon our mobile apps, based upon how we drive our cars. They are maximizing based upon all this data, and that brings us greater innovation. It is a plus to innovation, a plus to access. It can be a plus to lower costs. What we are just raising is could it be a conflict as well if they are trying to market to everybody differently.

Senator TILLIS. Thank you.

Chairman BROWN. Thank you, Senator Tillis. Senator Menendez from New Jersey is recognized.

Senator MENENDEZ. Thank you, Mr. Chairman. Chair Gensler, good to see you. As we all know, the asset management and investment consultant industries are overwhelmingly White and male. We also know that study after study has shown that greater diversity leads to greater profitability.

So in an effort to improve performance in these industries and thereby benefit everyday investors, the SEC’s Asset Management Advisory Committee unanimously recommended that the SEC take

several tangible, concrete actions to improve diversity in the industry in a way that is aligned with the SEC's own diversity and inclusion goals and its mandate to protect investors and promote fair and open markets.

Have you had the opportunity to read the full Advisory Committee's report?

Mr. GENSLER. Sir, I am familiar with the report. I have read a summary, to be candid with you.

Senator MENENDEZ. OK. Have you been briefed by the authors of the recommendations on the Advisory Committee's Diversity and Inclusion Subcommittee leadership?

Mr. GENSLER. I have met with the leadership of the committee.

Senator MENENDEZ. Uh-huh. Have they advised you about it?

Mr. GENSLER. Oh yes. Yes.

Senator MENENDEZ. OK. Well, these recommendations, they are simple, they are straightforward. For example, one is to require enhanced disclosure requirements on gender and racial diversity of advisory firms. Some firms already report this information voluntarily. And others to establish a procedure to allow the SEC, when it receives reports of discriminatory practices, to direct reporting parties to the Government agency best equipped to investigate the complaint.

None of this is particularly difficult or controversial, as is evidenced by the unanimous vote of the Advisory Committee. So given that broad support, can you commit to bringing these items before the Commission for a vote before the end of the year so we can bring transparency and diversity to the industry and ultimately deliver better market outcomes for investors?

Mr. GENSLER. I have asked staff to look very closely not only at these recommendations but other recommendations with regard to issuers, but you are speaking about on the investment management side and make recommendations up to the Commission. With a full docket I do not want to say what time that will be. It might be after—

Senator MENENDEZ. Let me just say—

Mr. GENSLER. —after the end of this year.

Senator MENENDEZ. Let me just say I have been around here for a while, and I get similar answers from every chair. And the problem is we never end up with any concrete steps to creating the diversity that everybody claims that they support. So I am tired of hearing about we are going to study it, we are going to get more recommendations. I want to know what is our pathway to action.

Mr. GENSLER. So, sir, we are doing more than just studying. I have asked staff for recommendations on the issuer side, as we have talked about earlier, about human capital, and that is the 7,000-plus issuers, and that includes diversity. It includes workforce statistics, as Senator Warner and I were discussing earlier as well, and Chair Brown.

So I have asked to bring that up in front of the five-member commission. It is a lot to take on to do the economic analysis, and it be very investor focused, because we have to live within the chalk lines. This is about investors and what investors make their decisions upon.

Senator MENENDEZ. Well, we will be following up with you. This is an issue I have been pursuing for some time, and without satisfaction, to be honest with you.

Should shareholders of companies that make public pledges expect their company to act in a manner consistent with the stated company policy?

Mr. GENSLER. I think it is at the bedrock of our securities laws. President Roosevelt called the first action front of Congress, the '33 Act, the Truth in Securities Law. And so you are talking about that if you make a pledge to your shareholders about building a factory or any pledge, that you not defraud the public, that it be honest rendition of the disclosures you are making.

Senator MENENDEZ. Well, after the insurrection attempt earlier this year, many companies made public pledges to stop donating money to the 147 Members of Congress who objected to Congress' certification of President Biden's victory. However, since then, many of these companies resumed their political donations, in direct contradiction to their public pledges. So I do not believe necessarily that they follow what they say.

So, therefore, do shareholders have the right to know whether their companies' political donations contradict their public commitment and whether those companies may be supporting outcomes which might pose a material risk to the companies' bottom line?

Mr. GENSLER. If it poses, as you said, material risk and there has been a material misstatement to the public, that is at the center of our securities laws.

Senator MENENDEZ. Well, I look forward to seeing some enforcement on that.

Finally, due to public health concerns, in November of 2020, FINRA provided member firms the option to complete branch office inspections remotely for calendar years 2020 and 2021. What is your assessment of the quality of those remote inspections? Do you think regulators sacrificed any oversight by allowing these remote inspections, and because we are still facing, with the Delta variant pretty high, is the SEC considering extending remote inspections, given the current public health?

Mr. GENSLER. Senator, we are. I mean, we, as a Nation, are living through the most challenging time, well at least in my life, health-wise and economically related to that. When I have conversations with our head of examinations, we have about a 1,200-person examination unit, I ask that very question. What do we lose, what do we gain being remote? And there are tradeoffs. We have gained—people are not commuting as much. The people have a better work-life balance and so forth, our examiners. What we lose is you are not sitting in a room, eyeball to eyeball, talking to somebody as you are trying to inspect a fund or a company, and so forth.

But yes, we are looking at extending this, just because of the realities of this health pandemic that we are in.

Senator MENENDEZ. Thank you. Thank you, Mr. Chairman.

Chairman BROWN. Senator Scott from South Carolina is recognized.

Senator SCOTT. Thank you, Chairman, and thank you for holding this important hearing today, and thanks to the Ranking Member

for his comments earlier on, his opening statement, about the importance of having market accessibility to all Americans. It seems like we have been heading in the right direction for quite some time here, over the last 10 years or so. Some of the concerns I have, Chair Gensler, is that what I have seen from a policy position from you so far seems to actually jeopardize that path to financial opportunity for the average American.

I think back to my days in business when I was in the insurance and, for a small time, in the financial services business, I would tell my clients oftentimes that there are really only three ways to create wealth in America. The first is real estate, and one of the reasons why we focus on the American dream is synonymous with home ownership. There is no question in my mind that the fact is that you build equity in your house and you are actually building equity in this Nation. It is your share of the American dream that is so powerful and important that we focus on.

The second way that you create wealth in this Nation and experience more of the American dream is through having a business, and have that business grow, and it becomes more profitable, and that net worth that you see accumulating is part and parcel to the American dream.

And then finally it is having an equity position in the marketplace. And to the extent that we make it more affordable for the average person to invest in this marketplace they have a chance to literally experience the American dream, to exceed their wildest imaginations financially.

If you think back 32 years ago, do you have any idea what percentage of American households that were investing in the stock market?

Mr. GENSLER. Well, we have grown. I mean, particularly in the last 10 years.

Senator SCOTT. But 32 years ago, any idea what it was?

Mr. GENSLER. I mean, I do not know the specific number, but lower than today, about 10 points lower.

Senator SCOTT. Good answer. So 32 percent of American households, 32 years ago, had access to one of the three streams that leads to creating wealth in this Nation, and much of the reason why they had such limited access is because the fees to make a trade were so darn high.

Imagine today the average stock price is around \$119, the S&P 500. If you invested in a stock in the '70s and '80s, your stock would have to increase to \$139 before you made a penny, because you were using that increase to pay the transactional costs. Today, it is zero. So literally you have a chance to invest in the marketplace because we have gotten rid of those high transactional costs.

So, as you said, today the actual number of households that are able to invest in the market, 53 percent of households are invested in the market. Why? Because the price to get involved in the market has plummeted. And so when we hear things like banning payment for order flow, it sends shivers down the spines of people who have waited for this day to come. Fifteen years ago it was \$15 or \$20 to make your trade. Today it is nothing. Literally, you have access to a market. If you are in rural America, living in Saluda,

South Carolina, or inner-city Chicago, for the first time you have a chance to be in the marketplace.

Under the Biden administration, those opportunities could vanish away so quickly, and that is painful, as a kid who grew up in poverty, who now has access to the market. Forty percent of the households in this Nation who make less than \$75,000, they are in the market. Why? Because it is affordable. We have to trust Americans to make their own decisions on their own investments and not have a paternalistic regime helping protect Americans because they cannot figure it out for themselves.

I am concerned about that, and my question for you is, what is your plan to ensure that the existing system, the potential for innovation within that system, continues so that the average retail investor benefits from that and we do not see ourselves going backwards that leads to higher trade costs, so that fewer Americans are able to invest their hard-earned money in the way that they see fit?

Mr. GENSLER. Senator, I am sitting here thinking, one, how much my father, Sam Gensler, if he was alive today, would like you, because he would have agreed on your three points about real estate, start a small business, which he did—he never had more than 30 employees—and as a kid he used to toss us value-line tear sheets and he would say, “What do you think of this stock?” and he would try to buy 50 shares of something.

Senator SCOTT. Yes.

Mr. GENSLER. I could not agree with you more. In terms of the retail investing, I think that is a positive thing in America, and it was when I was a kid as well.

On the cost, we can always do better. And what I am saying is, technology has driven down, and competition has driven down the cost of, as you said, investing. But there is still a cost left, the payment for order flow. Even if it is a couple of pennies out, it is a cost. So it is buried behind the scenes. What I have raised to the economists, with Jessica Wachter and her whole team, is can we do better to have more competition, that orders compete with orders rather than one wholesaler buying half of the retail flow in America?

And so it is about trying to even do better in these great capital markets we have, but we cannot take anything for granted. So I think we are more aligned. It is about trying to drive it down even lower cost.

Senator SCOTT. And, Chair, I will take you at your word, and frankly it sounds like your father was an amazing guy who had a chance to own his house, start a business, and invest in the marketplace.

Mr. GENSLER. He never went to college and raised five kids.

Senator SCOTT. Yep, and that is the story of the American dream. One of the things that I hope that we protect is the notion that the American dream is accessible for all Americans. And we have within the Administration parts of the puzzle that can make it worse for the average person in our Nation, I think we should pause and take a serious look at how the market works and how can we make it better. Thank you.

Chairman BROWN. Thank you, Senator Scott. Senator Warren from Massachusetts is recognized.

Senator WARREN. So thank you, Mr. Chairman. We hear a lot about how crypto is all about financial inclusion, a way for people who do not have a lot of money to be able to manage it or invest it.

Now the banks have done a pretty lousy job on financial inclusion, so I want to test out with you whether or not crypto is an improvement. Last Tuesday, the cryptomarket tanked once again. The prices of Bitcoin and Ether each fell by about 10 percent, while a bunch of other tokens failed by as much as a third. So in a matter of hours, \$400 billion in market value disappeared. Poof. It was just gone.

And meanwhile, several of the biggest crypto exchanges had outages, which kept customers from making withdrawals or trades. So how did that affect people who do not have a lot of money to lose?

Chair Gensler, let's say that last Monday I took out the last sliver of my savings. I went on the crypto exchange, Coinbase. I bought \$100 worth of Ether. Then I woke up early on Tuesday morning, I saw that the market looked like it was beginning to tank, and I thought I better sell right now. But when I tried to sell, Coinbase, the exchange, was down.

So Chair Gensler, was there anything I could do to get my money out?

Mr. GENSLER. Not at a Federal agency, because they have not yet registered with us, even though they have dozens of tokens that may be securities.

Senator WARREN. Yeah. OK. So that sounds pretty risky to me. But let's say that instead of buying Ether on Coinbase last Monday I decided instead to put that \$100 toward buying a cool, new token, let's call it Newcoin, that was being hyped on Twitter. Now Newcoin is available only on a quote/unquote, "decentralized" crypto exchange, so to buy it I had to pay a fee, about \$20, to the cryptominers who process the transactions. That is \$20 to buy \$100 worth of tokens. But I figured that was OK because Twitter told me that Newcoin was going to make me a lot of money. But then, of course, I woke up on Tuesday morning and the market was tanking.

So let's ask about this one. Chair Gensler, on Tuesday, when I wanted to sell Newcoin and get back to dollars fast, that exchange had not shut down. But remember, I had to pay \$20 on Monday to get into decentralized finance. So how much would I have had to pay to get out of DeFi on Tuesday to sell my coins? Would I have had to pay a second \$20 fee, or might I have had to pay even more?

Mr. GENSLER. I do not know because it would be all in the user agreement. And, by the way, you put quotes around "DeFi." I think that is helpful, because they are really decentralized in name only. There is a user agreement. There is something you are doing with this platform. There is a governance token. There are usually some fees. But I do not know what the particular fees would be.

Senator WARREN. Well actually, we do know some of the fees from last Tuesday. The fee to swap between two cryptotokens on the Ethereum network was more than \$500, obviously way more than the \$100 I was trying to trade in the first place.

So the question I have is, in the face of these high, unpredictable fees, small investors could easily get jammed and wiped out entirely. Chair Gensler, advocates say cryptomarkets are all about financial inclusion, but the people who are most economically vulnerable are the ones who are most likely to have to withdraw their money the fastest when the market drops. Does this sound like the path to financial inclusion to you?

Mr. GENSLER. It is a highly speculative asset class. It does not sound like the path that you mentioned.

Senator WARREN. Yeah. You know, there are a whole list of problems with crypto—unreliable tech, scams, devastating climate impact—but high unpredictable fees can make cryptotrading really dangerous for people who are not rich. Regulators need to step up to address crypto's regulatory gaps and ensure that we are actually building the inclusive financial system that we need. And, Chair Gensler, I expect you and the SEC to take a leading role in getting this done. Thank you.

Mr. GENSLER. Thank you.

Chairman BROWN. Thank you, Senator Warren. Senator Daines from Montana is recognized.

Senator DAINES. Thank you, Mr. Chairman, and thank you, Chair Gensler, for being here today. I want to, I think, join my colleagues by expressing my concern with the SEC's posture toward cryptocurrency and blockchain. The keyword here is "innovation." As I have said before, I believe a lighter touch regulatory approach is what is called for here, and that overregulating this young and emerging industry could drive jobs and innovation overseas in the global race, which we should all agree on would be a very bad outcome.

America has long led the world in innovation, and we must do our very best to ensure that the conditions continue to exist for America to lead in this space, and especially in the cryptosector.

Chair Gensler, you have, on multiple occasions, asked cryptocompanies to come in and speak with you. However, many of these companies that have come to speak with you have soon after found themselves the targets of enforcement actions, or even legal threats. The question is, what is the process for the SEC to provide guidance, and what might companies expect from talking directly with you?

Mr. GENSLER. I thank you. I want to say, I think the way we innovate is within public policy frameworks. But we have asked companies to come in, talk to us. If they are trading or lending a security there is a registration regime, and companies, since the 1930s on for 90 years, have found ways to innovate but register, or seek an exemption, or seek a no-action letter, and work with us to ensure that they are registered but there is a public policy framework around that.

Senator DAINES. So you are drawing lines, I think, through public statements without actually going through, you know, APA process. What kind of responsibility do you have to provide clarity to market participants as opposed to really chilling the marketplace through some of these vague speeches, vague remarks, vague interviews?

Mr. GENSLER. So with all respect I think that actually the SEC has the authorities that Congress granted, and it is a very broad definition of security that includes investment contract, that includes note, includes 35 other things. My predecessors put out various guidance. Chair Clayton, and so forth, put out guidance in this area as well.

And so I think come in, talk to us. Not you, Senator, but, you know, the entrepreneur, and work within an investor protection regime that also facilitates capital formation. I fear if it stays outside, this field that I studied for 3½ years at MIT, I have a belief that this has been a catalyst for change. But I think if it stays outside of the public policy framework for anti-money laundering, tax compliance, investor protection, it is not going to long persist.

Senator DAINES. I want to shift gears for a moment and talk about China. You have made it clear that you will be increasing oversight of Chinese firms who are trading in the U.S. markets. However, it is not clear to me that the SEC is doing enough as it relates to the oversight of Chinese broker-dealers who have substantial U.S. customer bases, and frankly they are growing rapidly.

My question is, what is the SEC doing to ensure that Americans are not unknowingly having sensitive personal and financial information transferred to the Chinese Government?

Mr. GENSLER. Senator, if I could ask if we could meet, you know, one on one or with your staff and so forth, because I want to understand more about your concerns there, because I do think that is an important issue to ensure that Americans are protected, their personal information and their privacy is protected, just as if they were working with a U.S. firm.

Senator DAINES. Yeah. Having spent a lot of years in the cloud computing world it is a real threat where this data resides and the access the Chinese Government have to this very sensitive and important personal information.

I want to shift to the CFTC for a moment. You have previously acknowledged the need to work together with the CFTC to provide effective oversight on the cryptomarket. At the same time, you have stated that, quote, "Many tokens may be unregistered securities," end quote. What role do you see the CFTC playing with respect to oversight of the cryptosector and in your capacity as SEC chair, and have you had any conversation with the CFTC on this topic to date?

Mr. GENSLER. Yes, I have had some really good conversations with Acting Chair Behnam. I was honored to chair the agency once as well and think the world of the agency. I think we each have respective jurisdictions. They have an enforcement authority on commodities, not a regulatory authority. We have a regulatory authority where we can write rules and we can register companies that are trading platforms and the like. But on those trading platforms there may be some commodities on it. So what Chairman Behnam and I have been talking about is how could we partner up, using our existing authorities, to best protect investors.

Senator DAINES. Chair Gensler, thanks for your time.

Mr. GENSLER. Thank you, and I look forward to following up on that China issue.

Chairman BROWN. Thank you, Senator Daines. Senator Cortez Masto from Nevada is joining us remotely.

Senator CORTEZ MASTO. Mr. Chairman, thank you. Chair Gensler, thank you for joining us.

Let me jump back—this seems to be the topic of conversation with my colleagues—the cryptocurrency. One thing I just want to verify. Is the SEC sufficiently equipped, whether by regulation or funding, to appropriately ensure compliance and keep pace in the cryptocurrency market? Do you believe so? And if you do not, then what should we be doing in the Committee? What do we need to know to help you?

Mr. GENSLER. I think you have raised both points. I think funding-wise we could use a lot more people. I just have to be frank with you. I mean, there are 6,000 projects, and while some of those are commodities, many of them are securities under the laws, and many of the platforms are. So we could use some more funding.

In terms of legislation, I think what I have said earlier in this hearing is the coordination between the market regulators is strong, and Chair Behnam has been talking through how to do this, but there may be things that Congress can weigh in and help on the coordination, and also around stablecoins, the coordination with the banking regulators.

And then there are some things, frankly, a bit in the weeds about transfer agents and custody and the like.

Senator CORTEZ MASTO. Thank you. And so let me just say, I look forward to working with you on that. Whatever we can do here, on the Committee, to support how we address and look at the cryptocurrencies, please know that you have got support from me.

Let me talk a little bit about gamification. When you were here in March for your confirmation hearing I raised concerns about behavioral prompts and gamification, and I said that free apps that encourage trading could be detrimental to some retail investors.

So I know that you are looking at this. Senator Toomey mentioned that you had talked about doing a report sometime this summer and putting a report out, if I remember correctly. Can you talk a little bit about where you are and your concerns with gamification and how it impacts investors?

Mr. GENSLER. So three things. One, on the GameStop report, we are pretty close. It is in front of my fellow commissioners, and I would assume it will be out shortly. On the, quote, “gamification,” we have asked the public, through a request for comment, to give us feedback. I think the issue there is we are living through a transformation time in America, and we are seeing this in every bit of our society, and so forth. But if Netflix figures out that I am a rom-com guy, and yes, I am a rom-com type of guy, I might see a bad rom-com for an hour-and-a-half. But this is about people’s investing future.

So what I have asked, I think the core question is, is if the data analytics are maximizing the platforms’ revenues, optimizing for revenues, optimizing for data collection, that may be in conflict with maximizing for the users’ investment returns, and how do we square that.

And last, if I could, and I apologize, respectfully, to say it is not actually free on these apps. It might be zero commission, but you

are still paying. The payment for order flow is underneath the hood, and it is still there, and my real concern is about whether the competition is there, whether it is sufficient order-by-order competition.

Senator CORTEZ MASTO. Thank you. I appreciate that clarification.

And then let me just add one final thing, and I know Senator Tester talked about this, but climate risk. We have seen, from the West, and particularly in Nevada and California, some of the worst wildfires we have ever seen, because of the extreme weather, impacting the air quality as well that we breathe.

And so I know there was discussion earlier about why should the SEC be concerned about the climate crisis and climate risk, but would you talk a little bit about this? I understand you have said that investors should be able to understand what is under the hood of green or sustainable funds. What do you mean by that?

