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OVERSIGHT OF THE U.S. SECURITIES AND EXCHANGE COMMISSION

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BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

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SECOND SESSION

ON

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

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OVERSIGHT OF THE U.S. SECURITIES AND EXCHANGE COMMISSION

THURSDAY, SEPTEMBER 15, 2022

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

The Committee met at 10:02 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.

Today's hearing, as usual, is in the hybrid format. Witnesses are in person. The witness, Mr. Gensler, nice to see you, Chair. Our witnesses are—Members have the option to appear in person or virtually.

Welcome back, Chair Gensler, to this Committee.

Workers and their families do not measure the economy by the stock market; neither should we. It is why in the Senate and in the still new Biden administration we work to create an economy that delivers results for people who get their incomes from a paycheck, not an investment portfolio, raising wages and good-paying jobs, and lowering costs. It means fighting the corporate price gouging that so often hurts consumers and the unfair labor practices that so often hurt workers. It means investing in American manufacturing and the workers and farmers who drive it. It means making sure our financial watchdogs keep our economy and our markets stable.

At the SEC, that includes going after companies that try to cheat the market. Chair Gensler is doing that very well. It means strengthening corporate disclosures to stay ahead of risks like climate change. It means looking into the practices of private equity and hedge funds as they stretch their tentacles into more and more areas of our economy.

It has been an eventful year. This summer, the Senate confirmed President Biden's two nominees to the SEC. I know both new commissioners got right to work on the many issues before this Agency and the Commission and its dedicated staff have been busy.

Republicans on this Committee have bellyached, and I assume will today, about your ambitious agenda. If Wall Street and its allies are complaining, it tells me you are doing your job. You put America's savings first. You focus on transparency and fairness,

two concepts critical to making sure our markets work for everyone, not just insiders, not just corporate execs.

The SEC must continue making enforcement a priority. Bad actors are always coming up with new schemes to separate people from their hard-earned money or to cheat the rules to gain a little bit more for themselves. Under your watch, SEC has increased prosecution for insider trading which, as of course you know, under the Trump administration had fallen to the lowest level in a generation.

In April, this Committee considered a Reed-Menendez bill that would outlaw insider trading in statute. The House has already passed a similar bill; the Senate must. Last month, we saw the successful results of bipartisan work of our Committee Members to improve transparency and fight fraud.

In 2020, Senator Kennedy, who is sitting to my left, more or less, and Senator Van Hollen pushed for the passage of the Holding Foreign Companies Accountable Act, a bill to stop the U.S. Stock Exchange trading of foreign companies with China based auditors that refused to comply with our oversight laws. Because that law jumpstarted negotiations, the Public Company Accounting Oversight Board signed an agreement with Chinese authorities that will, finally, allow auditors to begin inspections.

In March, the President signed an Executive order establishing a whole-of-Government strategy for digital assets. While agencies across our Government look at how we respond to the growth of crypto and best protect Americans' money, we know the SEC continues to enforce the laws, going after cryptotokens that violate security laws, shutting down crypto Ponzi schemes, charging insider trading crimes in crypto.

Over the last year in the Banking, Housing, and Urban Affairs Committee, we have looked at how crypto assets are used in scams and frauds and play a role in illicit finance. We heard from the Treasury Under Secretary who testified on the President's Working Group report on stablecoin.

This morning, the Ag Committee downstairs and Senator Smith and I on this Committee, on the Democratic side, sit on both of these Committees is considering a crypto bill sponsored by Senators Stabenow and Boozman that focuses on digital commodities. I appreciate their work to create regulation in the crypto space.

It is critical, though, that we are careful and deliberate in drawing jurisdictional lines. In this kind of regulation, we have to prevent gaps and close loopholes that can be exploited or abuse. It is not easy. It is why action by the Agriculture Committee and the Commodity Futures Trading Commission Agency, Chair Gensler is very familiar with, why that action is welcome, but we also know it is not enough.

