

MEMO# 33796

September 30, 2021

SEC Chair Gensler's Testimony on September 14 Before the Senate Banking Committee: Market Structure, ESG, and Cryptocurrencies

[33796]

October 1, 2021

TO: ICI Members

Advertising Compliance Advisory Committee

Derivatives Markets Advisory Committee

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Fixed-Income Advisory Committee

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SEC Rules Committee

Securities Operations Advisory Committee SUBJECTS: Advertising

Derivatives

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ESG

Financial Stability

Fintech and Digital Assets

Fixed Income Securities

Trading and Markets RE: SEC Chair Gensler's Testimony on September 14 Before the Senate Banking Committee: Market Structure, ESG, and Cryptocurrencies

On September 14, SEC Chair Gary Gensler testified before the Senate Banking, Housing, and Urban Affairs Committee as part of that committee's oversight of the SEC. His testimony covered four topics from the SEC's unified agenda: (i) funds and investment management; (ii) market structure; (iii) predictive data analytics; and (iv) issuers and issuer disclosure. Chair Gensler's remarks are summarized below.[\[1\]](#)

Funds and Investment Management[\[2\]](#)

Chair Gensler noted that he asked the staff to consider ways to determine what stands behind funds' claims that they are "green," "sustainable," "low carbon," etc., and to ensure

that investors have the necessary information to understand their investment choices among these types of funds.

Separately, he pointed out that the staff is "developing a proposal for the Commission's consideration on cybersecurity risk governance,[\[3\]](#) which could address issues such as cyber hygiene and incident reporting."

The Chair also indicated that he asked the staff for recommendations on how to "build greater resiliency in both money market funds and open-end bond funds," building on feedback the SEC has received on the President's Working Group report.

Market Structure

Chair Gensler indicated that he asked the staff to "take a look at five market structure-based projects: the Treasury market, non-Treasury fixed income markets, equity markets, security-based swaps, and crypto asset markets."

Treasury Markets

Chair Gensler stated that he asked the staff to work with the Treasury Department and the Federal Reserve on ways to "enhance resiliency and competition" in Treasury markets. To that end, he noted that the SEC will "seek to consider some of the recommendations that external groups, like the Group of Thirty and Inter-Agency Working Group for Treasury Market Surveillance, have offered around potential central clearing for both cash and repo Treasuries."

He also mentioned that he asked the staff to "reconsider some initiatives on Treasury trading platforms" as well as 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."

Non-Treasury Fixed Income Markets & Equity Markets

Chair Gensler indicated that he asked the staff for recommendations on how to "bring greater efficiency and transparency to the non-Treasury fixed income markets" (i.e., the markets for corporate bonds, municipal bonds, and asset-backed securities) which he noted are "critical to issuers."

With regard to equity markets, Chair Gensler stated that he asked the staff for recommendations on how the SEC can "facilitate greater competition and efficiency on an order-by-order basis," especially as "past reforms and new technologies may have led to more segmented markets and higher concentration amongst market makers." Such conditions further led him to question whether the consolidated tape (i.e., the National Best Bid and Offer) "fully reflects the full range of activity on exchanges."

Chair Gensler also remarked that he asked the staff for recommendations on "how [to] address financial conflicts in the market," especially given his belief that "payment for order flow and exchange rebates may present a number of conflicts of interest."

Lastly, Chair Gensler indicated that he directed the staff to work on a draft proposal on the shortening of the standard settlement cycle, which he noted "could reduce costs and risks in our markets."

Security-Based Swaps

Beyond the rules related to security-based swaps that the SEC will implement this year^[4] and those that it has yet to finish, Chair Gensler stated that he asked the staff for recommendations on how the SEC can "finalize mandates to stand up the regime established under the Dodd-Frank Act" and whether the SEC should implement its regime for security-based swap execution facilities consistent with what the CFTC did for swap execution facilities.