Mr. GENSLER. So we have—I thank you for asking that—we have a separate rule docket where I have asked for recommendations from staff. There are funds, asset managers that are making themselves as green or sustainable or carbon-free, and just as we walk into a grocery store and it might say fat-free, it is like what is behind that marketing? And I think that actually probably will unite Senators on this Committee. I mean, what is behind the marketing and the name? So staff will make recommendations, but I hope that we would say something about that there has to be some metrics standing behind if you are marketing yourself, so to speak, as carbon-free or green.

Senator CORTEZ MASTO. Thank you. And I would assume there is a reason why they are making themselves that way, because that is what investors, some investors are looking for. Is that correct?

Mr. GENSLER. I think that is right. I think that investors increasingly are interested. Investors get to decide. In the basic bargain of our capital markets, investors get to decide. But investors also get to decide how they make their decisions. And all the SEC is trying to do is response to investors, say here is how we can maybe help bring consistency, comparability, and some decision-useful information.

Senator CORTEZ MASTO. Thank you. Chair Gensler, thank you again for joining us.

Mr. GENSLER. Thank you.

Chairman BROWN. Thank you, Senator Cortez Masto. Senator Warnock of Georgia is recognized.

Senator WARNOCK. Thank you, Chairman Brown, and thank you, Chairman Gensler, for your testimony.

America's capital markets are some of the most robust and transparent markets in the world, but not everyone has equal access to them. In Georgia, people of color account for nearly half of the total Georgia population while only about 23 percent of Georgia's startups are minority owned. Women-owned businesses are also lagging, with women accounting for only 38 percent of business owners in the State.

According to a study by the Kauffman Foundation, Black entrepreneurs are three times as likely as White entrepreneurs to report

that their businesses' profitability is negatively impacted by a lack of access to capital, and almost twice as likely to cite the cost of capital as hurting their businesses' profitability. Needless to say, all of us have a stake in the ability of entrepreneurs to pursue the American dream, to create jobs.

Chair Gensler, what initiatives is the SEC leading right now to increase diversity within the venture capital industry?

Mr. GENSLER. We have a number of tools in the toolkit, and this question came up earlier for Senator Menendez too. We had some recommendations from Investment Advisory Committee earlier this year, and I have asked staff to say, all right, now what can we do with regard to disclosure regimes in the investment management side?

We have more clear disclosure regimes in the company side, the issuer side, than the investment management side, but there is something, it is in the weeds, Form ADV, that we are taking a look at more closely.

Senator WARNOCK. What tools do we have to increase diversity?

Mr. GENSLER. We are very much, at the SEC, a disclosure-based regime, and disclosing to decisionmakers, investors, about those funds or the companies they invest with, and ensuring that that disclosure is what those investors want. So it is sort of like it has got to come from investors, we stay in the chalk lines we talked about earlier, and both on the issuer side and the investment management side what investors wish to make their decisions.

Senator WARNOCK. And so the role you play in providing that kind of transparency and disclosure, I understand that. Let me ask it in a different way. What is the SEC doing, or, in your view, what could SEC do to help encourage investor capital funds to look outside of their traditional geographical areas for investment opportunity in other areas of the country, and not just in big cities like Atlanta but small cities like Augusta and Macon and Columbus? I think a lot of this happens because without intentionally doing something else, there is a way in which the way things are traditionally done has its own momentum.

Mr. GENSLER. You know, I could not agree with you more, and I think it might sound like back to basics but fundamentally it is the middle part of our mission, making sure that the markets are efficient and competitive. And even in the private funds space, we have some projects to promote competition in that space so that the person raising money, in Georgia or elsewhere, of any background—ethnic, racial background—that the cost of them raising money is lower as well, for that small business entrepreneur raising money, that it is not just a friends and family round but they can go to a venture capitalist, as you say, and raise money efficiently.

Senator WARNOCK. All right. I am going to shift to another topic. It is vitally important, and I think we all agree, that investors have confidence that financial regulators are keeping their protection top of mind so that our markets work for everyone. The pandemic has wreaked havoc on our Nation, caused significant strains for every aspect of Americans' lives, including hardworking families in Georgia and throughout the country. Georgians face layoffs, small busi-

nesses permanently closing and having constantly to worry about the health of their families and loved ones.

Through all of this, criminals saw an opportunity to prey, particularly on vulnerable populations, and commit fraud, whether it is tricking folks into investing in companies falsely claiming to be producing medical equipment or businesses using the pandemic to disguise their own fraudulent dealings.

What tools and resources do you believe Congress can further provide your agency with to support in its work to fight fraud and protect retail investors?

Mr. GENSLER. I thank you for that question. I think two areas. One is, frankly, funding. We have shrunk during the prior Administration by about 5 percent. We have grown a little bit since this new Administration. But we are about 4 percent down in head count, and yet retail investing is up. We are in the middle of a pandemic. We have got the challenges of doing things remotely.

So it would be good, at a minimum, just to get back to where we were in 2016, and I think we actually should get a little bit further than that.

And two, in some areas—and we have talked about the cryptocurrency area—is really just to help bring people into the investor protection remit, because right now there are many individuals in this country that have already been hurt, and there are unfortunately going to be more spills on aisle three, so to speak—an old grocery store term—because this crypto area is trying to stay outside an investor protection perimeter.

Senator WARNOCK. Thank you so much, Chairman. We certainly want to see job growth. We want to see the economy continue to thrive. And my first question, I guess, is about equity, and the other about integrity. We need both of these things in order for the market to perform for everybody.

Mr. GENSLER. Thank you so much, sir.

Chairman BROWN. Thank you, Senator Warnock. Senator Smith is recognized, from her office.

Senator SMITH. Thank you so much, Chair Brown and Ranking Member Toomey, and welcome, Chair Gensler. It is nice to be with you virtually.

Mr. GENSLER. It is good to see you.

Senator SMITH. I have a specific question to start with. Having a safe and secure retirement is a crucial goal for so many American families, and here is my specific question. Registered index-linked annuities has become a rapidly growing savings option for many Americans. In the first quarter of 2021 alone, more than \$9.2 billion of these annuities were sold.

So here is the problem. The SEC does not have a registration form for these products. Now this might seem like not a big deal, but it is a big problem, and kind of a classic bureaucratic quagmire. Because what it means is that for big portions of the year these new products cannot be registered at all, and when they are registered reporting costs are higher, the disclosure forms have a bunch of information that actually is not that useful to investors, as they are trying to find the information that really matters.

So I have introduced a bipartisan bill to fix this problem, and I am really glad that the Consumer Federation of America, a leading

investor advocacy organization, is supporting my bill. But I think you know, the reality is that we do not need legislation to fix this problem, and we do not need congressional action. The SEC has the authority to create a new registration form itself. And, in fact, I think the SEC has literally dozens of product-specific registration forms in place.

So my question to you, Chair Gensler, is can you commit to me today to issuing a new registration form for registered index-linked annuities?

Mr. GENSLER. Senator, I know that we have different regimes for index-linked annuities, and so I look forward to working with you and your staff and learning more. Just 5 months into the job, I have to admit that I do not know all the details of the RILAs, but I look forward to working with you and your staff about the potential of doing, as you say, another form, because I think we do have different forms for index-linked annuities.

Senator SMITH. Right. Thank you. Yeah, it is a specific thing and it is something that I think we could solve relatively easily, and I hope your agency, when you are releasing your updated regulatory agenda soon, I would love to see a fix for this issue on that regulatory agenda.

Mr. GENSLER. Again, I look forward to meeting with you and getting our staffs together to understand. I think our staffs have already chatted, but to understand that even better.

Senator SMITH. I think so too. We will follow up, and I look forward to working with you on this.

So let me ask you a slightly broader question. You know, we often have conversations in this Committee about risk disclosure to investors, and I think there is general agreement that the market works better when investors have clear and trusted and transparent information about the risks that businesses face, and that that information is provided in a systematic way so that investors can compare risks across organizations.

But some of my colleagues on this Committee just take a completely different approach when it comes to risk disclosure for climate change, and this just does not make any sense to me when, as we, as Senator Tester pointed out, we are seeing billions and billions of dollars in costs for extreme weather events caused by climate change, and that is not only a public sector cost, it is also a private enterprise cost as well.

So right now, when companies release climate-related information, if they release any at all, it is not in a systematic format or with any specific guidelines, and I think this is a problem for investors, and it gets, as you say, the goal of the SEC should be to protect investors. It is also a problem for regulators, as Chair Powell has laid out and talked about to this Committee earlier this year.

So I just want to commend the work that you and Commissioner Allison Herren Lee have done so far on climate risk disclosure. I am glad that you are working to solicit comments on how best to address this problem, and I understand that you are reviewing those comments right now.

So let me just ask you a question about this, Chair Gensler. Why do you think that climate risk disclosure is an important priority for investors, to help them understand climate risk?

Mr. GENSLER. Well, I think investors have spoken loudly to, to your question, and companies right now are making disclosures. They are just not consistent disclosures, and it is better when it is consistent. But why it is important is there can be physical risks, as we have seen, whether it is from flooding or weather events and the like, but it also can be transition risks, the transitioning to a new economy as we globally address this. But investors are really demanding it, and the role the SEC might have is to help bring some consistency and comparability to all of this.

Senator SMITH. Well, thank you. Thank you for your work on this. Mr. Chair, I do not see climate risk disclosure as a social issue. I see it as systemic risk that investors face, because of climate change, and it is important, we all understand that, including investors. Thank you.

Chairman BROWN. Thank you, Senator Smith. Senator Van Hollen of Maryland is recognized, and thanks for your patience, Chris.

Senator VAN HOLLEN. No, thank you. Thank you, Mr. Chairman, and, Mr. Chairman, great to see you. Let me start by thanking you for your efforts to move forward on a rulemaking on 10b5-1 plans. Senator Fischer and I had bipartisan legislation that would have directed the SEC to look at this, because you know well that public confidence in the markets requires confidence that there is not insider trading, and I look forward to your rulemaking in that regard.

I just want to try and cover a couple other points. One involves the whistleblower provisions. As you know, we have whistleblower laws designed to encourage individuals to surface cases of fraud. And beginning in 2010, a Marylander, John McPherson, he was a former forensics accountant, gave the SEC what the SEC described as, quote, "extraordinary and continuing," unquote, assistance, that helped the agency shut down a \$1.4 billion investment scam by a company called Life Partners Holdings, Inc.

Despite his substantial assistance, Mr. McPherson did not receive the whistleblower award, because the company went bankrupt, and as a result the SEC did not collect its fine. But the case did require over \$1 billion for investors. As you know, in bankruptcy, all the lawyers and accountants got paid, but the person who was the most instrumental in bringing this case to light and exposing the fraud did not receive his whistleblower award.

So I want to work with you and the SEC to see if you can, through your existing authorities, make sure that he gets what would normally be expected in this case, or if a change in law is required to work with us, because I think you would agree, would you not, that we do want to continue to incentivize people to bring these cases to light.

Mr. GENSLER. Senator, I agree wholeheartedly. I know the work that Senator Grassley did to bring this whistleblower regime into place. The SEC, to date, has had a really robust whistleblower program, and it has helped the American public and the investors public. But I look forward to working with your office on this matter.

Senator VAN HOLLEN. Right. I mean, this kind of situation obviously may discourage people from coming forward at great risk, potentially, to themselves, at the end of the day.

Mr. GENSLER. What I do not know yet is whether it will need a change in law rather than something in our current authority.

Senator VAN HOLLEN. That is what we are exploring now with your team, but I look forward to continuing to do that.

So turning to DiDi, in July, following the collapse of the share prices of DiDi, I urged the SEC to thoroughly investigate the incident to see if investors were intentionally misled by DiDi's public disclosures. As you know, that collapse in share price came shortly after that happened. I know you cannot disclose whether there is an ongoing investigation, and I commend you for the statements you have made generally about reviewing listings of Chinese companies on the U.S. exchanges.

Can you expand on that? I heard Senator Kennedy also reference your op-ed piece in the *Wall Street Journal* regarding implementation of the legislation that he and I introduced on holding companies responsible to ensure that we are allowed to see their books, through an independent entity, to protect American shareholders and investors. Can you just talk about both those pieces of the need to better protect American investors?

Mr. GENSLER. So there is about 270 Chinese-related companies in our capital markets, between \$1.5 and \$2 trillion, to give you a sense of scope and scale, but many of these actually, the U.S. cannot invest directly. See, in China, they prohibit foreign ownership in the internet and telecom and other fields. So there has been a form of setting up a shell company in the Cayman Islands. That Cayman Islands company raises money in the U.S., and it has some operating arrangements with the Chinese company, which, by the way, usually is still owned 100 percent in China by friends and family, and so forth.

So I sort of got to the SEC; you all had passed the Holding Foreign Companies Accountable Act. I think there are two issues. One is 19 years after Sarbanes-Oxley, Chair Sarbanes sitting in this chair, in this room, passed, and our good friend, our Maryland mentor—I consider a mentor—passed that bipartisan bill, 50-plus jurisdictions have complied, and 2 have not—China and Hong Kong. So Congress, on a bipartisan basis, again said, let's address that. We have got 3 years. We have had discussions directly with the Chinese authorities. The clock is ticking.

But I also think, in the meantime, in the meantime we should enhance the disclosures of the existing companies, these 200-plus companies, as to the political risks, the regulatory risks, and the real financials between China and the Cayman Islands.

Senator VAN HOLLEN. Thank you. Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Van Hollen. Senator Ossoff is joining us from his office.

Senator OSSOFF. Thank you, Mr. Chairman, and thank you, Chair Gensler, for joining us.

The COVID-19 pandemic has presented the most immediate and ongoing threat to the U.S. economy and the global economy of the last 2 years. But beyond the risks presented by the pandemic, Chairman Gensler, as a voting member of the Financial Stability Oversight Council and in your capacity as SEC Chair, can you please provide to this Committee your assessment of the greatest systemic risks to financial stability in the United States?

Mr. GENSLER. We work together at the Financial Stability Oversight Council on an annual report, and we are sort of in the midst of that right now. And I think that systemic risk issues are something that can spill over into the whole marketplace. Though our capital markets have weathered the storm of this pandemic, and actually weathered, I think, better than it would have because of the reforms of DoddFrank and the greater capital in the system, there is still risk in the system, whether it is in the commercial real estate area, the reach for yield—a second area I am mentioning is a reach for yield, that many investors, not just retail investors but investors more broadly are reaching for yield.

We, in our country, are also transitioning off of something that created systemic risk in the past called the London Interbank Offered Rate, and the transition away from LIBOR to another set of rates is, I think, being managed well, but it still presents some risk in that transition because there are \$200 to \$300 trillion of assets on top of that.

But I would say the biggest risk is the health care risk itself, and the health care risk and how that is managed as a Nation, and the economic risk associated with that are probably the biggest risks.

Senator OSSOFF. You have a three-part mission, Mr. Chairman, to protect investors to maintain fair, orderly, and efficient markets and to facilitate capital formation. Could you please inform the Committee how you view climate change as impacting that three-part mission, and the actions you are going to take in order to protect investors maintain fair, orderly, and efficient markets and facilitate capital formation, given the projections of significant negative impacts from climate change?

Mr. GENSLER. I think that we are taking up two initiatives, and I think both of them relate to all three of the pieces. I think investors increasingly want to know about the climate risk of their companies they own, and I think by bringing consistent, comparable information and standards into this that the companies themselves will benefit. The companies will benefit because they will say, Oh, now we can compete efficiently in the capital markets by presenting this set of standards around their greenhouse gas emissions and around their management of climate risk.

The second docket is around the fund management side, and if they are saying that they are green or sustainable or carbon-free, what stands behind that. But again, I think that that helps investors make decisions and companies raise money. So I think it helps all three of our mission points.

Senator OSSOFF. Thank you, Chairman Gensler. Returning to the question of systemic risk and financial stability, in recent testimony before this committee the Fed Chair testified about his concerns regarding money market funds and Treasury markets, the performance of money market funds during conditions of financial stress in March of 2020, requiring Federal intervention. And he testified regarding Treasury markets, quote, “that at that time the Treasury market really lost functionality. The most important financial market lost functionality significantly during the acute phase of the crisis,” that being the initial onslaught of COVID-19.

Do you share the Fed Chairman’s assessment and concerns regarding money market funds and Treasury markets?

Mr. GENSLER. I thank you for reminding me. To your earlier question I should have said that Treasury market itself does present, the functioning of that market, some systemic risks. Three times—October 14, the fall of '19, and the spring of '20—we had more than hiccups inside the Treasury market, and it is about the structuring of that market. And so working with Secretary Yellen, Chair Powell, even Acting Chair Behnam, I would hope we can produce more resilience through central clearing in that market and also bringing the principal trading firms, the high-frequency trading firms, into that remit.

To your other question about money market and open-end funds, we do have that on our docket, as Ranking Member Toomey asked earlier. We do hope to do that, I would say, maybe by Q1 of the year, to address money market funds around the connection between the liquidity provided and what are called gates, but also to look at the liquidity rules themselves in that market as well as open-end bond funds.

Senator OSSOFF. Thank you, Mr. Chairman. I appreciate your testimony, and Chairman Brown, I yield back.

Chairman BROWN. Thank you, Senator Ossoff. Thank you, Chair Gensler, for joining us today.

For Senators who wish to submit question for the record those questions are due 1 week from today, Tuesday, September 21st. Chair Gensler, per our Committee rules, we ask that you respond to any questions within 45 days from the day you receive them. Thank you again.

With that the hearing is adjourned.

[Whereupon, at 12:03 p.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN SHERROD BROWN

Welcome Chair Gensler.

Five months ago today, the Senate confirmed you as Chair of the Securities and Exchange Commission. I know you have already gotten to work for the American people, and you had your work cut out for you.

Over the past year-and-a-half, the disconnect between the stock market and most Americans' lives has never been more painfully clear.

Most of the country has been devastated by COVID-19. Hundreds of thousands have lost loved ones. People lost jobs and family businesses. Mothers were forced to leave their paid jobs in droves. Still today, millions are at risk of eviction from their homes.

But you would never know any of that by looking at the stock market. It hits new records month after month—53 records since the beginning of the year. Eye-popping gains in the stock market and crypto assets attracted millions to start investing.

And like during past times of upheaval, the COVID crisis opened the door for bad actors looking to seize upon people's fears and insecurity. Pandemic related fraud—from Ponzi schemes to offers to invest in COVID-related medical care—skyrocketed last year.

The SEC stepped up to educate investors and punish bad actors. The dedicated public servants at the Commission have continued to fight for all the Americans whose pensions and 401(k)s and college savings are at risk.

Many have been enticed by dramatic jumps in the value of new digital assets. They've dreamed of riding the coattails of professional investors and celebrities in a new wave of public offerings of more speculative investments known as "special purpose acquisition companies," or SPACs.

Some professional investors and celebrities make earning millions look easy. But, as we are reminded time and again, it's never that simple—and too often, someone's quick profit comes at the expense of workers and entire communities.

Chair Gensler, it's your job to make sure that efficient markets are balanced with strong enforcement that protects Americans from the worst Wall Street greed and careless risk—even if that means challenging practices or shady investment products that previous chairs ignored.

It also means working to increase transparency that the last Administration didn't take seriously. For example, the SEC approved new human capital disclosure last year without requiring companies to provide even basic details or data.

And let's remember—"human capital" is business school-speak for the tens of millions of Americans who work for these companies.

Despite the new standard and investor demand for essential information used to judge how companies treat and manage these workers, most companies are barely providing any additional information.

My colleagues have been working to improve transparency.

Senator Warner of Virginia introduced the Workforce Investment Disclosure Act to get companies to provide important information on how they pay, train, and invest in their workers.

His bill will finally shed some sunlight on how companies outsource and sub-contract their workers, something he and I have jointly written to the GAO about.

Today's tech companies like to say they're more "efficient" than companies of the past, when in reality they hire the same number of workers—half of them are just invisible to us under today's disclosure requirements.

Senator Warren of Massachusetts introduced the Climate Risk Disclosure Act, which calls for significant new public disclosures from public companies regarding the risks climate change poses to their operations and financial results.

These bills are good policy, and the largest investors have been calling for more of this kind of information. It's why I'm a cosponsor of both bills.

Of course this would be just a start. Transparency is only a first step to getting corporations and the biggest investors to behave better.

And there's much you already have the authority to do to make markets work better for the real economy, outside of investment firm and hedge fund board rooms.

For too long, the financial system has catered to the big guys, and left everyone else on their own.

There are far too many stories of how insiders game the system.

Big banks abuse customers while they make record profits. Brokers who have taken advantage of customers use the system to cover up and erase their misconduct. Private equity firms buy up companies and treat workers as a cost to be minimized. Or they buy up houses, raise rents, and evict families, even during a pandemic.