When Congress wrote Dodd-Frank, we fixed the problems in the oversight of the over-the-counter derivatives market. It is a lesson we need to remember, thinking of the damage that was done prior to when it comes to crypto. Our regulators need to work together to make sure investors and consumers and market stability come first.

SEC's work on climate risk disclosure is an important example of how to improve the market's understanding of risk and to pro-

vide transparency and comparability. Clarity and uniformity are key. If only a subset of companies provides disclosure and they do so in whatever form they want, that does not serve anyone. Investors outside the U.S. already benefit from standardized climate risk disclosure. It is time the U.S. market did as well.

SEC's recent rule proposal to require more disclosure about corporate stock buybacks will also bring much needed transparency to the market. Thank you for that.

We know stock buybacks are a big problem. They distort the market. They funnel profits to executives at the expense of long-term investment in workers and in innovation. The process allowed for these buybacks has only made them more manipulative. For decades, companies have been able to announce stock buybacks to juice their stock price, but then they only provide details months later on how, when, and even whether they even completed their plans. Under SEC's new proposal, the market and the SEC would understand when companies are buying their stock and if executives are buying or selling at the same time.

Taken together with unprecedented steps in the Inflation Reduction Act to finally tax these buybacks—and I appreciate Senator Tester and others on this Committee supporting that—these are the first real steps we have seen in years to rein in this Wall Street scheme, another example of a new President of the United States who fights for workers and sides with workers.

Chair Gensler, I look forward to hearing more about other ways the SEC is working to hold bad actors accountable and protect Americans who invest their hard-earned money in the markets.

Ranking Member Toomey.

OPENING STATEMENT OF SENATOR PATRICK J. TOOMEY

Senator TOOMEY. Thank you, Mr. Chairman.

Chairman Gensler, welcome back to the Committee. Good to see you again.

The SEC, as we all know, has a critical role to play in protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. Unfortunately, some of the SEC's recent actions and inactions raise concern about how well it is carrying out this important mission. Take for example the SEC's handling of crypto lending platforms like Celsius and Voyager. Celsius and Voyager were offering interest rates as high as 18 percent if customers would lend their digital assets to them. The firms would then lend that crypto to presumably other larger investors to make short-term bets on cryptomarkets. But once the crypto selloff began, many borrowers could not pay their debts, and these platforms froze customer accounts.

The SEC did take enforcement action against BlockFi for similar activities last winter yet somehow let Celsius and Voyager continue through the spring when both companies blew up and found themselves in bankruptcy, with investors staring at billions in losses. Where was the SEC?

And where has the SEC been in clarifying the rules of the road for cryptomarket participants? The Chairman insists in his written testimony that "the vast majority" of cryptotokens are securities, but he has also acknowledged that Bitcoin is not. Now presumably,

that is because Bitcoin is so thoroughly decentralized, but that naturally raises the question: Where on the decentralization continuum does a token cease to be a security?

Most of these tokens do not even have a financial claim on the issuer. Doesn't that make these tokens very different from at least the vast majority of ordinary securities?

And if the Chairman is right that most tokens should be considered securities, then, as he himself states in his written testimony, "It follows that many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity."

But crypto transactions typically can be settled in real time on chain and without intermediaries. As a result, crypto intermediaries often serve different customer needs, they have got different business models, and they pose different risks than traditional securities intermediaries.

All of that raises the question: What is the crypto specific roadmap for these crypto intermediaries to register?

Stepping back, I think there is a larger problem here. As Bloomberg columnist Matt Levine put it, "Chairman Gensler's posture is that he should be in charge of writing the rules for crypto but not write them. I just do not see how that can work." I think Mr. Levine has a good point.

Given the novel nature of these tokens, really, Congress ought to step in and provide clarity. In particular, we need to revisit the definition of security as part of a larger effort to tailor a regulatory framework that is calibrated to the unique risks and activities of the cryptomarket.

As I have said, cryptotokens have varying degrees of decentralization, they usually do not have a financial claim on the issuer and typically can be settled in real time without intermediaries. These are very major and important differences from traditional securities, and they merit a clearly stated and tailored regulatory framework.