He also noted that he asked the staff, in light of the collapse of the Archegos family office, to think about drafting rules with regard to requiring "disclosure for positions in security-based swaps and related securities."

Crypto Asset Markets

Chair Gensler emphasized that there is not "enough investor protection in crypto finance, issuance, trading, or lending;" and that "this asset class is rife with fraud, scams, and abuse." Thus, he asked the staff to work with other regulatory agencies^[5] on how to "best bring investor protections to these markets," and to determine if there are any gaps that, with Congress's assistance, the regulators may be able to fill.

Chair Gensler also noted that "to the extent that there are securities on [crypto] trading platforms, under our laws they have to register with the Commission unless they qualify for an exemption."

Predictive Data Analytics

Chair Gensler noted that while trading platforms' "new capabilities to tailor marketing and products to individual investors" may increase access and choice, these new capabilities also "raise new questions about potential conflicts within the brokerage, wealth management, and robo-advising spaces." Such models, he stated, may also "inadvertently reflect historical biases embedded in data sets that may be proxies for protected characteristics, like race and gender."

Further, the Chair suggested that "advances in predictive data analytics may raise some systemic issues when we apply new models and artificial intelligence across the [US] capital markets," and referenced the SEC's recent request for comment on digital engagement practices.^[6]

Issuers' Climate Risk Disclosures

Chair Gensler indicated that he asked the staff to develop proposals for the Commission's consideration on how to provide the "consistent, comparable, and decision-useful disclosures around climate risk, human capital, and cybersecurity" that investors are looking for. He stated that he believes "the SEC should step in when there is this level of demand for information relevant to investor's investment decisions."

Special Purpose Acquisition Companies (SPACs), China, and 10b-5-1 Plans

Chair Gensler remarked that he has asked the staff for recommendations about enhancing disclosures in SPACs, as "there are a lot of fees and potential conflicts of interest inherent within SPAC structures," and investors should receive "clear information so that they can better understand the costs and risks."

With regards to China, the Chair pointed out that the SEC is working on enhancing

disclosures for Chinese companies issuing securities in the US, especially those that use variable interest entity structures to get around Chinese prohibitions on the sale of ownership stakes to foreigners. He noted that the SEC is 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."

Lastly, Chair Gensler stated that he asked the staff for recommendations on how to "tighten Rule 10b5-1 to modernize this 20-year-old safe harbor and fill perceived gaps in [the SEC's] insider trading regime."

Nicolas Valderrama
Law Clerk

endnotes

[1] See Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 14, 2021), available at <https://www.sec.gov/news/testimony/gensler-2021-09-14>.

[2] In addition to the remarks below, Chair Gensler also stated that he believes the SEC can enhance private funds' disclosures, particularly around managers' potential conflicts of interest and the fees they charge. Enhanced disclosures, he noted, would better enable pension funds and other investors to get the information they need to make investment decisions.

[3] In a separate speech, Chair Gensler later clarified that he asked the staff to work on two proposals on cybersecurity risk governance, one addressing issuers and another addressing funds. Prepared Remarks by Gary Gensler Before the Asset Management Advisory Committee, Washington, D.C., (Sept. 27, 2021), available at <https://www.sec.gov/news/public-statement/gensler-amac-2021-09-27>.

[4] For example, in November, security-based swap dealers and major security-based participants will begin registering with the SEC and new post-trade transparency rules will go into effect. Beginning on February 14, 2022, swap data repositories will be required to disseminate data about individual transactions to the public.

[5] He pointed out that the SEC is working with the CFTC on investor protection matters, and that it is working on a broader set of policy frameworks along with the Federal Reserve, the Department of Treasury, the Office of the Comptroller of the Currency and other members of the President's Working Group on Financial Markets.

[6] See 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, SEC Release No. 34-92766 (Aug. 27, 2021), available at <https://www.sec.gov/rules/other/2021/34-92766.pdf>.

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