And of course no matter what happens to the workers at the companies they've raided for parts, or to the families in the mobile home complex where they've jacked up the rents, or to the larger economy, the big guys—the hedge funds, the SPAC sponsors, the big banks, the brokers—the big guys seem to do just fine.

That system isn't sustainable.

Increasing people's trust and faith in the market and the financial system will lead to more saving and broader participation. Yet some of my colleagues say we should let the market sort it out. They want to tie the SEC's and other watchdogs' hands.

We know that's counterproductive. It's the same thinking that led to a market collapse in 2008, and that has led to decades of more and more investment flowing to a smaller and smaller share of the country.

The last Administration subscribed to that same Wall Street-first view, and left this country worse off than they found it. The damage is too vast to measure. Our economy and markets were no exception.

Investors have fewer tools to hold management accountable; savers—and that means retirees, widows, families—have fewer protections. And corruption runs rampant—existing, serious conflicts of interest have been ignored.

The Biden administration is taking a different view—that the economy and the markets should work for everyone, not just the well-connected. And they should reflect the economy we all want—with broadly shared prosperity, and a growing middle class that all workers can join.

When that happens, people will have confidence the markets will actually work for them, not just Wall Street. And we'll see more Americans save and invest for the future.

Chair Gensler, I look forward to hearing about the progress you're making toward those goals.

PREPARED STATEMENT OF SENATOR PATRICK J. TOOMEY

Thank you, Mr. Chairman. Welcome, Chair Gensler.

The SEC has historically administered securities laws on a bipartisan basis.

During your confirmation process, I expressed concerns that you'd stray from this tradition and use the SEC to advance a liberal political agenda, such as combatting global warming and advancing so-called social justice; and push the legal bounds of the SEC's authority to pursue disclosures that are not financially material to the reporting companies. Unfortunately, your actions at the SEC have not alleviated these concerns.

You added mandatory disclosures on global warming and "human capital"—such as board and employee racial and gender identity—to the SEC's agenda. And you've essentially said that if large investment advisors and pension funds like BlackRock and CalPERS—who invest other people's money—want information about global warming or workforce diversity, it must be disclosed even if financially insignificant and irrelevant to a particular business.

Even President Obama's SEC Chair, Mary Jo White, opposed using the SEC's disclosure powers for the purpose of "exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions." That's exactly what you're doing. You are also well on your way to politicizing the PCAOB after firing all of the existing board members.

It's not the SEC's role nor expertise—as an independent financial regulator with zero democratic accountability—to address these political and social issues.

Similarly, I worried that you'd favor the paternalistic push by some on the Left to restrict investor freedom under the guise of protection, while actually harming retail investors. Such harm may result from your apparent opposition to payment for order flow, which helped allow brokers to offer commission-free trading.

Payment for order flow allows a broker to keep a portion of the price improvement obtained by routing to a wholesaler. The SEC hasn't demonstrated any failure or harm associated with payment for order flow, which the SEC has allowed for years. Banning payment for order flow could very well have the effect of eliminating commission-free trading, and would be a grave disservice to average investors.

Likewise, you've criticized mobile apps that make investing easy and fun as "gamification." Since when has delivering a product that customers like been a bad thing?

I worry that you're attempting to fix problems that don't exist. Today is the best time ever to be a retail investor. Retail investors receive best execution. A person of modest means can share in the gains of stock market at negligible transaction costs. We see the tightest bid/offer spreads ever.

Four major developments made this possible. Retail investors can access commission-free trading, accounts with no minimum balances, low- or no-fee mutual funds and ETFs, and user-friendly technology like mobile apps. Investors can also voluntarily use a broker who declines payment for order flow but may charge a commission.

Despite decades of rapidly growing numbers of retail investors participating in stock market gains, and enjoying more product opportunities at lower costs, some colleagues suggest that the markets are rigged against retail investors. I'd like to hear how it is rigged. Don't retail investors receive dividends like institutional investors? Aren't retail investors entitled to best execution like institutional investors? Don't the value of retail investors' shares and those of institutional investors increase when a stock's price increases?

The SEC's job is not to make retail investing expensive, unpleasant, and difficult. In America, adults investing their own money should be free to decide how to do so.

Let me turn to cryptocurrency, which we should further study and support. Cryptocurrencies and blockchain are important new technologies that are actively traded on many platforms.

A key question is whether a cryptocurrency is a security for regulatory purposes under Howey or some other test. Based on your public statements, you believe that some are securities but others are not. So, I am frustrated by the lack of helpful SEC public guidance explaining how you make this distinction. What makes some of them securities and others not?

I understand that SEC staff will privately provide feedback and analysis on whether a cryptocurrency is a security. Why keep this analysis private? Why not publicly announce what characteristics make a cryptocurrency a security or not a security? Why wait to make the SEC's views known only when it swoops in with an enforcement action, in some cases years after the product was launched?

This regulation by enforcement is extremely objectionable and will kill domestic innovation.

Chair Gensler, there are many things on which you and I agree and that the SEC can do to protect investors, ensure fair, orderly, and efficient markets, and facilitate capital formation. I hope that we can productively work together on this mission.

PREPARED STATEMENT OF GARY GENSLER

CHAIR, U.S. SECURITIES AND EXCHANGE COMMISSION

SEPTEMBER 14, 2021

Good afternoon, Chairman Brown, Ranking Member Toomey, and Members of the Committee. I'm honored to appear before you today for the first time as Chair of the Securities and Exchange Commission. I'd like to thank you for your support in my confirmation this spring. As is customary, I will note that my views are my own, and I am not speaking on behalf of my fellow Commissioners or the staff.

We are blessed with the largest, most sophisticated, and most innovative capital markets in the world. The U.S. capital markets represent 38 percent of the globe's capital markets.¹ This exceeds even our impact on the world's gross domestic product, where we hold a 24 percent share.²

Furthermore, companies and investors use our capital markets more than market participants in other economies do. For example, debt capital markets account for 80 percent of financing for nonfinancial corporations in the U.S. In the rest of the world, by contrast, nearly 80 percent of lending to such firms comes from banks.³

Our capital markets continue to support American competitiveness on the world stage because of the strong investor protections we offer.

We keep our markets the best in the world through efficiency, transparency, and competition. These features lower the cost of capital for issuers, raise returns for investors, reduce economic rents, and democratize markets. That focus on competition is in every part of the SEC's work, particularly with respect to market structure.

We can't take our remarkable capital markets for granted, though. New financial technologies continue to change the face of finance for investors and businesses.

¹ See Securities Industry and Financial Markets Association, "2021 SIFMA Capital Markets Fact Book", available at <https://www.sifma.org/wp-content/uploads/2021/07/CM-Fact-Book-2021-SIFMA.pdf>.

² See World Bank data: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

³ Ibid.

More retail investors than ever are accessing our markets. Other countries are developing deep, competitive capital markets as well.

The SEC is a remarkable organization. In just under 6 months, I have gotten to know many of the dedicated 4,400 people across 12 offices. Our agency covers nearly every part of the \$110 trillion capital markets. Those markets touch many Americans' lives, whether they're investing for their future, borrowing for a mortgage, taking out an auto loan, or taking a job with a company that's tapping our capital markets. We engage with companies raising money and with the key parties that sit in between companies and investors, including accountants, auditors, and investment managers.

While just last month we authorized voluntary return to office, we've largely been remote for 18 months now. I cannot compliment the dedication of this staff enough for their service to the American public.

In this testimony, I will cover some of the broad themes from the SEC's unified agenda,⁴ before closing with a few words on our enforcement and examinations divisions.

- Market Structure
- Predictive Data Analytics
- Issuers and Issuer Disclosure
- Funds and Investment Management

Market Structure

I'll start with market structure. In every generation, we have to look at how we can revisit our rule sets to better enhance efficiency and competition in our markets.

Markets work best when they are transparent and competitive. Issuers and investors alike benefit from that competition because it lowers the cost of capital.

I have asked staff to take a look at five market structure-based projects across our \$110 trillion capital markets: the Treasury market, non-Treasury fixed income markets, equity markets, security-based swaps, and crypto asset markets.

Treasury Market

First, let me turn to the Treasury market. This \$22 trillion market⁵ is integral to our overall capital markets as well as to global markets. It is the base upon which so much of our capital markets are built. Treasuries are embedded in money market funds; myriad other markets and financial products are priced off of Treasuries; and they are an essential part of our central bank's toolkit. They are called the "risk-free asset" not just here in the U.S. but globally. They are how we, as a Government and as taxpayers, raise money: we are the issuer.

During the start of the Covid crisis, liquidity conditions in the Treasury market deteriorated significantly. This wasn't the first time we observed challenges in this market, though. Back in October of 2014, there was the Treasury "Flash Crash". In the fall of 2019, we had significant dislocations in Treasury funding markets, called the Treasury repo market.

I've asked staff to work with our colleagues at the Department of the Treasury and the Federal Reserve on how we can better enhance resiliency and competition in these markets.

To the extent that this market is more efficient, that could potentially save money for U.S. taxpayers and lower the cost of our debt. To the extent that this market is more resilient, it is less likely to add to systemic risks during times of stress.

We will seek to consider some of the recommendations that external groups, like the Group of Thirty⁶ and Inter-Agency Working Group for Treasury Market Surveillance,⁷ have offered around potential central clearing for both cash and repo Treasuries.

Further, I've asked staff to reconsider some initiatives on Treasury trading platforms, and also to consider how to level the playing field by ensuring that firms that significantly trade in this market are registered as dealers with the SEC.

⁴ See <https://www.sec.gov/news/press-release/2021-99>.

⁵ Statistics from Securities Industry and Financial Markets Association: <https://www.sifma.org/resources/archive/research/statistics/>.

⁶ See Group of Thirty, "U.S. Treasury Markets: Steps Toward Increased Liquidity", available at <https://group30.org/publications/detail/4950>.

⁷ See Brian Smith, "Remarks at the Federal Reserve Bank of New York's Annual Primary Dealer Meeting" (April 8, 2021), available at <https://home.treasury.gov/news/press-releases/jy0116>.

Non-Treasury Fixed Income Market

Additionally, I've asked staff for recommendations on how we can bring greater efficiency and transparency to the non-Treasury fixed income markets—corporate bonds, a \$11 trillion market; municipal bonds, a \$4 trillion market; and asset-backed securities (which back mortgages, automobiles, and credit cards), a \$13 trillion market.⁸ This market is so critical to issuers. It is nearly 2.5 times larger than the commercial bank lending of about \$10.5 trillion in our economy.⁹

Equity Market

Next, I'd like to discuss equity market structure.

Every so often, in response to new technologies, the SEC updates its rules around market structure. After the internet came along, buyers and sellers could meet in new trading venues. An earlier Commission created a new rule in the 1990s to facilitate that. In 2005, the Commission further addressed this fragmented structure under Regulation National Market Structure.

In the last 16 years, though, technology has expanded by leaps and bounds. It has changed how market makers interact, how trading platforms compete, how investors access those markets, and the economic incentives amongst these various market participants. Retail investors can trade over commission-free brokerage apps. Telecommunication has transformed the speed of high-frequency trading. That wasn't the case even a few years ago.

Despite these new technologies and developments affecting the structure of equity markets, we are often relying on rules written in an earlier period. Rules mostly adopted 16 years ago do not fully reflect today's technology.

I believe it's appropriate to look at ways to freshen up the SEC's rules to ensure that our equity markets reflect our mission and are as efficient and competitive as they could be.

I think it's time we take a broad view about what the market structure should look like today. The Commission started this exercise with regard to market data under former Chairman Jay Clayton. I've asked staff for recommendations, particularly around two key questions:

First, how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace?

While there is fragmentation amongst trading platforms, past reforms and new technologies may have led to more segmented markets and higher concentration amongst market makers. Nearly half of the volume transacted is executed in “dark pools” or by wholesalers. One firm has publicly stated that it executes nearly half of all retail volume.¹⁰ Further, I wonder whether this means that the consolidated tape—the so-called National Best Bid and Offer—fully reflects the full range of activity on exchanges.

Second, how do we address financial conflicts in the market? As I have stated previously, I believe payment for order flow and exchange rebates may present a number of conflicts of interest.

Around those two key principles, I've asked staff for recommendations as to how we can ensure a more level playing field, enhance competition, and improve resiliency in our markets.

Moreover, I believe shortening the standard settlement cycle could reduce costs and risks in our markets. I've directed the SEC staff to put together a draft proposal for the Commission's review on this topic.

Security-Based Swaps

The security-based swaps market is not a large market compared to the fixed income and equity markets, but it was at the core of the 2008 financial crisis. More recently, total return swaps were at the heart of the failure of Archegos Capital Management, a family office.

This year, the SEC is implementing rules related to securities-based swaps. Security-based swap dealers and major security-based swap participants will begin registering with the Commission by Nov. 1.

Further, on Nov. 8, new post-trade transparency rules will go into effect, requiring transaction data to be reported to a swap data depository and thus available to the SEC and, under appropriate circumstances, other regulators. Then, beginning on

⁸Statistics from Securities Industry and Financial Markets Association: <https://www.sifma.org/resources/archive/research/statistics/>.

⁹See Federal Reserve, “Assets and Liabilities of Commercial Banks in the United States”, available at <https://www.federalreserve.gov/releases/h8/current/default.htm>.

¹⁰See Citadel Securities, “Equities & Options”, available at <https://www.citadelsecurities.com/products/equities-and-options/>.

Feb. 14, 2022, the swap data repositories will be required to disseminate data about individual transactions to the public, including the key economic terms, price, and notional value.

In addition, the Commission has yet to finish the rules for the registration and regulation of security-based swap execution facilities. I've asked staff for recommendations on how the Commission can finalize mandates to stand up the regime established under the Dodd–Frank Act and to consider whether it would be best to do this consistent with the regime established by the Commodity Futures Trading Commission for security-based swap execution facilities. The CFTC has had swap execution facility rules that have worked well since they were adopted nearly a decade ago.

Further, to allow the Commission and the public to see aggregate positions, Congress under Exchange Act Section 10B gave us authority to mandate disclosure for positions in security-based swaps and related securities. I've asked staff to think about potential rules for the Commission's consideration under this authority. As the collapse of Archegos showed, this may be an important reform to consider.

Crypto Assets Market

Next, I'll turn to a newer market structure issue: crypto assets.

Right now, large parts of the field of crypto are sitting astride of—not operating within—regulatory frameworks that protect investors and consumers, guard against illicit activity, and ensure for financial stability.

Currently, we just don't have enough investor protection in crypto-finance, issuance, trading, or lending. Frankly, at this time, it's more like the Wild West or the old world of “buyer beware” that existed before the securities laws were enacted. This asset class is rife with fraud, scams, and abuse in certain applications. We can do better.

I have asked SEC staff, working with our fellow regulators, to work along two tracks:

One, how can we work with other financial regulators under current authorities to best bring investor protection to these markets?

Two, what gaps are there that, with Congress's assistance, we might fill?

At the SEC, we have a number of projects that cross over both tracks:

- The offer and sale of cryptotokens
- Cryptotrading and lending platforms
- Stable value coins
- Investment vehicles providing exposure to crypto assets or crypto derivatives
- Custody of crypto assets

With respect to investor protection, we're working with our sibling agency, the CFTC, as our two agencies each have relevant, and in some cases, overlapping jurisdiction in the cryptomarkets. With respect to a broader set of policy frameworks, we're working with not only the CFTC, but also the Federal Reserve, Department of Treasury, Office of the Comptroller of the Currency, and other members of the President's Working Group on Financial Markets on these matters.¹¹

Further, I've suggested that platforms and projects come in and talk to us. Many platforms have dozens or hundreds of tokens on them. While each token's legal status depends on its own facts and circumstances, the probability is quite remote that, with 50, 100, or 1,000 tokens, any given platform has zero securities. Make no mistake: To the extent that there are securities on these trading platforms, under our laws they have to register with the Commission unless they qualify for an exemption.

I am technology-neutral. I think that this technology has been and can continue to be a catalyst for change, but technologies don't last long if they stay outside of the regulatory framework. I believe that the SEC, working with the CFTC and others, can stand up more robust oversight and investor protection around the field of crypto-finance.

Predictive Data Analytics

The second theme is predictive data analytics.

We are living in a transformational time, perhaps as transformational as the internet itself. Artificial intelligence, predictive data analytics, and machine learning are shaping and will continue to reshape many parts of our economy.

¹¹ See “Readout of the Meeting of the President's Working Group on Financial Markets to Discuss Stablecoins” (July 19, 2021), available at <https://home.treasury.gov/news/press-releases/jy0281>.

To take just one example, I believe we're in an early stage of a transition toward driverless cars. Policymakers already are thinking through how to keep passengers and pedestrians safe, if and when these changes take hold.

Finance is not immune to these developments. Here, too, policymakers must consider what rules of the road we need for modern capital markets and for the use of predictive data analytics.

Today, trading platforms have new capabilities to tailor marketing and products to individual investors. While this can increase access and choice, such differential marketing and behavioral prompts raise new questions about potential conflicts within the brokerage, wealth management, and robo-advising spaces, particularly if and when brokerage or investment advisor models are optimized for the platform's revenue and data collection.

These models also could inadvertently reflect historical biases embedded in data sets that may be proxies for protected characteristics, like race and gender.

Advances in predictive data analytics also could raise some systemic risk issues when we apply new models and artificial intelligence across our capital markets. This could lead to greater concentration of data sources, herding, and interconnect- edness, and potentially increase systemic risk. We've just put out a request for comment on digital engagement practices.

Issuers and Issuer Disclosure

The third theme relates to issuers and issuer disclosure.

Disclosures

Since the 1930s, when Franklin Delano Roosevelt and Congress worked together to reform the securities markets, there's been a basic bargain in our capital mar- kets: investors get to decide what risks they wish to take. Companies that are rais- ing money from the public have an obligation to share information with investors on a regular basis.

Those disclosures changes over time. Over the years, we've added disclosure re- quirements related to management discussion and analysis, risk factors, executive compensation, and much more.

Today's investors are looking for consistent, comparable, and decision-useful dis- closures around climate risk, human capital, and cybersecurity. I've asked staff to develop proposals for the Commission's consideration on these potential disclosures. These proposals will be informed by economic analysis and will be put out to public comment, so that we can have robust public discussion as to what information mat- ters most to investors in these areas.

Companies and investors alike would benefit from clear rules of the road. I believe the SEC should step in when there's this level of demand for information relevant to investors' investment decisions.

Special Purpose Acquisition Companies, China, and 10b5-1 Plans

There are three other important topics relating to issuers that we have prioritized at the SEC.

First, given the surge in special purpose acquisition companies (SPACs), I have asked staff for recommendations about enhancing disclosures in these investments. There are a lot of fees and potential conflicts inherent within SPAC structures, and investors should be given clear information so that they can better understand the costs and risks.

Second is related to China. We have another basic bargain in our securities re- gime, which came out of Congress on a bipartisan basis under the 2002 Sarbanes- Oxley Act. If you want to issue public stock in the U.S., the firms that audit your books have to be subject to inspection by the Public Company Accounting Oversight Board. While more than 50 jurisdictions have complied with this requirement, two do not: China and Hong Kong.

Once again on a bipartisan basis, Congress last year said that it's time for all ju- risdictions around the world to comply with Sarbanes-Oxley. The SEC has acted quickly to meet our requirements under the Holding Foreign Companies Account- able Act.

Further, we are working to enhance disclosures with regard to how Chinese com- panies issue securities in the U.S. Chinese companies conducting business in certain industries, such as internet and technology, are prohibited from selling their own- ership stake to foreigners. As a workaround, they use structures called variable inter- est entities to raise capital on U.S. exchanges through shell companies in the Cay- man Islands and other jurisdictions. We are working to ensure that the heightened risks related to these structures and other risks related to operating in China are clearly and prominently disclosed to investors.

The last priority area with respect to issuers is trading by corporate insiders. I have asked staff for recommendations on how we might tighten Rule 10b5-1 to modernize this 20-year-old safe harbor and fill perceived gaps in our insider trading regime.

Funds and Investment Management

The fourth theme I will discuss is the potential reforms we are exploring in the funds and investment management space.

First of all, we've seen a growing number of funds market themselves as "green", "sustainable", "low-carbon", and so on.

I've asked staff to consider ways to determine what information stands behind those claims and how we can ensure that the public has the information they need to understand their investment choices among these types of funds.

Additionally, staff are developing a proposal for the Commission's consideration on cybersecurity risk governance, which could address issues such as cyber hygiene and incident reporting.