Now while the SEC has failed to provide the regulatory clarity in the cryptomarkets, it has been issuing numerous controversial and burdensome rules and proposed rules in the ordinary securities market. Top of that list is the SEC's climate disclosure rule. Public companies are already required, legally required, to disclose material climate change information. The proposed rule, however, would go much further, to require disclosure of exceedingly extensive global warming data.

This data will be enormously expensive to collect, but almost none of it will be material to a business's finances. For annual reports alone, the SEC estimates that aggregate external compliance costs for issuers will increase from $1.9 billion per year to $5.2 billion per year if the SEC's proposed climate disclosure rule becomes effective. The SEC itself again estimates that the external compliance cost of a company going public will increase by more than five times at a time when excessive regulatory costs are already resulting in ever fewer companies going public. The cost of compliance will be more material to the investor than the information itself.

But, of course, the climate disclosure rule is not really about informed investment decision. It is about equipping climate activists with data to run political pressure campaigns against companies,

which will often be to the detriment of shareholders. The end game is to discourage capital investment in oil, in natural gas, and other traditional energy industries, and we have seen how well that is working out in Europe.

The SEC is wading into controversial public policy debates that are far outside its mission and its expertise, and they are doing it without the legal authority to do so. And in the process, the SEC risks politicizing the Agency, slowing economic growth, increasing inflation, and possibly even undermining national security.

So given the importance of these issues, Banking Committee Republicans have written to the SEC, asking basic questions about how the SEC developed the climate disclosure rule. Instead of providing real, substantive answers, the SEC has been stonewalling us. Well, the SEC may not want to answer to Congress on its climate disclosure rule, but ultimately, the SEC will have to answer to the courts, which should make it nervous. The Supreme Court has repeatedly held "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions. It does not, one might say, hide the elephants in mouse holes."

This summer, the Supreme Court applied this sensible principle in the West Virginia v. EPA case. There, it ruled that the Executive branch and its agencies cannot use novel interpretations of existing law to pretend that they have got a legal authority to support sweeping policy changes, including on climate change, that Congress never intended. Well, that is precisely what the SEC appears to be trying to do with its climate disclosure rule. The SEC should consider itself to be on notice by the Court that the separation of powers still exists and will be upheld.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Toomey.

Today, we will hear from Securities and Exchange Commission Chair Gary Gensler. This is his annual trip here, but he sometimes does that more often, and we thank him for that.

And, Chair Gensler, you are particularly welcome because this will—we have a very good, well above average turnout today, so enjoy that, but thank you for joining us, Chair Gensler.

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

Mr. GENSLER. Chair Brown, Ranking Member Toomey, and Members of the Committee, I am honored to appear here before you today. I want to start just by thanking you, this Committee and all of Congress, for confirming our two new commissioners, Mark Uyeda, who I know worked up here on the Hill, Jaime Lizárraga, who worked on the other side of the Capitol for 32 years, terrific commissioners. It is welcome that we have a full complement.

As is customary, I want to say that I am speaking for myself; I do not speak on behalf of the fellow commissioners or the staff in this hearing.

I would like to start by just discussing 2 key years in policymaking a while back: 1933, 1934. I think it was when Chair Fletcher sat in this seat, Chair Brown, if I recall my history right, but it was in the middle of the Great Depression. And President Roo-

sevelt and Congress addressed the crisis through a number of landmark reforms, and among them, Congress and FDR came together to craft the first two Federal securities laws. In 1933, President Roosevelt also suspended the use of the gold standard. In other words, in those two critical years, one could say that we replaced one gold standard with, I would like to say, another, the securities laws.

I really do believe the core principles of the securities markets have contributed to America's economic success and geopolitical standing. There was a basic bargain in there that investors get to decide on what risks they want to take, but there was a cop on the beat in securities laws where there was full, fair, and truthful disclosure.

As we execute our mission to protect investors, maintain fair and orderly, efficient markets, and facilitate capital formation, we cannot take the leadership for granted, though. Even gold medalists, especially gold medalists, constantly train to stay ahead of the competition. And I do thank Senators Kennedy and Van Hollen to help us a little bit with this issue with China. We must remain vigilant to opportunities to drive greater efficiency, integrity, resiliency across our remit.