The third topic centers on private funds, and in particular the conflicts of interest their managers may have and the information they are providing investors about the fees they charge. I believe we can enhance disclosures in this area, better enabling pensions and others investing in these private funds to get the information they need to make investment decisions. Ultimately, every pension fund investing in these private funds would benefit if there were greater transparency and competition in this space.

Fourth, following the challenges of the spring of 2020, I believe we can build greater resiliency in both money market funds and open-end bond funds. I've asked staff for recommendations to address those issues, building upon feedback we received on the President's Working Group report as well as other information.

Given the disruptions in the nearly \$5 trillion money market fund sector in spring 2020, particularly amongst prime money market funds, I believe it is time to reflect upon the reforms of 2014 and 2010 to see if we can further improve resiliency, particularly in times of stress.

Given significant growth in open-end funds and some lessons learned last spring, I believe it also is appropriate to take a close look at this \$5-plus trillion sector, to enhance resiliency during periods of stress.

Enforcement and Examinations

Beyond the new policy areas we are exploring, we also have robust enforcement and examinations regimes. About half of SEC staff work in these two divisions, ensuring that firms are inspected and wrongdoers are held accountable for their misconduct. These functions are essential to protecting investors, maintaining fair, orderly, and efficient markets, facilitating capital formation, protecting the competitiveness of our capital markets, and holding those who violate our securities laws accountable.

Our Division of Enforcement continues to be the cop on the beat, build on its successes, and focus on matters important to investors and the marketplace in order to ensure that investors are being protected. We cover the entire securities waterfront—investigating and litigating every type of case within our remit. This fiscal year, despite our remote work posture, the Division of Enforcement is on track to exceed the number of stand-alone actions against wrongdoers.

Moreover, our Division of Examinations continues to play the role of the "eyes and ears of the Commission." This staff is dedicated to protecting investors and working families through examinations of investment advisers, investment companies such as mutual funds and exchange traded funds, broker-dealers, and other SEC registrants. This fiscal year, this division is again on track to complete approximately 3,000 examinations, which are critical to ensuring that firms comply with our Federal securities laws and regulations.

Conclusion

Having started at the SEC in the spring, I have been struck by the sheer breadth and scope of the operations of this great agency and remarkable staff. The SEC's employees oversee 28,000 registered entities, more than 3,700 broker-dealers, 24 na-

tional securities exchanges, and 7 clearing agencies.¹² A record 67 million U.S. families held direct and indirect stock holdings in 2019.¹³

As our capital markets have grown, though, the SEC has not grown to meet the needs of the 2020s. At the end of fiscal year 2016, the SEC had 4,650 people on board. Nearly 5 years later, though, that number had decreased by about 4 percent.

Despite that, the agency has worked hard to keep up our mission. I hope you all agree that, as more Americans are accessing the capital markets, we need to be sure that the Commission has the resources to protect them.

Thank you and I look forward to answering your questions.

¹²See Securities and Exchange Commission, “Fiscal Year 2021 Congressional Budget Justification—Annual Performance Plan”, available at <https://www.sec.gov/files/secfy21congbudjust.pdf>. Numbers from fiscal year 2019. See Securities and Exchange Commission, “National Securities Exchanges”, available at <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

¹³Data drawn from the public version of triennial Survey of Consumer Finances (SCF): <https://www.federalreserve.gov/econres/scfindex.htm>. The SCF is sponsored by the Board of Governors of the Federal Reserve System with the cooperation of the U.S. Department of the Treasury. The 2019 SCF is the most recent survey.

**RESPONSES TO WRITTEN QUESTIONS OF CHAIRMAN BROWN
FROM GARY GENSLER**

Q.1. In his 2020 Report to Congress, the SEC Investor Advocate indicated his willingness to work with Congress and other regulators to implement the “Senior Investor Protection Grant Program” established by Sec. 989A of the Dodd–Frank Act if Congress were to pass a change moving the program to the SEC for implementation. Do you support this change? How would the SEC implement the program if Congress acted to make the change?

A.1. If Congress were to move the implementation of the Senior Investor Protection Grant Program to the SEC, I would welcome the addition of this function to the SEC’s other important responsibilities. In order to implement the program, we would need additional resources for Commission offices to support implementation and administration, as well as the appropriation to fund the grants. The amount of resources required would depend on the size of the grant program that is ultimately approved.

Q.2. In 2013, the Commission proposed rules to enhance transparency in the marketplace for so-called private offerings, but the proposal was never finalized. Since then the market for private offerings has continued to grow, but without sufficient transparency. What are some ways for the Commission to address this information deficit and enhance investor protection?

A.2. As indicated on the spring regulatory agenda, the Division of Corporation Finance is considering ways to further update the Commission’s rules related to exempt offerings to more effectively promote investor protection, including ensuring appropriate access to and enhancing the information available regarding Regulation D offerings. Division staff will continue to study these issues and make recommendations to the Commission.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR TOOMEY
FROM GARY GENSLER**

Q.1. At the Banking Committee hearing on September 14, 2021, in response to questions, you stated “I agree with you that some of these tokens have been deemed to be commodities. Many of them are securities.” Please identify the specific characteristics that distinguish a cryptocurrency that is a security from one that has been deemed a commodity.

A.1. Congress established the definition of a security, which includes about 20 items, like stock, bonds, and notes. One of the items is an investment contract. The Supreme Court took up the definition of an investment contract, stating that it exists when “a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” The Supreme Court has repeatedly reaffirmed this Howey Test. Thus it depends upon the particular facts and circumstances, whether any particular financial instrument, including a crypto asset, is being offered or sold as a security. The SEC’s Section 21(a) 2017 Report of Investigation on The DAO and subsequent settled enforcement orders set forth the SEC’s views on how the Federal securities laws apply to particular crypto assets. Under the Com-

modities Exchange Act, derivatives on commodities that are not securities are subject to the CFTC's exclusive jurisdiction.

Q.2. At the same hearing, I asked whether stablecoins that are linked to the dollar and lack any inherent expectation of profit are securities. Your response was that “they may well be securities.”

Is it your contention that such a stablecoin constitutes an “investment contract” and is therefore a security? If so, could you please explain why you believe such a stablecoin would meet the “expectation of profit” prong of the Howey test?¹

If your response is that such a stablecoin may be a security under one of the other types of securities listed in the definition of a security in Section 2(a)(1) of the Securities Act (U.S.C. §77b(a)(1)), please specify which type and explain your analysis.

Let's say there is a proposed stablecoin called ProposedCoin that is linked to the dollar and the holder of ProposedCoin does not expect any profit or return from holding ProposedCoin. Underlying dollars received by ProposedCoin will be held in multiple FDIC-insured bank accounts held at thousands of Federal or State-chartered banks throughout the country. Holders intend to use ProposedCoin as a medium of exchange for goods and services within the ProposedCoin ecosphere and do not view ProposedCoin as a means of investment. Is ProposedCoin a security? Why or why not? Please explain your analysis. Please do not address any potential effects of ProposedCoin on the banking system or systemic risk implications.

If additional information is needed in order to determine whether ProposedCoin is a security, please specify what information is missing.

A.2. The existing stablecoin market is worth nearly \$138 billion and is embedded in cryptotrading and lending platforms. Though they represent only about 5 percent of all crypto assets, more than 75 percent of trading on all cryptotrading platforms occurred between a stablecoin and some other token.

While I appreciate your inquiry regarding a particular hypothetical fact pattern, there are many facts that come into play when determining whether any particular financial instrument is or is not a security. As the President's Working Group report on stablecoins notes, “stablecoins, or certain parts of stablecoin arrangements, may be securities, commodities and/or derivatives.” Thus, the use of stablecoins presents a number of public policy challenges with respect to protecting investors.

Stablecoins may facilitate those seeking to sidestep a host of public policy goals connected to our traditional banking and financial system, such as anti-money laundering, tax compliance, sanctions compliance, and other safeguards against illicit activity. We at the SEC will be working with our sibling regulators, including the CFTC, to deploy the full protections of the law to these products and arrangements where appropriate.

Q.3. At the September 14, 2021, hearing, you referenced that the SEC had previously taken the position, upheld in the courts, that the acquisition interests in whiskey caskets were securities. In

¹SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

what ways are interests in whiskey caskets comparable to interests in stablecoins for purposes of analyzing whether a security exists. For example, is each whiskey casket, and its contents, viewed as indistinguishable from other whiskey caskets? If not, would that analysis apply comparably to stablecoins within a particular cryptocurrency?

A.3. Congress created a definition of security that is intended to be broad, in order to encompass new and different types of investments that are presented to investors and that invoke the protections of the Federal securities laws. The definition of security includes “investment contract” among the list of other types of securities. Whether a particular instrument is within the definition of security is based on the facts and circumstances. As it relates to investment contracts, the U.S. Supreme Court’s *Howey* case and subsequent case law have found that an “investment contract” exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.

For example, in the late 1960s and early 1970s, the Commission published releases that warned about investment contracts that were sold in the form of whiskey warehouse receipts. In the whiskey warehouse scenario, the promoters sold receipts to finance the aging and blending processes of Scotch whiskey, where purchasers expected a return from the promoter’s efforts in developing and selling the Scotch. These cases highlight the fact that whether something is a security or not will depend on the economic reality of the transaction or product, not on any name or label given.

Q.4. Please list all no-action letters, arranged in chronological order, issued since January 1, 2021, through the date of your response, that reference cryptocurrencies, tokens, digital assets, and similar items. Please also provide the number of pending no-action letter requests that involve such items.

A.4. All issued no-action letters are publicly available on the SEC’s website. A list of digital asset-related staff no-action letters can be found at the SEC’s website at <https://www.sec.gov/finhub> under the “Blockchain/Distributed Ledger” section and “Regulation, Registration, and Related Matters” drop-down tab. More specifically, there have been a number of SEC staff no-action letters issued that relate to “cryptocurrencies, tokens [and] digital assets,” including staff letters to TurnKey Jet, Inc., Pocketful of Quarters, Inc., Paxos Trust Company, LLC, and IMVU, Inc. Staff also issued a no-action letter to the Financial Industry Regulatory Authority (FINRA), and the Commission published a no-action statement, relating to the custody of digital asset securities by special purpose broker-dealers. There have been no such no-action letters issued since January 1, 2021.

Pending no-action inquiries with the staff are nonpublic and in most cases are submitted to the staff subject to claims of confidential treatment. As pending inquiries are not staff actions that are public, I am unable to provide any information about them.

Q.5. Please list all exemptive orders, arranged in chronological order, issued since January 1, 2021, through the date of your response, that reference cryptocurrencies, tokens, digital assets, and

similar items. Please also provide the number of pending applications for exemptive orders that involve such items.

A.5. The SEC has not issued any exemptive orders that reference cryptocurrencies, tokens, digital assets, or similar items during the period between January 1, 2021, and November 23, 2021.

Pending inquiries, including requests for exemptions from applicable provisions of the Federal securities laws are, unless required to be submitted publicly, generally nonpublic and in most cases submitted to the staff subject to claims of confidential treatment. I am unable to provide any information about pending applications for exemptive orders that are nonpublic. I am aware of one pending public request, which can be found here: <https://www.sec.gov/Archives/edgar/data/1009268/000095010321008030/dp151409-406b.htm>.

Q.6. Please list all publicly disclosed enforcement actions, arranged in chronological order, taken since January 1, 2021, through the date of your response, that reference cryptocurrencies, tokens, digital assets, and similar items.

Which of these actions identify a specific cryptocurrency, token, or digital asset that is a security?

A.6. These are matters of public record, and there is a list of such actions, and the information requested on the SEC's website at <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions>. The SEC's complaints and orders in those actions are also a matter of public record and are available on the SEC's homepage at the link above. The SEC's complaints and orders in those actions are also a matter of public record and are available on the SEC's homepage at the link above. The actions and trading suspensions filed since January 1, 2021, are listed below for convenience.

Actions

Action Name	Description	Date Filed
SEC v. Ginster	The Securities and Exchange Commission charged Ryan Ginster of Corona, California with conducting two unregistered and fraudulent securities offerings that raised over \$3.6 million in cryptocurrency from retail investors.	11/18/2021
GTV Media Group, Inc., et al.	The Securities and Exchange Commission charged New York City-based GTV Media Group Inc. and Saraca Media Group Inc., and Phoenix, Arizona-based Voice of Gao Media Inc., with conducting an illegal unregistered offering of GTV common stock. The SEC also announced charges against GTV and Saraca for conducting an illegal unregistered offering of a digital asset security referred to as either G-Coins or G-Dollars. The respondents have agreed to pay more than \$539 million to settle the SEC's action.	9/13/2021
SEC v. Rivetz Corp., et al.	The Securities and Exchange Commission charged Rivetz Corp., Rivetz International SEZC, and Steven K. Sprague, the President of Rivetz and CEO of Rivetz International, with conducting an illegal, unregistered offering of securities through an initial coin offering.	9/8/2021
SEC v. BitConnect, et al. SEC v. Brown, et al.	The Securities and Exchange Commission filed an action against BitConnect, an online crypto lending platform, its founder Satish Kumbhani, and its top U.S. promoter and his affiliated company, alleging that they defrauded retail investors out of \$2 billion through a global fraudulent and unregistered offering of investments into a program involving digital assets. The Commission previously charged five other individuals in a related action for promoting the BitConnect offering.	9/1/2021 5/28/2021
Poloniex, LLC	The Securities and Exchange Commission filed settled charges against Poloniex, LLC, under which Poloniex agreed to pay more than \$10 million for operating an unregistered online digital asset exchange in connection with its operation of a trading platform that facilitated buying and selling of digital asset securities.	8/9/2021
Blockchain Credit Partners d/b/a DeFi Money Market, et al.	The Securities and Exchange Commission charged two Florida men and their Cayman Islands company for unregistered sales of more than \$30 million of securities using smart contracts and so-called "decentralized finance" (DeFi) technology, and for misleading investors concerning the operations and profitability of their business DeFi Money Market.	8/6/2021

Action Name	Description	Date Filed
SEC v. Uulala, Inc., et al.	The Securities and Exchange Commission filed settled charges against Uulala, Inc., and two of its California-based founders, Oscar Garcia and Matthew Loughran for allegedly defrauding more than a thousand investors in an unregistered offering of digital asset securities that raised more than \$9 million and against Uulala and Garcia for allegedly engaging in a second fraudulent offering of convertible notes.	8/4/2021
Blotics Ltd., f/d/b/a Coinschedule Ltd.	The Securities and Exchange Commission filed settled charges against the operator of Coinschedule.com, a once-popular website that profiled offerings of digital asset securities. The SEC's order finds that United Kingdom-based Blotics Ltd. violated the anti-touting provisions of the federal securities laws by failing to disclose the compensation it received from issuers of the digital asset securities it profiled.	7/14/2021
Loci, Inc., et al.	The Securities and Exchange Commission filed settled charges against Loci, Inc. and its CEO John Wise for making materially false and misleading statements in connection with an unregistered offer and sale of digital asset securities. According to the SEC's order, Loci provided an intellectual property search service for inventors and other users through its software platform called ImVenn. The SEC's order finds that from August 2017 through January 2018, Loci and Wise raised \$7.6 million from investors by offering and selling digital tokens called "LOCIcoin." As stated in the order, in promoting the ICO, Loci and Wise made numerous materially false statements to investors and potential investors, including false statements concerning the company's revenues, number of employees, and ImVenn's user base.	6/22/2021
SEC v. Hamid, et al.	The Securities and Exchange Commission charged three individuals for their roles in the \$30 million initial coin offering fraud that was spearheaded by convicted criminal Boaz Manor and his associate, Edith Pardo. The SEC previously charged Manor, Pardo, and their companies, CG Blockchain, Inc. and BCT Inc. SEZC in connection with the scheme in January 2020.	6/15/2021
SEC v. Manor, et al.		1/17/2020
SEC v. Radjabli, et al.	The Securities and Exchange Commission filed charges against Edgar M. Radjabli of Boca Raton, Florida, and two entities he controlled for engaging in several securities frauds of escalating size. The SEC's complaint alleges that Radjabli, formerly a practicing dentist, and Apis Capital Management LLC, an unregistered investment adviser firm Radjabli owned and controlled, conducted a fraudulent offering of Apis Tokens, a digital asset representing tokenized interests in Apis Capital's main investment fund. The complaint further alleges that Radjabli and Apis Capital manipulated the securities market for Veritone Inc., a publicly-traded artificial intelligence company, by announcing in December 2018 an unsolicited cash tender offer to purchase Veritone for \$200 million, when, in truth Radjabli and Apis Capital lacked the financing or any reasonable prospect of obtaining the financing necessary to complete the deal.	6/11/2021
SEC v. LBRY, Inc.	The Securities and Exchange Commission charged LBRY, Inc., a blockchain company, with conducting an unregistered offering of digital asset securities. According to the SEC's complaint, from at least July 2016 to February 2021, LBRY, which offers a video sharing application, sold digital asset securities called "LBRY Credits" to numerous investors, including investors based in the US. LBRY allegedly received more than \$11 million in U.S. dollars, Bitcoin, and services from purchasers who participated in its offering.	3/29/2021
SEC v. Cutting	The Securities and Exchange Commission filed an emergency action and obtained a temporary restraining order and asset freeze against Shawn C. Cutting of Sandpoint, Idaho, for allegedly raising millions of dollars from hundreds of investors by falsely claiming to be a financial adviser with	3/5/2021

Action Name	Description	Date Filed
	securities licenses, overstating investment returns, and misappropriating money received from investors.	
SEC v. Coinseed Inc., et al.	The Securities and Exchange Commission charged Coinseed, Inc., a company that purported to offer a mobile investment application that enabled users to invest in digital assets, and its co-founder and Chief Executive Officer, Delgerdalai Davaasambu, in connection with Coinseed's offer and sale of digital asset securities.	2/17/2021
SEC v. Krstic, et al.	The Securities and Exchange Commission charged three individuals with defrauding hundreds of retail investors out of more than \$11 million through two fraudulent and unregistered digital asset securities offerings.	2/1/2021
Wireline, Inc.	The Securities and Exchange Commission filed a settled cease-and-desist proceeding against financial technology company Wireline, Inc. for making materially false and misleading statements in connection with an unregistered offer and sale of digital asset securities.	1/15/2021
American CryptoFed DAO LLC	The Commission instituted proceedings against American CryptoFed DAO LLC, a Wyoming-based organization concerning the registration of the company's securities.	11/10/2021
Long Blockchain Corp.	The Commission revoked registration of the securities of Long Blockchain Corp., a beverage business that had announced a shift to become a blockchain technology business which never became operational, for failure to file quarterly and annual reports.	2/22/2021

Q.7. Please list all guidance materials posted to sec.gov or investor.gov since January 1, 2021, through the date of your response that reference cryptocurrencies, tokens, digital assets, and similar items. You may omit any items listed in response to the prior three questions.

A.7. Statements and other materials relating to digital assets are available to the public from our website homepage on the sec.gov and investor.gov websites. Click through: SEC.gov/Strategic Hub for Innovation and Financial Technology (FinHub); Investor.gov/Spotlight on Initial Coin Offerings and Digital Assets.

Statements since January 1, 2021, include:

Risk Alert: The Division of Examinations' Continued Focus on Digital Asset Securities.

Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market.

Funds Trading in Bitcoin Futures—Investor Bulletin.

Digital Asset and “Crypto” Investment Scams—Investor Alert.

President's Working Group on Financial Markets, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency Report on Stablecoins.

Statement by Chair Gary Gensler on President's Working Group Report on Stablecoins.

Q.8. You recently stated in an August 5, 2021, letter to Senator Warren that the public would benefit from “additional (Congressional) authority to write rules for and attach guardrails to crypto trading and lending.” Do you believe the SEC needs additional

Congressional authority to properly regulate the digital asset marketplace?

A.8. I have stated before that I believe we need additional authorities to prevent crypto asset-related transactions, products, and platforms from falling between regulatory cracks.

Additional SEC regulatory authority over cryptotrading and lending platforms and intermediaries could aid the SEC's ability to prevent fraud and abuse and promote investor and market protection. I have asked SEC staff, working with our fellow regulators, to work along two tracks. First, I have asked them how we can work with other regulators under our current authorities to best bring investor protection to these markets. Second, I've asked them what gaps we might need Congress' assistance to fill.

Q.9. I want to learn more about your thoughts on the threshold for a token to be deemed decentralized. In a 2018 *New York Times* article, you spoke about the decentralization of Ethereum (ETH). As the article lays out, "Mr. Gensler said Ether could have more problems because the first Ether tokens were sold in 2014, before the network was functional, by the Ethereum Foundation. Ether could get off the hook, Mr. Gensler said, because its development has been more decentralized recently, and new Ether tokens are now given out to so-called miners through a network."² Meanwhile, you have also repeatedly said that you agree with former SEC Chair Clayton's statement that he has yet to see an initial coin offering that was not a security.

I highlight these two instances because to me it appears that you believe ETH transitioned from a security to a commodity. The concept that ETH can transition to a commodity because "its development has been more decentralized" appears to conflict with your past statements that all ICO tokens are securities. I understand there are pending court cases that may address this very issue, but as we await decisions in these cases, can you clarify your position as to when a token is sufficiently decentralized in light of your previous statements?

A.9. Though I am unable to comment about any particular crypto asset or project, I find myself generally agreeing with former SEC Chairman Jay Clayton when he testified in 2018: "To the extent that digital assets like [initial coin offerings, or ICOs] are securities—and I believe every ICO I have seen is a security—we have jurisdiction, and our Federal securities laws apply." Purchasers of ICO tokens generally are buying these tokens anticipating profits, and there's a small group of entrepreneurs and technologists standing up and nurturing the projects. I believe we have a cryptomarket now where many tokens may be unregistered securities, without required disclosures or market oversight.

The U.S. Supreme Court's *Howey* case and subsequent case law have found that an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.

Q.10. I understand from your previous remarks that a Bitcoin exchange-traded fund (ETF) approval is unlikely to occur soon given

² <https://www.nytimes.com/2018/04/22/technology/gensler-mit-blockchain.html>

your concerns around market structure and volatility. However, even with these concerns being voiced publicly over 20 companies have applied to launch a Bitcoin ETF due to the strong amount of interest cited by U.S. institutions. We have seen regulatory bodies in Canada, Germany, Switzerland and Sweden approve bitcoin ETPs, and many U.S. investors are finding ways to access these products in lieu of the absence of an SEC-approved domestic product.

What are your views on other international regulators approving these bitcoin ETPs?

A.10. Various international jurisdictions have different legal standards and processes for consideration of new investment products, including proposed exchange-traded products that may be based on bitcoin. Our staff continues to monitor developments in other jurisdictions with respect to bitcoin-focused investment vehicles and has engaged with fellow international regulators on their approaches to potential bitcoin-based investment vehicles and ongoing monitoring of such vehicles if they exist. As fellow regulators, our staff seeks to learn from the experiences of others. However, actions in the other jurisdictions are not binding on U.S. regulators, and our staff continues to follow applicable legal standards and processes under the Federal securities laws when considering bitcoin-focused investment products.

Q.11. Is there a role Congress can play in hopes of making bitcoin ETPs (including an ETF) happen here in the United States?

A.11. I welcome Congress' interest and input on the prospect of bitcoin ETPs. As noted above, our staff continues to follow applicable legal standards and processes under the Federal securities laws when considering bitcoin-focused investment products. That being said, the markets for actual bitcoin itself today are largely unregulated. This lack of regulatory oversight and surveillance leads to concerns about the potential for fraud and manipulation. Congress could bring the bitcoin markets under the U.S. regulatory umbrella, which could be helpful in our consideration of bitcoin ETPs.

Q.12. You stated in a recent speech that you look forward to reviewing filings of ETFs registered under the Investment Company Act, adding that you look forward to the filings "particularly if those are limited to these CME-traded Bitcoin futures."³ Can you please explain why you look forward to evaluating CME-traded Bitcoin futures but do not express the same enthusiasm for approving a Bitcoin spot exchange-traded product (ETPs), particularly when they both are based upon the same underlying spot Bitcoin markets? Please also explain whether your views also apply to the submission of proposed listing rule changes for national securities exchanges regarding Bitcoin-related ETPs and ETFs.

A.12. The first of the bitcoin futures ETFs have gone effective and are operating. The Commission considers all exchange-trading products under the standards applicable to them.

Q.13. In December 2020, the SEC put out a statement and request for comment regarding the custody of digital asset securities by

³ <https://www.sec.gov/news/public-statement/genler-aspens-security-forum-2021-08-03>

special purpose broker-dealers (SPBDs). The statement requires the SPBD to limit its business to “dealing in, effecting transactions in, maintaining custody of, and/or operating an ATS [alternative trading system] for digital asset securities.”⁴ Several submitted comments have noted that requiring a broker-dealer to bifurcate its operations to be able to deal separately with digital asset securities is unnecessary and could lead to additional operational risk for the broker-dealer, among other challenges. Is the SEC considering revisions to its statement to remove the requirement to bifurcate a broker-dealer’s operations for the purposes of acting as a custodian of digital asset securities?

A.13. In the December 2020 statement, the Commission expressed certain concerns regarding the custody of crypto asset securities and the potential ramifications that would result from the loss or theft of crypto asset securities. The period in which the statement and request for comment is in effect will provide the Commission and its staff an opportunity to gain additional insight into the evolving standards and best practices with respect to custody of crypto asset securities. During this 5-year period, the Commission will continue to evaluate its position on an ongoing basis and will consider comments to inform any future rulemaking or other Commission action in this area.

Q.14. Recent press articles have discussed high fees being charged to public companies in connection with distribution of proxy materials. Historically, these have been set according to a fee schedule adopted by the New York Stock Exchange (NYSE).

Earlier this year, the SEC rejected a proposed rule change by NYSE to cease setting a fee schedule.

What steps are being taken to lower these costs, particularly as more proxy materials are being distributed electronically?

Some service providers who fulfill brokers’ obligations to distribute proxy materials impose an additional “suppression fee,” which results in the service provider receiving a higher fee for electronic distributions than for paper mailings. Please explain whether charging higher fees for electronic distributions is in the best interests of investors.

A.14. Thank you for your interest in NYSE’s schedule of proxy distribution fees. I agree that these fees present important issues. An NYSE petition for Commission review of staff’s disapproval of an NYSE proposal to remove the fee schedule from its rules is before the Commission. I’m looking forward to learning more about these issues and appreciate your engagement.

Q.15. I have previously suggested to the SEC that it make permanent the relief it granted for allowing virtual meetings, rather than in-person, for investment company boards under the Investment Company Act. Please discuss whether you intend to add this project to the SEC’s next regulatory agenda.

A.15. The Investment Company Act requires certain board votes to be cast in person. The Commission has at times granted temporary industrywide relief from this requirement in response to various national emergencies, including the COVID-19 pandemic. The

⁴ <https://www.sec.gov/rules/policy/2020/34-90788.pdf>

Commission’s exemptive authority depends on, among other things, the exemption being consistent with the purposes intended by the provisions of the Investment Company Act. The Commission could consider applications for in-person voting relief for appropriate situations beyond emergencies, as its exemptive authority permits.

Q.16. The Consolidated Appropriations Act, 2021, Public Law No. 116-260, instructed the SEC to deliver two reports about small issuers by June 2021—one on analyst research⁵ and one about the effects of the 10 percent limitation on investments by investment companies.⁶ These reports are now overdue. What is the estimated timeframe for delivery of these reports?

A.16. SEC staff are in the process of preparing the requested reports based on a review of relevant legal and regulatory requirements, academic literature, and available data. These are important topics that require careful consideration and evaluation of a number of issues. We are working diligently to complete the reports as soon as possible.

Q.17. In your responses to a question for the record from your confirmation hearing, you stated that you would “work with fellow Commissioners and SEC staff to eliminate unnecessary costs [on public companies] where possible.”⁷ Please list the most promising items to eliminate unnecessary costs on public companies that you have identified to date.

A.17. Consistent with our statutory mandates to consider efficiency, competition, and capital formation alongside investor protection, we continue to strive to eliminate unnecessary costs in our rules. One recent example is the Commission’s rule to modernize how filing fees are reported, calculated, and paid. We also released two proposed rules for public comment increasing the use of electronic filing for submissions, which we expect will expedite and ease the filing process going forward. We will continue working to eliminate unnecessary costs as we consider future rules.

Q.18. In your responses to a question for the record from your confirmation hearing, you stated that you would “holistically review capital formation rules related to small and medium-sized companies and make individualized determinations about whether to preserve, expand or revise such rules.”⁸

What are the most promising items you have identified so far to facilitate capital formation for small and mid-size companies?

If you have not completed this review, please provide an estimated timeframe for its completion.

A.18. Small and medium-sized companies need access to our capital markets to fund innovations and scale their operations. We are continuously looking at what is working, what barriers may be preventing the facilitation of capital formation, and how investors are faring and being protected in these markets. As noted on the

⁵ Division Q, Sec. 106.

⁶ Division Q, Sec. 107.

⁷ Gary Gensler’s March 5, 2021, response to Senator Toomey’s question for the record, #14, for Senate Banking Committee’s March 2, 2021, hearing, “Nominations of Gary Gensler and Rohit Chopra”, available at <https://www.banking.senate.gov/imo/media/doc/Gensler%20Resp%20to%20QFRs%203-2-21.pdf>.

⁸ Id. at #18.

Spring 2021 regulatory agenda, staff in the Division of Corporation Finance are considering recommendations to the Commission on ways to further update the Commission's rules related to exempt offerings. In addition, our Office of the Advocate for Small Business Capital Formation has been publishing new educational content to help small businesses and their investors demystify the offering process, thereby facilitating capital formation and promoting compliance. As part of that initiative, the staff recently released a new interactive capital raising navigator tool on sec.gov to help small businesses and their investors navigate their options for funding small businesses.

Q.19. Any change to the current wealth and income thresholds in the Regulation D definition of accredited investor may have a relatively larger impact on smaller and rural communities where the cost of living and incomes are lower than in metropolitan areas. This could complicate the ability of entrepreneurs in non-urban areas to raise capital from investors located in those areas. If you intend to pursue changes to the accredited investor thresholds, how will you ensure it does not become more difficult for companies to raise money outside of the largest cities?

A.19. Historically, the accredited investor definition has generally used wealth and income based criteria as proxies to determine those persons whose financial sophistication may render certain protections of the Securities Act's registration process superfluous. The Commission recently expanded the definition of accredited investor to provide additional measures for establishing an individual's financial sophistication that are not connected to their annual income or net worth.

The Dodd-Frank Act directs the Commission to review the accredited investor definition at least every 4 years to determine whether the definition should be modified or adjusted. The next required review is due to be completed no later than 2023. I expect the Commission will carefully review both how effectively the wealth- and income-based criteria of the accredited investor definition—along with the effectiveness of the recently adopted amendments—are serving their intended regulatory function and what impact any changes in those thresholds would have.

Q.20. In your responses to a question for the record from your confirmation hearing, you stated that you would “work to improve liquidity for thinly traded stocks of smaller companies.”⁹ Please describe how you intend to consider these concerns as part of your market structure review.

A.20. We will take the liquidity concerns around thinly traded securities into consideration as we continue to review U.S. market structure.

Q.21. In your responses to a question for the record from your confirmation hearing, you stated that you would “review . . . the SEC's proposed Exemptive Order issued last year that would exempt certain ‘finders’ from broker registration requirements” and

⁹Id. at #19.

determine if further action is appropriate.¹⁰ Please provide an update on your review of the proposed Exemptive Order.

A.21. The regulatory status of “finders” has been a long-standing issue in the area of broker regulation. The Commission received a wide range of comments in response to the proposed Exemptive Order. SEC staff are considering the comments received as they continue to evaluate potential appropriate next steps to recommend to the Commission.

Q.22. In your responses to a question for the record from your confirmation hearing, you stated that you would “more thoroughly” evaluate former SEC Chairman Clayton’s December 2020 letter to the SEC Asset Management Advisor Committee regarding “Thoughts on the Future Progress of Private Investment Subcommittee”.¹¹ This letter outlined ways that the SEC could expand retail investor exposure to private equity and venture capital, including through a diversified target date retirement fund. Please provide an update on your review of the ideas set forth in this letter.

A.22. The Private Investments Subcommittee of the AMAC issued a Final Report and Recommendations on September 27, 2021.¹² The staff from the SEC’s Division of Investment Management is reviewing the final report and its recommendations, and I look forward to their input.

Q.23. On June 1, 2021, the SEC’s Division of Corporation Finance issued a statement stating that it would not recommend enforcement actions to the SEC based on the 2020 amendments for proxy voting advice businesses, entitled “Exemptions From the Proxy Rules for Proxy Voting Advice”.

Please explain why it is appropriate for recipients of proxy voting advice distributed by firms like Institutional Shareholder Services (ISS) and Glass Lewis to not receive disclosure about any conflicts of interest.

Please explain why it is appropriate to exempt ISS, Glass Lewis, and other proxy voting advisory firms from possible SEC enforcement if they distribute fraudulent and misleading information in connection with their advice.

A.23. We have heard from market participants who use the proxy advisory firms about the rules’ current and future possible impact on the independence, timeliness, and costs of the advice.

Last Wednesday, November 17th, the Commission voted to propose amendments to these rules. Those proposals are tailored to address the independence, timeliness, and cost concerns raised by clients of proxy advisory firms and the confusion around sources of liability. The proposals would make no change to the conflict of interest disclosure requirements of the 2020 amendments. The release further clarifies, but does not alter, the application of the antifraud provisions of our proxy rules to proxy voting advice. These proposals are now in the notice and comment process and we encourage the public to share their views with the Commission.

¹⁰Id. at #21.

¹¹Id. at #22.

¹²Available at Final Recommendations and Report of the Private Investments Subcommittee (sec.gov).

Q.24. To the extent that the Internal Revenue Code is amended to eliminate the current tax treatment for ETFs and their investors, will that reduce returns for long-term buy-and-hold investors that hold ETF shares in nonretirement accounts?

A.24. I understand that the Code currently does not require “regulated investment companies” to realize capital gains when they distribute property in response to redemption requests and that the proposed amendment would remove this exception. Accordingly, the proposed amendment may change when a shareholder of an investment company that uses in-kind redemptions would recognize capital gains. This change is more likely to affect ETF shareholders than mutual fund shareholders because many ETFs use in-kind redemptions, while mutual funds generally do not.

Q.25. My office has received concerns that career SEC staff are waiting for direction from the SEC Chair’s office before proceeding on no-action letters and similar requests involving technical interpretations of the Federal securities laws and SEC rules. In some cases, the requestors had been working with the SEC staff for a significant period of time. For example, my office is aware of one request for no-action relief involving the application of Sections 13 and 16 of the Securities Exchange Act of 1934 to authorized participants in connection with non-fully transparent active exchange-traded funds that have been already approved by the SEC. What steps are you taking to ensure that career SEC staff can resolve pending requests on such technical issues?

A.25. The Commission staff continues to review and issue no-action and similar requests, with numerous requests processed in the last few months. As part of its review, the staff considers investor protection concerns as well as the complexity and the novel nature of the issues raised by the request. The staff continues working to expeditiously review pending requests and to complete its review in a manner consistent with the Commission’s investor protection mandate.

Q.26. In May 2021, the Federal Housing Finance Authority (FHFA) finalized a rule that requires Fannie Mae and Freddie Mac (each, an “Enterprise”) to develop plans to facilitate their rapid and orderly resolution in the event FHFA is appointed receiver. 86 FR 23,577 (May 4, 2021). These resolution plans are intended to, among other things, “foster[] market discipline by making clear that no extraordinary Government support will be available to indemnify investors against losses or fund the resolution of an Enterprise.” Id. at 23,580. Specifically, “[i]n developing a resolution plan, each Enterprise shall: . . . [n]ot assume the provision or continuation of extraordinary support by the United States to the Enterprise to prevent either its becoming in danger of default or in default (including, in particular, support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as supervisor, conservator, or receiver of the Enterprise, including the Senior Preferred Stock Purchase Agreements entered into by FHFA and the U.S. Department of the Treasury on September 7, 2008, and any amendments thereto).” 12 CFR 1242.5(b)(2). Related to this, Treasury’s Housing Reform Plan released in September 2019 recommended that “[a] credible resolution framework can ensure that

shareholders and unsecured creditors bear losses, thereby protecting taxpayers against bailouts, enhancing market discipline, and mitigating moral hazard and systemic risk.” In light of FHFA’s policy that, notwithstanding the Senior Preferred Stock Purchase Agreements, unsecured creditors of each Enterprise should be at risk of loss upon an insolvency event affecting the Enterprise, why should SEC regulations governing money market mutual funds, registration requirements, or other market activity continue to treat securities issued by the Enterprises in a manner similar to securities issued by the U.S. Treasury?

A.26. The Investment Company Act defines “Government securities” to include any security issued by the United States, or by a person controlled or supervised by and acting as an instrumentality of the U.S. Government pursuant to Congressional authorization.¹³ The Enterprises currently are in conservatorship, and FHFA, an agency of the U.S. Government, is the conservator of each Enterprise.¹⁴ If and when plans for ending conservatorship are developed, SEC staff would expect to consider any questions regarding the treatment of securities issued by the Enterprises under the Act and its rules as they arise.

**RESPONSES TO WRITTEN QUESTIONS OF
SENATOR MENENDEZ FROM GARY GENSLER**

Q.1. Dodd–Frank Section 1504 introduced a disclosure requirement for mining, oil, and gas companies requiring them to disclose payments made to foreign Governments. The SEC issued a strong rule implementing this provision in 2016 which was then disapproved via CRA by Congress. In 2020, the SEC voted to implement a new, much weaker rule. In particular, the 2020 rule fails to properly carry out the Congressional intent of fighting corruption and protecting investors. Additionally, the rule falls short of international standards and redefines the term “project” in a way that does not align with other jurisdictions.

Given this, would the SEC commit to amending the 2020 rule to better align with global standards and meet Congressional objectives?

A.1. As noted in the 2021 Unified Regulatory Agenda, the Division of Corporation Finance is currently considering recommending that the Commission review the rules under Section 1504 of the Dodd–Frank Act to determine if additional amendments to the rules might be appropriate. We are actively monitoring developments in this area.

¹³Investment Company Act §2(a)(16).

¹⁴The Enterprises are federally chartered housing finance enterprises whose purposes include providing liquidity, stability, and affordability to the residential mortgage market. See FHFA, Fannie Mae and Freddie Mac, <https://www.fhfa.gov/about-fannie-mae-freddie-mac>. FHFA was appointed by its Director as conservator of each Enterprise on Sept 8, 2008. See FHFA, History of Fannie Mae and Freddie Mac Conservatorships, <https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae-Freddie-Conservatorships.aspx>.

**RESPONSES TO WRITTEN QUESTIONS OF
SENATOR CORTEZ MASTO FROM GARY GENSLER**

Q.1. LIBOR—How will the SEC work with companies to prepare for the discontinuation of LIBOR and the transition to an alternative reference rate?

Is action needed from Congress to ensure a smooth transition from LIBOR to an alternative rate?

A.1. SEC staff is actively working on the issue through engagement with the industry during meetings and examinations. The staff has published statements and risk alerts, including Staff Statement on LIBOR Transition (July 12, 2019), EXAMS Risk Alert—Examination Initiative: LIBOR Transition Preparedness (June 18, 2020), and Office of Municipal Securities Staff Statement on LIBOR Transition In The Municipal Securities Market (January 8, 2021). SEC staff participate in the Alternative Reference Rates Committee, including on accounting and regulatory issues, and routinely coordinate with domestic and foreign regulators.

Federal legislation to address tough legacy USD LIBOR products, and to amend the Trust Indenture Act of 1939 (TIA), could help ensure a smooth transition from LIBOR to an alternative rate and lower the risk of disruptive litigation related to the transition—especially for those products with ineffective fallback provisions subject to indentures governed by the TIA.

Q.2. Processing Fees—Mutual funds pay “processing fees” to deliver prospectuses and other SEC-required documents to their investors. Some have raised concerns that the prices charged by these processing fee vendors is excessively high.¹ Is the SEC looking into the “processing fee” framework and if not, will you commit to its review?

A.2. Thank you for your interest in the “processing fee” framework. I agree that these are important issues. In fact, a New York Stock Exchange (NYSE) petition for Commission review of staff’s disapproval of a NYSE proposal to remove the fee schedule from its rules is before the Commission. I’m looking forward to learning more about these issues and appreciate your engagement.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR SINEMA
FROM GARY GENSLER**

Q.1. The pandemic has changed how we live, work, and do business. This includes the SEC and the companies it regulates. These changes include regulatory relief extended as a practical matter due to the remote nature of work during the pandemic, such as inspections of home offices. What regulatory activities do you anticipate reverting to in-person as we reach our new normal, and what regulatory activities can continue to be conducted remotely?

A.1. Since the beginning of the pandemic, the Division of Examinations (EXAMS) has conducted examinations through correspond-

¹ Darbyshire, Madison; Temple-West, Patrick. “‘A True Monopoly’: Fee Fight Reveals Heft of Wall Street Linchpin Broadridge”. *Financial Times*. August 24, 2021. <https://www.ft.com/content/5f912194-cd4e-424a-8d42-da3a98ca3836>; Stoller, Matt. “Other People’s Money: The Email Monopoly Gouging Investors Over Shareholder Reports”. *BIG*. August 24, 2021. <https://mattstoller.substack.com/p/other-peoples-money-the-email-monopoly>

ence to protect both the health and safety of its staff and those of SEC registrants. When it is safe to do, EXAMS expects to resume conducting examinations on-site, particularly where staff may benefit from in-person meetings and review of documents. EXAMS will likely continue to rely on correspondence examinations in certain instances such as where efficiencies can be gained from a remote presence. Further, in September, FINRA filed a proposed rule change with the Commission that would allow broker-dealers to continue to conduct branch office inspections remotely until June 30, 2022.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR SCOTT
FROM GARY GENSLER**

Q.1. Environmental, Social, and Governance (ESG) based investing is the form of investing by which investment decisions are made based on a firm’s environmental impact, its relationship with various communities and social agendas, and management culture. From 1995 through 2018, the number of assets in funds with ESG criteria increased from \$0.6 trillion to \$12 trillion, an increase of 2,000 percent. More than half of all public pension funds are now invested with ESG criteria.

I was concerned to learn that a recent study by the Center for Retirement Research at Boston College found that State mandates and ESG investing policies reduce annual returns by 70 to 90 basis points. As SEC Chairman, you have clearly telegraphed the Commission’s intention develop and implement mandatory climate risk investment disclosure by the end of 2021.

Based on the findings of the Boston College study cited above, would you agree that by making climate risk disclosures mandatory the SEC will be prioritizing a political agenda over financial returns for Americans saving for retirement?

A.1. Full and fair disclosure promotes efficiency, transparency, and competition in our markets, and is crucial to informed investment decision-making. It allows investors to decide what risks they wish to take.

From time to time the SEC freshens up our disclosure regimes to reflect investor demands. Today, investors in our markets increasingly want to understand the climate risks of the companies whose stock they own or might buy. Thus, I have asked SEC staff to develop a proposal for climate risk disclosure requirements—to provide consistent, comparable, and decision-useful disclosures—for the Commission’s consideration.

In the asset management space, many funds these days brand themselves as “green,” “sustainable,” “low-carbon,” and so on. I’ve directed staff to review current practices and consider recommendations about whether fund managers should disclose the criteria and underlying data they use to market themselves as such.

Q.2. In the same Boston College study, one main factor that researchers cited as contributing to lower returns for funds with ESG criteria were the increased fees associated with ESG disclosures and investing. ESG disclosures and investing requires a tremendous amount of research and trading, research and trading which

is often provided by a cadre of Wall Street banks, consultants, asset managers, and advisory firms. I fear that ESG investing may simply be another form of active trading aimed at bolstering Wall Street's bottom line.

Rather than lining the pockets of Wall Street traders and banks through high ESG investment fees and expenses, wouldn't most Americans be better served putting their money into broad market index funds or other instruments with very low or no management fees?

A.2. All registered funds, including ESG-focused funds, are required to provide clear and robust disclosure of their fees and expenses in their registration statements. This information allows investors to compare fees and expenses across funds and make informed investment decisions. Earlier this year, the SEC's Office of Investor Education and Advocacy issued an Investor Bulletin providing investors with information about ESG funds. The bulletin encourages investors to ask questions before investing in ESG funds and carefully read all of the fund's available information. When selecting an investment product, investors should make sure they understand the fees and expenses they will pay for a fund. The bulletin also reminds investors that they should compare the fees and expenses of an ESG fund to other available investment options.

Q.3. Digital assets are a new and exciting technological development that holds the potential to transform not just the finance industry, but also energy, logistics, art, and so many others. I know you have a background and understand the potential of this emerging technology sector.

As policymakers, we must ensure the United States remains a leader in the world for technology and financial innovation. Despite this, I noted that there are no proposed rulemakings on the SEC's most recent Unified Agenda related to digital assets. For these reasons, I'm perplexed by several of your recent public announcements and actions taken by the SEC regarding cryptoregulation.

Rather than releasing clear and transparent rules of the road for the industry, does the SEC plan to regulate via enforcement and one-off private staff guidance to stakeholders?

A.3. I support innovative developments in our capital markets. Before starting at the SEC, I had the honor of researching, writing, and teaching about the intersection of finance and technology at the Massachusetts Institute of Technology. In that work, I came to believe that, though there was a lot of hype masquerading as reality in the cryptofield, Satoshi Nakamoto's innovation is real. Further, it has been and could continue to be a catalyst for change in the fields of finance and money.

While I'm technology-neutral, I am anything but public policy-neutral. As new technologies come along, we need to be sure we're achieving our core public policy goals. In finance, that's about protecting investors and consumers, guarding against illicit activity, and ensuring financial stability.

I also believe that innovation should not be used to circumvent the important investor and market protections that are at the

heart of the SEC's mission—protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. Innovation in our capital markets has been ongoing over many decades and such innovation facilitates new and effective ways to invest, trade, and raise capital. As innovation in financial products and markets further develops, we will continue to foster that development while assuring compliance with the Federal securities laws.

Q.4. As we discussed during the hearing, over the last decade technological advancements and innovation have spurred competition among retail brokers, lowering costs and barriers to entry for retail investors. This has resulted in a younger and more diverse group of Americans reaping the benefits of stock ownership—many of them for the first time.

The existing rules regulating the markets have worked well to both foster and keep up with the pace of innovation and competition in the marketplace. I remain concerned that the SEC may move prematurely, and without sufficient analysis or stakeholder input, to pursue proposals that would raise costs and curb retail investor access to the markets.

Can you please provide additional details regarding the areas of regulation or market structure that, as SEC Chairman, you are encouraging the Commission to reexamine in an effort to ensure that the rules of the road are keeping pace with marketplace innovation?

A.4. We can't take our leadership in capital markets for granted. New financial technologies continue to change the face of finance for investors and issuers. More retail investors than ever are accessing our markets. Other countries are developing deep, competitive capital markets as well. Because of rapidly changing technology and business models, I think the SEC needs to look for opportunities to freshen up our rules related to market structure to continue to maintain markets that are the envy in the world.

Ultimately, promoting fair, orderly, and efficient markets can help reduce the cost of capital for issuers and increase the rate of returns for investors across each of the markets the SEC oversees—Treasury markets, corporate bonds, municipal bonds, mortgage and other asset back securities, equity markets, and security based swaps amongst others. This helps contribute to economic growth and is a competitive advantage for our Nation.

I recently addressed your core question—how we might reexamine regulation of market structure to ensure keeping pace with innovation—at a talk to the Securities Industry Financial Market Association.¹

Q.5. During our conversation at this hearing, one of the issues we both strongly agreed upon was the importance of small business and entrepreneurship in empowering Americans to accumulate wealth and achieve long-term financial stability. In some of your previous appearances before Congress the issue of business development companies, or BDCs, have been discussed. As you're probably well aware, there's been longstanding bipartisan support to reform the rules that apply to BDCs so they can deploy more capital

¹ <https://www.sec.gov/news/speech/gensler-sifma-110221>

to small and businesses throughout the country and provide the opportunity for them to grow.

One of these issues that's arisen is known as acquired fund fees and expenses, or AFFE. Essentially, AFFEs require a misleading disclosure about the actual cost of investing in BDCs and basically "double counts" investor expense. This creates an unintended consequence of harming both investors and small businesses by closing the door to increased investment.

This effectively discourages investment into American small businesses. For example, after this rule was implemented, we saw a decline in the number of BDCs available to invest in, resulting in a massive decline in investment and as such a decline in small business growth.

This has harmed both BDC investors and their portfolio companies and has had a negative economic effect in areas that have a large BDC presence, like South Carolina.

Please answer the following with specificity:

We know that BDCs play a vital role in providing opportunities for investors to help encourage small business growth. What can you tell us about the SEC's agenda to remove disincentives to invest in BDCs at this point?

Last year the SEC proposed a rulemaking that would have provided at least a partial fix for the AFFE problem, however there is bipartisan support for the SEC to go further and ensure that BDCs can be re-included in indices. What is the SEC's plan for finalizing this proposal and is your goal to facilitate institutional investment in BDCs?

A.5. The Commission has an outstanding proposal addressing AFFE, among a number of other disclosure topics. Specifically, the proposal would permit funds, including BDCs that make limited investments in other funds to disclose AFFE in a footnote to the fee table and fee summary, rather than as a fee table line item. Comments on the proposal have been mixed, with some supporting and others opposing the proposed changes. The staff is reviewing the comments received, and I look forward to engaging with the team and my fellow Commissioners on this topic.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR ROUNDS
FROM GARY GENSLER**

Q.1. Mr. Gensler, citizens and entrepreneurs alike are concerned the SEC will disrupt the domestic operation of the burgeoning crypto industry through "regulation by enforcement." Considering the unique characteristics of crypto assets, namely the ability to engage with exchanges globally or with counterparties directly, do enforcement actions have the potential to do more harm than good to the investing public?

A.1. The SEC's Division of Enforcement is responsible for investigating potential violations of the Federal securities laws and regulations and prosecuting the SEC's civil suits in the Federal courts as well as the SEC's administrative proceedings. As currently operating, I believe that cryptosecurities markets that are not registered or exempt from registration are acting outside of, and in noncompliance with, laws that provide important investor and mar-

ket protections. I have asked SEC staff, working with our regulatory and law enforcement partners, to use our current authorities to bring more investor protection to these markets, including by prosecuting violations of the law.

Q.2. Mr. Gensler, the SEC has been instrumental in developing U.S. capital markets into the global gold standard by addressing abuses such as market manipulation, insider trading, etc. Enforcement as a way to implement policy was effective, in part, because market actors fell under the same set of regulations, and citizens exclusively engaged the market through SEC regulated market actors. Cryptomarket structure, however, includes countless individuals and entities operating outside of the SEC's jurisdiction. Will the investing public be misled by the appearance that the SEC is the cop on this beat? More generally what, if any, assurances will the SEC be able to provide to citizens engaging with permissionless platforms?

A.2. The SEC's Division of Enforcement is responsible for investigating potential violations of the Federal securities laws and regulations and prosecuting the SEC's civil suits in the Federal courts as well as the SEC's administrative proceedings. As currently operating, I believe that the cryptosecurities markets that are not registered or exempt from registration are acting outside of, and in noncompliance with, laws that provide important investor and market protections. I have asked SEC staff, working with our regulatory and law enforcement partners, to use our current authorities to bring more investor protection to these markets, including by prosecuting violations of the law.

Q.3. Mr. Gensler, during the Senate Banking Committee hearing on oversight of the SEC, Senator Lummis inquired about responsible innovation. When you consider the breadth of products and services being deployed on permissionless blockchains, in your opinion do those products and services represent "responsible innovation?"

A.3. I support innovative developments in our capital markets. Before starting at the SEC, I had the honor of researching, writing, and teaching about the intersection of finance and technology at the Massachusetts Institute of Technology. In that work, I came to believe that, though there was a lot of hype masquerading as reality in the cryptofield, Satoshi Nakamoto's innovation is real. Further, it has been and could continue to be a catalyst for change in the fields of finance and money.

While I'm technology-neutral, I am anything but public policy-neutral. As new technologies come along, we need to be sure we're achieving our core public policy goals. For those who want to encourage innovations in crypto, I'd note that financial innovations throughout history don't long thrive outside of public policy frameworks. In finance, that's about protecting investors and consumers, guarding against illicit activity, and ensuring financial stability.

I also believe that innovation should not be used to circumvent the important investor and market protections that are at the heart of the SEC's mission—protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. Innovation in our capital markets has been ongoing over many dec-

ades and such innovation facilitates new and effective ways to invest, trade, and raise capital. As innovation in financial products and markets further develops, we will continue to foster that development while assuring compliance with the Federal securities laws.

Q.4. Mr. Gensler, are there unique opportunities for misuse or abuse of customer’s crypto assets compared to traditional markets? For example, what consideration is the SEC giving to things like rug pulls, trading bots, and so-called “extractable value?”

A.4. The SEC’s Division of Enforcement is responsible for investigating potential violations of the Federal securities laws and regulations and prosecuting the SEC’s civil suits in the Federal courts as well as the SEC’s administrative proceedings. As currently operating, I believe that the cryptosecurities markets that are not registered or exempt from registration are acting outside of, and in noncompliance with, laws that provide important investor and market protections. I have asked SEC staff, working with our regulatory and law enforcement partners, to use our current authorities to bring more investor protection to these markets, including by prosecuting violations of the law.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR TILLIS
FROM GARY GENSLER**

Q.1. I understand that mutual funds are forced to pay what some characterize as unreasonable “processing fees” to brokers just to have prospectuses and other SEC-required documents delivered to investors. These fees cost fund investors approximately \$220 million annually, which reduces the returns of retail mutual fund investors—Americans saving for their retirement, their children’s college education, and other important life goals. The SEC recently had an opportunity to reform the “processing fee” framework but opted instead to preserve the status quo. What steps might the SEC, under your leadership, take to right-size this regulatory system and protect the interests of retail fund investors?

A.1. Thank you for your interest in the “processing fee” framework. I agree that these are important issues. In fact, a New York Stock Exchange (NYSE) petition for Commission review of staff’s disapproval of a NYSE proposal to remove the fee schedule from its rules is before the Commission. I’m looking forward to learning more about these issues and appreciate your engagement.

Q.2. You have previously stated that bringing “greater transparency and resiliency”¹ to the U.S. Treasury market it is a priority of yours. I agree that the effort to strengthen the U.S. Treasury market should be a top priority. In a recent report released by the Group of Thirty, entitled “U.S. Treasury Markets; Steps Towards Increased Resilience”,² leading market experts and academics endorsed increasing public post-trade transparency as a key step regulators could take to strengthen the Treasury market. Do you agree that steps should be taken to increase the post-trade

¹ <https://static.politico.com/f9/3e/aa7bf5714cb19cea53a55c21a345/0623gensler-126251.pdf>

² <https://group30.org/images/uploads/publications/G30-U.S.-Treasury-Markets-Steps-Towards-Increased-Resilience-1.pdf>

transparency of U.S. Treasuries, bringing this market in-line with our stock, options, and corporate bond markets?

A.2. As outlined in a recent speech at the U.S. Treasury Market Conference, there is much work that can be done to bring greater efficiency, competition and transparency; market integrity; and resiliency to the \$23 trillion Treasury markets.³ The SEC plays a critical role in our overall efforts to improve the functioning of the Treasury market. I've asked staff to make recommendations for the Commission's consideration to freshen up our rules to reflect the state of the Treasury market today.

One work stream relates to data quality. Currently, the Trade Reporting and Compliance Engine (TRACE), a facility operated by FINRA, facilitates the mandatory reporting of over-the-counter transactions in Treasury securities. TRACE does not publicly disseminate any information about these individual transactions. Further, only broker-dealers that are registered with FINRA, however, report Treasury transactions to TRACE, leaving out major market participants like commercial banks and proprietary trading firms.

I support the Fed's recently announced new rule requiring large banks to report transactions to TRACE. I've asked staff to continue to work with FINRA, the Department of the Treasury, and the Federal Reserve to consider further enhancements to TRACE. In part to help make the TRACE data set more comprehensive, I have directed the SEC staff to consider whether nonbank firms that significantly trade in the Treasury market should be registered as dealers with the SEC and required to become TRACE-reporting members of FINRA.

Q.3. Though many in industry have asked the Federal Reserve over the past several years to update the outdated margin eligibility rules under Regulation T (i.e., which securities are eligible to be held on margin), the Fed has yet to act. Without revised guidance, many established companies that are not traded on a national stock exchange, including hundreds of community banks across the U.S., are disadvantaged because their stock is not margin eligible. In the past, the SEC has exercised authority over the Federal Reserve's margin rules as applied to securities of foreign companies. Will the Commission consider working with the Federal Reserve, or issuing updated guidance, to review and modernize the margin requirements so that investors in qualified companies can take advantage of margin benefits?

A.3. I'm looking forward to working with you and your staff to learn more about this issue.

Q.4. As Americans work to rebuild financially following the COVID-19 pandemic, Congress and Federal regulators should look for ways to encourage capital formation. Unfortunately data reveals that the number of public offerings continues to decline, a trend already in place prior to the pandemic. Fewer companies go public and those that do, often do so later in their life cycle, depriving investors of alpha. Investors—informed and able to make reasoned financial decisions—should be able to invest in private markets to access growth opportunities and diversify holdings with this asset

³ <https://www.sec.gov/news/speech/gensler-us-treasury-market-conference-20211117>

class. Last year, the Commission took an important first step to expand the definition of accredited investor based on financial sophistication instead of a strict income or wealth-based test.

Do you believe wealth and income is the only way a person should be able to qualify as an accredited investor?

Will you commit to examining other metrics to allow investors to demonstrate financial sophistication and ability to assess risk, including the possibility of a test to determine financial sophistication?

A.4. Historically, the accredited investor definition has generally used wealth and income based criteria as proxies to determine those persons whose financial sophistication may render certain protections of the Securities Act’s registration process superfluous.

The Commission recently expanded the definition of accredited investor to provide additional measures for establishing an individual’s financial sophistication that are not connected to their annual income or net worth.

The Dodd–Frank Act directs the Commission to review the accredited investor definition at least every 4 years to determine whether the definition should be modified or adjusted. The next required review is due to be completed no later than 2023. I expect the Commission will carefully review both how effectively the wealth- and income-based criteria of the accredited investor definition—along with the effectiveness of the recently adopted amendments—are serving their intended regulatory function and what impact any changes in those thresholds would have.

Q.5. During the hearing last week you reiterated that major changes to equity market structure, including banning payment for order flow, are still “on the table.” If the SEC intends to ban PFOF, will you commit to considering and analyzing alternatives to such a ban before moving forward?

A.5. I have not reached any conclusions with regard to equity market structure and have asked the staff to develop recommendations for consideration by the Commission. In this regard, I’ve asked staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I’ve asked staff to consider whether shrinking tick sizes, reevaluating what is included in the National Best Bid and Offer, enhancing disclosure, or leveling competition between trading venues and wholesalers could increase transparency and competition. I’ve asked staff to consider the potential conflicts of interest in the context of payment for order flow and on-exchange use of rebates. Further, such review includes consideration of enhancements of rule 605 with regard to order execution information.

Q.6. During last week’s hearing, you stated that the goal in equity market structure reform is to improve “competition in the marketplace to lower the cost and raise the efficiency.” Given possible reforms you have discussed—including allowing exchanges to execute in sub-penny increments and updating the “out of date measuring rod” (or the NBBO) by which best execution is measured—could achieve the objectives of increased competition and efficiency, shouldn’t we explore the impact of these ideas before contemplating

out-right bans on business practices (like PFOF), which would clearly limit competition?

A.6. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.7. You have previously stated that execution firms who transact off-exchange get valuable information about retail orders that other market participants do not have and as such, execution firms have an improper information advantage. You may be aware that every trade—regardless of execution venue—must be immediately reported to the public tape for market wide dissemination and incorporation into real-time price discovery. While we acknowledge that scale conveys operational benefits, your statements suggest that you are conflating operational scale with an improper information advantage that harms competition and retail investors. Can you please elaborate on the data and analysis you conducted on our U.S. Equities markets to make those statements, including a list of factors you are assessing and comparing to determine whether or not one firm has an information advantage over another?

A.7. As you note, executed trades in NMS stocks are publicly reported and disseminated. Certain off-exchange execution dealers that receive the great majority of retail investor orders, typically known as wholesalers, however, receive information earlier than or beyond what is publicly reported and disseminated. Examples of such additional information include: (1) information on investor orders prior to execution or cancellation, including the submission of nonmarketable limit orders that wholesalers typically route out to exchanges for execution, as well as investor “stop loss” orders (orders that are not executable until the stock price hits the stop price selected by the investor); and (2) the identity of the routing broker (typically a broker that focuses on retail investors) for executed trades. In contrast, the public reports of orders executed in the off-exchange market do not identify the wholesaler that executed the trade or the identity of the retail broker whose customer submitted the order.

Q.8. You have been critical of the PFOF model, contending that it presents inherent conflicts of interest for broker-dealers and that retail customers are harmed through inferior execution quality. It is my understanding that among the ways retail brokers cure the potential conflict is to require similar PFOF arrangements from all of their execution partners such that all pay the same rate and retail brokers similarly put all of their execution partners in competition against one another to compete on execution quality—not amount of PFOF. Thus, retail brokers award order flow based on the a market center’s ability to consistently provide best execution as measured by a variety of factors including price improvement levels, size improvement levels, and service levels. According to filings made to the SEC by broker dealers, retail investors received over \$3.6 billion in price improvement dollars from execution firms in 2020 as measured under current SEC Rule 605 metrics.

Do you agree that retail brokers should route orders to the market center where they have the highest likelihood of obtaining the most favorable execution for their customers? Why? Why not?

Do you agree that uniform payment rates adequately mitigate the theoretical conflict? Why? Why not?

A.8. I believe that our equity market structure should promote the opportunity for investor orders to receive best execution and have asked the staff to develop recommendations in this area. Retail brokers should route orders to the market center where they can be executed on the best terms reasonably available in the market, which is required of brokers pursuant to the duty of best execution they owe to their customers.

Further, it is not clear that a uniform PFOF rate, as you describe it, adequately mitigates the conflict concerns raised by PFOF.

Q.9. Relatedly, are you familiar with the concept of “size improvement”? That’s where an execution firm fills an order for greater size than the size available at the NBBO. For example, a retail customer has an order for 1,000 shares, but there are only 300 shares being offered at the NBBO. The execution firm offers “size improvement” by executing the full 1,000 share order at or better than the NBBO, giving the customer a better price than she would have received if the order were sent to an exchange. I’ve been told that when you factor in both price improvement and size improvement, retail investors benefited to the tune of \$11 billion in 2020. This amount is missing from the current Rule 605 reports due to shortcomings in Rule 605—a shortcoming which many folks, including exchanges, argue should be addressed.

Do you agree that Size Improvement is a valuable benefit that retail receives today? Why? Why not?

If retail orders are forced onto exchanges, where do you suppose the Size Improvement would come from?

A.9. I have not reached any conclusions with regard to equity market structure and have asked the staff to develop recommendations for consideration by the Commission. In this regard, I’ve asked staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I’ve asked staff to consider whether shrinking tick sizes, reevaluating what is included in the National Best Bid and Offer, enhancing disclosure, or leveling competition between trading venues and wholesalers could increase transparency and competition. I’ve asked staff to consider the potential conflicts of interest in the context of payment for order flow and on-exchange use of rebates. Further, such review includes consideration of enhancements of rule 605 with regard to order execution information. Your query with regard to size improvement is amongst questions I’ve asked staff to consider when making recommendations.

Q.10. If the SEC were to ban PFOF, broker-dealers naturally would need to find alternative sources of revenue in order to run their businesses. I have a very difficult time understanding how a retail investor is better off paying \$9.99 or even \$4.99 a trade than under the current framework where there is no commission for trading and retail investors receive very substantial price and size

improvement from execution firms. Moreover, even if some brokers retained a zero commission model wouldn't you expect those revenues to be made up in less transparent ways like margin interest rates, lower interest rates on cash balances, inactivity fees, and other methods. What analysis have you and your staff done to determine how a return to commission-based trading will impact retail investors—especially lower-income investors? What data did you use?

A.10. I agree that transparency is a one of the SEC's important tools to promote competition in the U.S. equity markets. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.11. On multiple occasions, you have pointed out that other jurisdictions, including Canada and the U.K. have banned PFOF and forced trading onto lit exchanges. In these statements, you've suggested that the investor experience in those jurisdictions is better as a result. Can you please elaborate on the data and analysis you conducted to make those statements, including a list of factors you are assessing and comparing to determine that retail investor execution quality is better in those markets compared to the U.S.?

A.11. I have noted that other jurisdictions have prohibited their brokers from accepting PFOF from off-exchange venues. Amongst key questions on which I have asked the staff to consider in developing recommendations is what we can learn from these other markets and how our market structure could be improved to provide an opportunity for retail investors to receive the best possible execution quality for their orders.

Q.12. There is substantial research out there suggesting that the investor experience is worse in jurisdictions that have implemented rules forcing trades to be executed on exchanges rather than requiring brokerages to route orders to the market centers that provide the most favorable execution for the investor. According to an analysis by the CFA Institute, in Canada retail investors' average price improvement dropped 70 percent after such rule was adopted.

Do you believe that forcing retail orders to go to exchanges—rather than requiring brokerages to route based on best execution—will achieve the best outcome for retail investors? Why? Why not?

Do you agree that forcing retail order flow to exchanges will be a significant financial win for exchange operators at the expense of retail investors? Why? Why not?

A.12. Fair competition between market centers is essential for our market structure. I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.13. You have made comments suggesting that the recent growth in "off-exchange" trading is harmful to investors, and that our equity markets would benefit from more trades being routed to lit ex-

changes. Do you agree that investors' orders should be executed wherever they are able to obtain the most favorable execution? Why? Why not?

A.13. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. With regard to the equity markets, I've asked staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.14. Under the current framework, retail brokers incentivize competition for order flow by rewarding execution firms that provide superior execution quality. Forcing more retail order flow to exchanges would remove this direct link which is necessary for brokers to hold execution firms accountable and thus would reduce the competition that drives the price and size improvement benefits that retail investors receive today.

Do you agree that forcing retail orders on-exchange will reduce the retail brokers' ability to demand better price and size improvement benefits for retail investors? Why? Why not?

Do you agree that forcing retail order flow to exchanges will be a significant financial win for exchange operators at the expense of retail investors? Why? Why not?

A.14. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I've asked staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.15. In addition, there is hard data showing that forcing trades onto lit exchanges does not result in better executions for investors. For example, data from the SEC's Tick Size Pilot showed that, for the category of securities that included a "Trade-At" requirement that orders be executed on lit exchanges, spreads in fact widened more than other test groups. The same result flowed from similar "Trade-At" initiatives in other jurisdictions, such as Canada and Australia. What data and analysis do you have from our markets to suggest that the opposite outcome will occur in the U.S.?

A.15. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.16. Chair Gensler, I am sure you would agree with me that the proliferation of low or no-commission online trading firms has greatly reduced the barriers to entry for retail investors to access the markets. Firms like Robinhood that introduced commission-free trading are responsible for attracting tens of millions of new investors to our markets who are saving for college, to buy a home, or for retirement. This phenomenon—which was made possible by the

current regulatory structure that promotes competition among a diverse array of market participants, including retail brokers and execution firms that compete for order flow—has often been called the “democratization” of investing and has greatly promoted financial inclusion in the U.S. As you are considering potential changes to equity market structure, will you commit to me that you will refrain from pursuing any drastic changes that will threaten the substantial gains we have made in promoting financial inclusion?

A.16. New financial technologies continue to change the face of finance for investors and issuers. More retail investors than ever are accessing our markets.

Promoting fair, orderly, and efficient markets can help reduce the cost of capital for issuers and increase the rate of returns for investors across each of these markets. This helps contribute to economic growth and is a competitive advantage for our Nation. Market integrity is about financial inclusion and fairness of the markets. Promoting inclusion and equal access facilitates greater competition among capital providers.

As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.17. I am writing to ask if you have had a chance to review my letter submitted to you on June 9, 2021, regarding the harmful impacts that the proposed amendments to Rule 144 put forth under former Chairman Clayton will have on small businesses. Prohibiting the “tacking” of the time between the investment and the conversion in calculating the relevant holding period under Rule 144 for market-adjustable convertible loans and other convertible securities provided to unlisted public companies would lead to a significant decrease in capital.

Have you and your staff had a chance to properly collect data and review how this proposed rule change could remove access to capital from the small and microcap markets

What impact the disappearance of this capital will have on women and minority-owned businesses? If so, what are your findings on likely and possible adverse impacts?

A.17. Thank you for your continued engagement on important aspects of Rule 144. As noted in my prior reply to your letter, the staff is actively working on developing recommendations for the Commission concerning the proposed amendment to Rule 144. Currently, the staff is actively reviewing public comment submissions in response to a request for data or studies that would facilitate estimating effects on access to capital, as well as comments on all aspects of the analysis, including the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR KENNEDY
FROM GARY GENSLER**

Q.1. Chairman Gensler, you have previously stated that it is a priority of yours to bring “greater transparency and resiliency” to the U.S. Treasury market. I agree that the effort to strengthen the U.S. Treasury market should be a top priority.

In a recent report released by the Group of Thirty, entitled “U.S. Treasury Markets; Steps Towards Increased Resilience”, leading market experts and academics endorsed increasing public post-trade transparency as a key step regulators could take to strengthen the Treasury market.

Do you agree that steps should be taken to increase the post-trade transparency of U.S. Treasuries, bringing this market in-line with our stock, options, and corporate bond markets?

A.1. As outlined in a recent speech at the U.S. Treasury Market Conference, there is much work that can be done to bring greater efficiency, competition and transparency; market integrity; and resiliency to the \$23 trillion Treasury markets.¹ The SEC plays a critical role in our overall efforts to improve the functioning of the Treasury market. I’ve asked staff to make recommendations for the Commission’s consideration to freshen up our rules to reflect the state of the Treasury market today.

One work stream relates to data quality. Currently, the Trade Reporting and Compliance Engine (TRACE), a facility operated by FINRA, facilitates the mandatory reporting of over-the-counter transactions in Treasury securities. TRACE does not publicly disseminate any information about these individual transactions. Further, only broker-dealers that are registered with FINRA, however, report Treasury transactions to TRACE, leaving out major market participants like commercial banks and proprietary trading firms. I support the Fed’s recently announced new rule requiring large banks to report transactions to TRACE. I’ve asked staff to continue to work with FINRA, the Department of the Treasury, and the Federal Reserve to consider further enhancements to TRACE. In part to help make the TRACE data set more comprehensive, I have directed the SEC staff to consider whether nonbank firms that significantly trade in the Treasury market should be registered as dealers with the SEC and required to become TRACE-reporting members of FINRA.

Q.2. I would like to ask you about a longstanding problem that needlessly reduces the returns of retail mutual fund investors—Americans saving for their retirement, their children’s college education, and other important life goals. I understand that mutual funds are forced to pay excessive and unreasonable “processing fees” to brokers just to have prospectuses and other SEC-required documents delivered to investors. These fees cost fund investors approximately \$220 million annually. The SEC recently had an opportunity to reform the broken “processing fee” framework but preserved the status quo.

What is the SEC going to do, under your leadership, to fix this broken system and protect the interests of retail fund investors?

¹ <https://www.sec.gov/news/speech/gensler-us-treasury-market-conference-20211117>

A.2. Thank you for your interest in the “processing fee” framework. I agree that these are important issues. In fact, a New York Stock Exchange (NYSE) petition for Commission review of staff’s disapproval of a NYSE proposal to remove the fee schedule from its rules is before the Commission. I’m looking forward to learning more about these issues and appreciate your engagement.

Q.3. It is widely accepted that one of the principal reasons for the 2008 financial crisis was inflated credit ratings from Credit Rating Agencies (CRAs). As a result of the crisis, the SEC was required to study and recommend a new model for how credit rating agencies should operate. If no model was adopted by the SEC, and independent board would recommend a solution.

Given that the SEC has not recommended a new model for NSROs and other Credit Rating Agencies since Dodd–Frank became law more than 10 years ago, will you implement an independent board as prescribed by the Dodd–Frank Act’s adoption of the bipartisan Franken–Wicker Amendment?

A.3. Weaknesses at credit rating agencies contributed to the 2008 financial crisis, as the “issuer pays” model led to conflicts and potentially misaligned incentives. Section 939F of Dodd–Frank mandated that the SEC issue a report to Congress on its findings and recommendations regarding the credit rating process for structured finance products and various conflicts of interest. Additionally, Dodd–Frank provides the SEC rulemaking authority to address these conflicts of interest and directs the SEC to “give thorough consideration to the provisions of the [Franken–Wicker amendment] . . .”. As required under section 939F, the SEC issued a report to Congress titled “Report to Congress on Assigned Credit Ratings” in December 2012. As noted in the Spring 2021 Unified Regulatory Agenda, the Office of Credit Ratings is considering recommending that the Commission propose rules and amendments designed to address the conflicts of interest associated with the issuer-pay business model (i.e., the NRSRO receives compensation from issuers and obligors for rating the securities of the issuer or the obligor) and increase transparency and promote competition for the ratings of securities.

Q.4. As I have raised with your predecessors in the past, once fully operational, the Consolidated Audit Trail (CAT) will be the largest Government database of its kind, capturing all trading activity in equity securities and listed options in the U.S. as well as information on all individuals and institutions engaged in such trading. The CAT will ultimately hold data on 100 million plus retail and institutional accounts. This massive database will be a major target for hackers and foreign enemies. Investors trust the U.S. stock market with their savings and expect that their privacy is protected by the firms where they hold their accounts. The SEC’s CAT puts their privacy at risk by collecting personal information it doesn’t need.

Earlier this year I introduced the Protecting Investors’ Personally Identifiable Information Act that would prohibit the Securities and Exchange Commission (SEC) from requiring brokers to submit investors’ personally identifiable information and instead obtain this data by requesting it from the broker. To address the SEC’s

concern that such a process takes too long, the bill would require brokers to provide the data to the SEC within 24 hours.

Do you agree that the approach in my bill is a better and safer approach to protecting investors' data than the one currently contemplated by the CAT?

When do you intend to finalize Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security; Release No. 34-89632; File No. S7-10-20; RIN 3235-AM62, especially the sections that relates to the personal information the CAT can and cannot collect?

A.4. The protection of investors' personally identifiable information is critically important. The Commission previously issued relief that exempts the SROs from collecting or retaining the most sensitive data: (1) individual social security numbers and individual tax payer identification numbers; (2) dates of birth, and (3) account numbers. As a result of the relief, broker-dealers are required to report only "phone-book" type information: that is, name, address, and birth year. The Commission has proposed to codify the exemptive relief, and to adopt some additional protections for all CAT data, in the CAT Data Security Amendment. Commission staff are currently considering comments on the proposed amendments.

Q.5. It's been nearly 10 years since Allen Stanford's arrest for running the second largest Ponzi scheme in U.S. history and the collapse of Stanford Financial Group. Over 21,000 victims of Mr. Stanford's crimes, throughout the United States, have yet to be repaid in any meaningful way, collecting 11 cents on the dollar of the \$7.2 billion swindled from them. These victims, who purchased what were marketed as safe Certificates of Deposit, are primarily working class families. These families continue to deal with the economic overhang and financial hardship inflicted upon them by the Stanford Fraud each and every day.

Last year several Senators and I wrote to the SEC urging the Chairman to audit the books of the court appointed receiver, Ralph Janvey, who has proven to be dysfunctional, and demands high fees from victim's compensation, most recently a \$300 fee deducted from the recovery amount to transfer funds into their bank accounts. The receiver has recovered \$937 million for victims, however total receiver fees and expenses incurred exceeds \$210 million and is at least 38 percent of the amounts distributed to the wronged investors. This year, the receiver sought and was approved for a 42 percent hourly rate fee hike, and is further seeking approval for fees and expenses up to \$2.5 million for the months of March and April 2021.

I am constantly receiving complaints from my constituents about the lack of transparency of the receivership.

What role does the SEC have in overseeing fees charged by the receiver, which have already exceed \$210 million?

Will you commit to reporting back on whether increased SEC oversight is meaningfully improving recoveries for victims?

If increased oversight is not meaningfully improving recoveries, will you petition the Federal court in Texas for removal of the receiver?

The core problem here is that the Securities Investor Protection Corporation (SIPC) refused to help these victims, on legal and technical grounds. Now I know the SEC sued SIPC and lost. I respect the SEC for trying to do right.

What recommendations do you have for us, here in Congress, to fix this gross injustice?

A.5. The Receiver was appointed by the United States District Court for the Northern District of Texas, and he reports to the court. To be paid, the Receiver must submit, and the court must approve, detailed fee applications. While the SEC does not have formal oversight or audit authority over the Receiver, both SEC staff and the court-appointed Examiner closely monitor the work and fee applications of the Receiver. Our staff reviews and questions the Receiver's fee applications before they are filed, and has objected to prior fee applications. For example, the SEC objected to the recent increase in the Receiver's hourly rate, but the district court approved the increase anyway, over the SEC's objection. Should Congress determine that additional legislation is necessary to address similar challenges that might arise in the future, the SEC staff and I would be happy to work with your staff and you on possible legislation.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR MORAN
FROM GARY GENSLER**

Q.1. You have previously stated that execution firms who transact off-exchange get valuable information about retail orders that other market participants do not have and because of this, execution firms have an improper information advantage. You may be aware that every trade—regardless of execution venue—must be immediately reported to the public tape for market wide dissemination and incorporation into real-time price discovery. While we acknowledge that scale conveys operational benefits, your statements suggest that you are conflating operational scale with an improper information advantage that harms competition and retail investors.

Can you please elaborate on the data and analysis you conducted on our U.S. Equities markets to make those statements, including a list of factors you are assessing and comparing to determine whether or not one firm has an information advantage over another?

A.1. As you note, executed trades in NMS stocks are publicly reported and disseminated. Certain off-exchange execution dealers that receive the great majority of retail investor orders, typically known as wholesalers, however, receive information earlier than or beyond what is publicly reported and disseminated. Examples of such additional information include: (1) information on investor orders prior to execution or cancellation, including the submission of nonmarketable limit orders that wholesalers typically route out to exchanges for execution, as well as investor "stop loss" orders (orders that are not executable until the stock price hits the stop price selected by the investor); and (2) the identity of the routing broker (typically a broker that focuses on retail investors) for executed trades. In contrast, the public reports of orders executed in the off-exchange market do not identify the wholesaler that executed the

trade or the identity of the retail broker whose customer submitted the order.

Q.2. You have been critical of the PFOF model, contending that it presents inherent conflicts of interest for broker-dealers and that retail customers are harmed through inferior execution quality. It is my understanding that among the ways retail brokers cure the potential conflict is to require similar PFOF arrangements from all of their execution partners such that all pay the same rate and retail brokers similarly put all of their execution partners in competition against one another to compete on execution quality—not amount of PFOF. Thus, retail brokers award order flow based on the a market center’s ability to consistently provide best execution as measured by a variety of factors including price improvement levels, size improvement levels, and service levels.

According to filings made to the SEC by broker dealers, retail investors received over \$3.6 billion in price improvement dollars from execution firms in 2020 as measured under current SEC Rule 605 metrics.

Do you agree that retail brokers should route orders to the market center where they have the highest likelihood of obtaining the most favorable execution for their customers? Why? Why not?

Do you agree that uniform payment rates adequately mitigate the theoretical conflict? Why? Why not?

A.2. I believe that our equity market structure should promote the opportunity for investor orders to receive best execution and have asked the staff to develop recommendations in this area. Retail brokers should route orders to the market center where they can be executed on the best terms reasonably available in the market, which is required of brokers pursuant to the duty of best execution they owe to their customers.

Further, it is not clear that a uniform PFOF rate, as you describe it, adequately mitigates the conflict concerns raised by PFOF.

Q.3. Relatedly, I want to discuss “size improvement,” where an execution firm fills an order for greater size than the size available at the NBBO. For example, a retail customer has an order for 1,000 shares, but there are only 300 shares being offered at the NBBO. The execution firm offers “size improvement” by executing the full 1,000 share order at or better than the NBBO, giving the customer a better price than she would have received if the order were sent to an exchange. I’ve been told that when you factor in both price improvement and size improvement, retail investors benefited to the tune of \$11 billion in 2020. This amount is missing from the current Rule 605 reports due to shortcomings in Rule 605—a shortcoming which many folks, including exchanges, argue should be addressed. We understand that your view is that retail orders should be forced onto an all-to-all exchange for order-by-order competition.

Do you agree that Size Improvement is a valuable benefit that retail receives today? Why? Why not?

If retail orders are forced onto exchanges, where do you suppose the Size Improvement would come from?

A.3. I have not reached any conclusions with regard to equity market structure and have asked the staff to develop recommendations for consideration by the Commission. In this regard, I’ve asked

staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I’ve asked staff to consider whether shrinking tick sizes, reevaluating what is included in the National Best Bid and Offer, enhancing disclosure, or leveling competition between trading venues and wholesalers could increase transparency and competition. I’ve asked staff to consider the potential conflicts of interest in the context of payment for order flow and on-exchange use of rebates. Further, such review includes consideration of enhancements of rule 605 with regard to order execution information. Your query with regard to size improvement is amongst questions I’ve asked staff to consider when making recommendations.

Q.4. If the SEC were to ban PFOF, broker-dealers naturally would need to find alternative sources of revenue in order to run their businesses. I have a very difficult time understanding how a retail investor is better off paying \$9.99 or even \$4.99 a trade than under the current framework where there is no commission for trading and retail investors receive very substantial price and size improvement from execution firms. Moreover, even if some brokers retained a zero commission model wouldn’t you expect those revenues to be made up in less transparent ways like margin interest rates, lower interest rates on cash balances, inactivity fees, and other methods.

Do you agree that transparency is important to fostering competition among retail brokers? Why? Why not?

What analysis have you and your staff done to determine how a return to commission-based trading will impact retail investors—especially lower-income investors? What data did you use?

A.4. I agree that transparency is a one of the SEC’s important tools to promote competition in the U.S. equity markets. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.5. On multiple occasions, you have pointed out that other jurisdictions, including Canada and the U.K. have banned PFOF and forced trading onto lit exchanges. In these statements, you’ve suggested that the investor experience in those jurisdictions is better as a result.

Can you please elaborate on the data and analysis you conducted to make those statements, including a list of factors you are assessing and comparing to determine that retail investor execution quality is better in those markets compared to the U.S.?

A.5. I have noted that other jurisdictions have prohibited their brokers from accepting PFOF from off-exchange venues. Amongst key questions on which I have asked the staff to consider in developing recommendations is what we can learn from these other markets and how our market structure could be improved to provide an opportunity for retail investors to receive the best possible execution quality for their orders.

Q.6. There is substantial research out there suggesting that the investor experience is worse in jurisdictions that have implemented rules forcing trades to be executed on exchanges rather than requiring brokerages to route orders to the market centers that provide the most favorable execution for the investor. According to an analysis by the CFA Institute, in Canada, retail investors' average price improvement dropped 70 percent after such rule was adopted.

Do you agree that competition among market centers is essential to operating efficient and resilient markets? Why? Why not?

Do you believe that forcing retail orders to go to exchanges—rather than requiring brokerages to route based on best execution—will achieve the best outcome for retail investors? Why? Why not?

Do you agree that forcing retail order flow to exchanges will be a significant financial win for exchange operators at the expense of retail investors? Why? Why not?

A.6. Fair competition between market centers is essential for our market structure. I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.7. You have made comments suggesting that the recent growth in “off-exchange” trading is harmful to investors, and that our equity markets would benefit from more trades being routed to lit exchanges.

Do you agree that investors' orders should be executed wherever they are able to obtain the most favorable execution? Why? Why not?

A.7. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. With regard to the equity markets, I've asked staff to consider: how do we facilitate greater competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.8. Under the current framework, retail brokers incentivize competition for order flow by rewarding execution firms that provide superior execution quality. Forcing more retail order flow to exchanges could remove this direct link which is necessary for brokers to hold execution firms accountable and thus would reduce the competition that drives the price and size improvement benefits that retail investors receive today.

Do you agree that forcing retail orders on-exchange will reduce the retail brokers' ability to demand better price and size improvement benefits for retail investors? Why? Why not?

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competition and efficiency on an order-by-order basis—when people send each order into the marketplace? I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.9. There is hard data showing that forcing trades onto lit exchanges does not result in better executions for investors. For example, data from the SEC’s Tick Size Pilot showed that, for the category of securities that included a “Trade-At” requirement that orders be executed on lit exchanges, spreads in fact widened more than other test groups. The same result flowed from similar “Trade-At” initiatives in other jurisdictions, such as Canada and Australia.

What data and analysis do you have from our markets to suggest that the opposite outcome will occur in the U.S.?

Do you agree that forcing retail order flow to exchanges will be a significant financial win for exchange operators at the expense of retail investors? Why? Why not?

A.9. As noted above, I believe that our market structure should provide investor orders with an opportunity for the best possible execution. I have not reached any conclusions in this area and have asked the staff to develop recommendations for consideration by the Commission.

Q.10. There has been significant debate about the form that climate disclosures should take—mandates vs. guidance, prescriptive vs. principles-based, et cetera.

What direction do you believe the Commission will take in the proposal and what types of modeling are you doing to determine which form will yield the most informative disclosures for investors?

Will any of the various existing standards be used for mandatory ESG reporting (SASB, GRI, CDP)?

As you know, the Task Force on Climate-Related Financial Disclosures is only a framework and not a reporting standard. Does the SEC plan to incorporate TCFD into mandatory reporting requirements and if so, how might this be structured into metrics reporting?

Will mandatory reporting include verification and/or third party certification of reported elements? How has the SEC considered the cost of the increased burden of data gathering, verification, certification, and auditing?

It is undeniable that climate and ESG disclosures more broadly may have global impacts, but several international jurisdictions are seemingly ahead of the U.S. and the SEC in promulgating reporting obligations and standards around climate change and ESG. To that end, how do you see the Commission becoming more engaged with global standard setters in the coming years, particularly in leadership roles since U.S. markets are the deepest and most liquid in the world?

A.10. Today, investors increasingly want to understand the climate risks of the companies whose stock they own or might buy. Large and small investors, representing literally tens of trillions of dollars, are looking for this information to determine whether to invest, sell, or make a voting decision one way or another. Investors

are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs.

I have asked the staff of the Division of Corporation Finance to develop recommendations for the Commission to consider. The staff are currently engaged in that process, including considering how best to structure any recommended disclosure proposals.

As staff put together their recommendations, we have benefited from the input that the public submitted this spring. Among other frameworks and standards, many commenters referred to the Task Force on Climate-related Financial Disclosures (TCFD) framework. I've asked staff to learn from and be inspired by these external standard-setters. I believe, though, we should move forward to write rules and establish the appropriate climate risk disclosure regime for our markets, as we have in prior generations for other disclosure regimes.

Our Division of Economic and Risk Analysis will conduct an economic analysis that will carefully consider the effects on efficiency, competition, and capital formation along with investor protection of any proposal that the Commission considers.

Q.11. There is a longstanding problem that needlessly reduces the returns of retail mutual fund investors—Americans saving for their retirement, their children's college education, and other important goals. I understand that mutual funds are forced to pay excessive and unreasonable “processing fees” to brokers just to have prospectuses and other SEC-required documents delivered to investors. These fees cost fund investors approximately \$220 million annually. The SEC recently had a clear opportunity to reform the broken “processing fee” framework and failed to do so, just leaving it as it is.

What is the SEC going to do, under your leadership, to fix this broken system and protect the interests of retail fund investors?

A.11. Thank you for your interest in the “processing fee” framework. I agree that these are important issues. In fact, a New York Stock Exchange (NYSE) petition for Commission review of staff's disapproval of a NYSE proposal to remove the fee schedule from its rules is before the Commission. I'm looking forward to learning more about these issues and appreciate your engagement.

Q.12. In its request for information on climate disclosures promulgated by then-Acting Chair Allison Lee, the SEC included a question on whether disclosure requirements should extend to private companies. Specifically, question 14 posed the following question:

“What climate-related information is available with respect to private companies, and how should the Commission's rules address private companies' climate disclosures, such as through exempt offerings, or its oversight of certain investment advisers and funds?”

In your view, does the SEC have the authority to regulate the disclosure activities of private companies?

Does the SEC intend to promulgate rules or guidance that targets climate-related disclosures for privately held businesses?

A.12. Today, investors increasingly want to understand the climate risks of the companies whose securities they own or might buy. Large and small investors, representing literally tens of trillions of

dollars, are looking for this information to determine whether to invest, sell, or make a voting decision one way or another. Investors are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs. I have asked the staff of the Division of Corporation Finance to develop recommendations for the Commission to consider to provide investors with decision-useful disclosures. The staff are currently engaged in that process.

Over the last several decades, the Commission has adopted several rules to create safe harbors from registration requirements under Section 5 of the Securities Act. These regulations provide issuers with greater certainty than statutory exemptions alone. Many of these existing regulatory transaction and resale exemptions include disclosure requirements. Advisers to private funds also have disclosure obligations and antifraud liability.

Q.13. In June of this year, the SEC announced that it would reexamine and therefore not enforce the Proxy Advisor Rule that had been adopted by a majority of the Commission in July 2020 following a meticulous and years-long process under the Administrative Procedure Act. The Proxy Advisor Rule was guided by efforts to increase transparency, quality, and accountability in the proxy advisory system in the United States.

When does the SEC expect to announce further regulatory action related to the Proxy Advisor Rule?

Could you describe how SEC staff will conduct an appropriate review of the rule given that the SEC has decided not to enforce the existing rule before it has gone into effect?

How will the SEC's additional regulatory actions prioritize increasing the transparency, quality, and accountability around proxy advisor firms?

A.13. Although some parts of the 2020 rules are not yet effective, other parts have been effective since November 2020. We have heard concerns from market participants who use the proxy advisory firms about the rules' current and future possible impact on the independence, timeliness, and costs of the advice.

Last Wednesday, November 17th, the Commission voted to propose amendments to these rules. Those proposals are tailored to address the independence, timeliness, and cost concerns raised by clients of proxy advisory firms and the confusion around sources of liability. The proposals would make no change to the conflict of interest disclosure requirements of the 2020 amendments. The release further clarifies, but does not alter, the application of the antifraud provisions of our proxy rules to proxy voting advice. These proposals are now in the notice and comment process and we encourage the public to share their views with the Commission.

Q.14. News sources have reported that the SEC informed Coinbase that it would sue if Coinbase launched its cryptocurrency lending product, but has not disclosed the reasoning for its decision—either to Coinbase or the public.

Appreciating that the SEC's mission is both "to protect investors" and "maintain fair, orderly, and efficient markets," does the Commission have any plans to disclose its reasoning for barring lending products like the one proposed by Coinbase?

Wouldn't the issuance of public guidance help prevent the development of products the SEC finds problematic?

A.14. I cannot comment on any particular product. To the extent that crypto asset platforms are offering or selling crypto assets that are securities or securities derivatives, or are engaging in other activities that involve securities, the Federal securities laws would apply. The definition of security is intended to be broad, in order to encompass new and different types of investments that are presented to investors and that need the protections of the Federal securities laws. Whether a particular instrument is within the definition of security is based on the facts and circumstances. As I have stated at the hearing, none of the significant crypto asset trading platforms are registered as securities exchanges with the SEC or are operating pursuant to an exemption from registration, such as the exemption for alternative trading systems. The SEC has been clear about how it applies the Federal securities laws in this area, as explained, for example, in the 2017 DAO Report and SEC settled orders.

Q.15. You indicated in your testimony that you are working with the CFTC and other Federal agencies on policy frameworks for digital asset issues.

Could you be more specific on how you are working with the CFTC?

Are other CFTC and SEC Commissioners involved in these discussions?

A.15. The SEC and CFTC work closely and collaboratively on a wide range of crypto asset-related issues. Both agencies have dedicated offices responsible for staying abreast of developments in the crypto asset space, and our respective staff communicate frequently about these developments. Our efforts are assisted further by our respective participation in broader interagency initiatives, such as the President's Working Group on Financial Markets, which worked on addressing issues related to stablecoins. The SEC and CFTC also both participate in multiple international bodies that are addressing crypto asset-related issues, such as the International Organization of Securities Commissions. Dating back to the Shad-Johnson accord, the SEC and CFTC have repeatedly been called on to address issues that implicate the unique and also the overlapping jurisdictions of each agency and, in response, we have worked collaboratively on areas where our authorities overlap. We will continue to closely communicate and work together to ensure the integrity and transparency of our financial markets.

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR DAINES
FROM GARY GENSLER**

Q.1. On August 27, the Securities and Exchange Commission (the Commission) issued a 78-page "Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology To Develop and Provide Investment Advice". In addition to defining "digital engagement

practices” (DEPs) for the first time, the Commission poses 91 categories of questions. The Commission also makes clear that these questions are “not intended to limit the scope of comments, views, issues, or approaches to be considered.” Furthermore, the Commission requests “statistical, empirical, and other data” in response to its questions on the newly defined DEPs.

This is an exceedingly broad request for information on a loosely defined topic that could be relevant to nearly every financial services company. I am concerned that the unusually short current 30-day comment deadline of October 1 is insufficient to allow thoughtful and data backed engagement with the SEC on this topic—and breaks with the Commission’s own practice of providing a longer comment period for similar requests. For example, the SEC’s March 15 request for public input on climate disclosure gave commenters 90 days to respond.

Will you extend the comment period past the October 1 deadline?

Will you consider giving longer, more reasonable comment periods for RFIs in the future?

A.1. As you note, the comment period for the Request closed on October 1. To date, we have received over 2,000 comments in response to the Request, including many responses from retail investors to our “Feedback Flyer”. The Commission evaluates comment periods on a case by case basis consistent with the applicable law.

Although the comment period has closed, we continue to welcome additional feedback, including statistical, empirical and other data, as we consider all of the comments and evaluate potential next steps.

Q.2. Can you provide an update on what the Commission has done to date, and what it is planning to do moving forward, to protect seniors from fraudulent scams?

A.2. Deterrence through strong enforcement action has been an important part of the SEC’s efforts to protect senior investors, and the Division of Enforcement places a high priority on investigating frauds targeting seniors. For example, on February 4, 2021, the SEC announced charges against three individuals and their affiliated entities with running a Ponzi-like scheme that raised over \$1.7 billion from over 17,000 senior and other retail investors. In addition, the Division’s Retail Strategy Task Force develops and implements strategies for identifying potential violations to uncover the types of misconduct that most affect individual investors, with a focus on data-driven approaches, and investigates cases that involve schemes targeting the most vulnerable members of the investing public, often including senior investors. With the Office of Investor Education and Advocacy, the Division also seeks to educate senior investors so they can better protect themselves, through investor outreach, including in partnership with AARP, and issuing alerts and bulletins to educate seniors and other investors.

Finally, on June 15, 2021, in recognition of World Elder Abuse Awareness Day, the SEC, the North American Securities Administrators Association (NASAA), and the Financial Industry Regulatory Authority (FINRA) announced a training program to assist securities firms in identifying and reporting exploitative activity against seniors.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

LETTER FROM AMERICAN SECURITIES ASSOCIATION

September 14, 2021

The Honorable Sherrod Brown
 Chairman
 Committee on Banking, Housing,
 and Urban Affairs
 United States Senate
 Washington, DC 20510

The Honorable Patrick Toomey
 Ranking Member
 Committee on Banking, Housing,
 and Urban Affairs
 United States Senate
 Washington, DC 20510

Re: September 14th hearing "Oversight of the U.S. Securities and Exchange Commission"

Dear Chairman Brown and Ranking Member Toomey:

The American Securities Association (ASA)¹ appreciates this opportunity to provide comments to the Senate Banking Committee in advance of its oversight hearing of the U.S. Securities and Exchange Commission (SEC). The SEC has a critical three-fold mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Since its founding, the ASA has actively engaged with the SEC and members of Congress to provide policy recommendations and ensure the SEC carries out its mission in a transparent manner.

As the Committee receives the testimony of Chairman Gensler, we urge members to consider the following issues of importance to our capital markets:

- **The need for regulatory clarity surrounding the growing market and trading of cryptocurrencies.** Over the last few years, the combination of new technologies and the "gamification" of trading has led to an explosion of interest and speculative trading in cryptocurrencies. Many young investors – who have never experienced adulthood without a smartphone and apps that provide instant gratification in their hands – increasingly day trade cryptocurrencies on any number of unregulated trading platforms, many of which lack transparency into fees and spreads.

This has led to a kind of "Wild West" when it comes to crypto and presents significant risks for new and inexperienced investors who have not gone through a sustained market and economic downturn that depresses asset prices over a long period of time.

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 geographically diverse membership of almost one hundred companies located in every corner of the United States.





Regulators – including the SEC – have taken a confusing approach to regulating cryptocurrencies and crypto platforms. Instead of providing public statements or interviews that hint at what the SEC may or may not do in the future when it comes to crypto, we believe the SEC must take bold and comprehensive action to establish rules of the road and protect investors.

This includes approving applications for exchange-traded funds that hold cryptocurrencies. Approval of funds that hold physical cryptocurrency would help capital flow into investment products that are regulated and transparent. Providing clear rules would also assist registered brokers in navigating this new world to ensure their clients have access to alternative products but are not exposed to potentially harmful risks including unfair pricing.

- **Addressing the “gamification” of trading and risks to investors.** The ASA was pleased by Chairman Gensler’s recent request for information surrounding the gamification trading and new digital trading apps whose business model is based upon facilitating heavy trading by retail investors.² The ASA has submitted several comments to Congress and the SEC surrounding this issue encouraging regulators to consider whether these mobile apps are actually soliciting investors to enter into certain trades and should therefore be subject to Reg BI and other SEC rules.

We also believe the SEC should consider whether it is appropriate for apps to provide investors, with little to no trading experience, the ability to use margin in order to lever up their investments.

Finally, the Committee and the SEC should understand the interplay between equity option spreads, cryptocurrency spreads, and gamification. Wide spreads are common in equity option and cryptocurrency markets. Orders with large spreads often generate unusually large profits. It is worth researching whether business models using algorithms that incent retail investors to trade investment products with large spreads can lead to less-than-optimal order execution that directly harms retail investors.
- **Reforming equity market structure.** The ASA believes the SEC has put off meaningful equity market structure reforms for far too long. It needs to take action to address the conflicts of interest and monopolization that are present in today’s markets.³ This includes a full examination of payment for order flow (PFOF), including both exchange PFOF and wholesale PFOF. The conflicts inherent in the PFOF model call into question whether investors are truly receiving the best price for their orders and whether brokers

² <https://www.sec.gov/news/public-statement/gensler-dep-request-comment>

³ <https://www.americansecurities.org/post/asa-outlines-market-structure-reforms>





are fulfilling their best execution obligations. We also believe it's necessary to examine the NBBO and decide whether it reflects the best price given the large amount of off-exchange trading in today's markets.

Additionally, we believe the SEC can improve capital formation by taking on certain legacy market structure issues, such as allowing emerging growth companies (EGCs) to trade on a single exchange venue and to determine their own intelligent tick-size.

- **Congress should implement a capital formation agenda if the SEC fails to do so on its own.** The ASA previously submitted recommendations to the banking Committee that would expand upon the success of the 2012 Jumpstart our Business Startups (JOBS) Act and provide tailored regulatory relief for EGCs and other small issuers.⁴

These recommendations include: (1) Improving research coverage for pre-IPO companies and EGCs; (2) Scaling disclosure and other regulatory requirements for EGCs and small issuers to reduce burdens upon public company shareholders; (3) Proving greater transparency around the practice of short selling and cracking down on illegal behavior; and (4) Avoiding regulatory loopholes that expose investors to unnecessary risks, such as exempting certain merger and acquisition (M&A) brokers or private placement finders from SEC regulations.

- **Regulation Best Interest is Working.** We strongly suggest that the SEC refrain from making any changes to Reg BI's national standard through enforcement, examination, or interpretations. Reg BI is transparent, it has benefited investors, and it works, which is why we see no need to tinker with it. We are very concerned the SEC may seek to rewrite current law without going through the notice and comment process required under the Administrative Procedure Act. We ask the committee to exercise vigorous oversight of our concerns.
- **Remove opaque Chinese companies from U.S. exchanges.** One of the biggest risks posed to U.S. investors over the last decade was the listing of Chinese companies – including many controlled or influenced by the Chinese Communist Party (CCP) – on U.S. exchanges. Most of these companies regularly failed to comply with U.S. laws regarding the auditing of financial statements, proper disclosure, and governance. Unsurprisingly, there have been several high-profile scandals that have harmed U.S. investors. This problem is exacerbated by a loophole which allows passive investment funds to hold Chinese companies as part of their portfolios, diverting billions of dollars from U.S. investors into these entities.

⁴ <https://www.americansecurities.org/post/asa-releases-proposals-to-foster-economic-growth-and-small-business-capital-formation>



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The ASA was a strong supporter of the bipartisan Holding Foreign Companies Accountable Act, and we hope that the House will ultimately pass Sen. Kennedy's Accelerating Holding Foreign Companies Accountable Act to ensure that Chinese companies that do not follow U.S. law are delisted as swiftly as possible.

In the meantime, the SEC should exercise its authority to question whether companies listed on American stock exchanges and not in compliance with U.S. laws should continue to be made available for trading to the American investing public. Investors should understand how it is possible for exchange listing standards to allow companies that do not comply with U.S. laws to continue to be listed on their markets.

Finally, Chair Gensler has taken a courageous step by prohibiting Chinese IPOs that use the VIE structure and he should be commended for that. We believe he also has the power to remove every listed Chinese company that uses the VIE structure from our markets. The use of complicated shell company structures to divert American investor money into China deprives shareholders of their rights and it threatens our national security. Chairman Xi has used Chinese companies to manipulate our capital markets and harm American investors for far too long- it's time for that to end.

The ASA appreciates the Committee's ongoing attention to these issues, and we look forward to serving as a resource to members of Congress and the SEC.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association



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