First, markets work best when they are efficient. Now what does that mean? That means that there is competition, there is transparency in the middle of the market. When we lower the costs in the middle, that means issuers have lower costs to raise money and investors get better returns.

So we have done a lot, but we have not updated our national market system, our equity system in 17 years. Imagine if you had in your pocket a phone that was 17 years old. You would think, oh, my God, maybe I should update that phone. Technology moves fast.

We are also looking at the efficiency of our Treasury market and, yes, our private funds market. Issuers and investors also would benefit from greater competition because it lowers the cost of capital, as I said.

Second, our system works best when there is integrity in the market, and hence, we have rule proposals to bring greater integrity into the market around special purpose acquisition companies, the insiders trading plans, and so forth.

But another area is crypto, as Ranking Member Toomey raised. Of the nearly 10,000 tokens in the cryptomarket, I do believe that the vast majority are securities. Offers and sales of these securities tokens are covered by the securities laws, and given that, as the Ranking Member quoted me as saying, it follows that many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity.

I would note when Chair Fletcher was in that seat there was not a central electronic clearing and you could actually exchange a security, person to person, in a paper form.

Thus, staff is working with market participants to help ensure investors get time-tested protections in the market. In that work and any work that Congress does, I do think we have to make sure that we do not inadvertently undermine the securities laws underlying a $100 trillion capital market. That is the sort of motherlode. That is our capital markets. Crypto is 1/100th that size.

Third, markets work best when they are resilient, both in normal times and stress. We have seen those stresses in 2008 and 2020. History tell us, no doubt, we will have stresses again in the future. That is just the nature of economics and finance. Thus, we have a number of projects on resiliency. This includes shortening the settlement cycle. This includes the work we are doing in the Treasury markets. It includes the work we are doing around money market funds and open-end funds and cybersecurity.

In all our work, we are anchored by the laws Congress passed, the courts' interpretation of those laws, economic analysis, and public input. And as the Commission, we benefit greatly from public input including from Congress and this Committee, Members, and I stand ready to meet with any of you, one on one, nearly any time you want. We benefit from that feedback.

Our capital markets are the gold standard. Let us do everything we can to keep them that way.

I thank you. I look forward to questions.

Chairman BROWN. Thank you, Chair Gensler. I think what you have said—and I have heard you say this before in smaller groups, publically, and bigger groups—that we cannot allow the cryptomarket to undermine a $100 trillion capital market, that is fundamentally our job here. Consumer protections, all that, but fundamentally that is our job in the Banking, Housing, and Urban Affairs Committee, and that is yours.

You have made improving transparency in corporate disclosures a priority. In addition to the climate risk disclosures, enhanced stock buyback information I mentioned earlier, the Commission is addressing cybersecurity risks, improving visibility, if you will, into concentrated ownerships of stocks. Discuss briefly why it is critical that we improve these types of disclosure for investments, large and small investors, and for how markets operate.

Mr. GENSLER. I would say, there is two core things and it goes back to our founding. One was this basic bargain that investors get to decide as long as they get the full and fair disclosure, material disclosures, but full and fair disclosures, and they get to decide, and you cannot defraud them and mislead them. That lowers the cost of capital actually because then there is trust in the market.

The second thing that transparency does is it helps promote competition in the markets, and competition, that is the nature of things. It promotes our economies as well and that competition amongst intermediaries, amongst people trying to raise money from the public.

So I would say those are the two things, not to mention also market integrity.

Chairman BROWN. Thank you. I have noticed today—I commented, and Senator Toomey has confirmed this, that we have seen—we will see an unusually high turnout of Republicans for this hearing today. I think that the turnout of Republicans, many of whom, against all evidence—many Republican Senators, many of whom, against all evidence, are climate deniers, will, I would assume, ask you questions about that, but let me go with that.

On climate risk disclosure, specifically, discuss why your Agency is—what you are proposing is not, quote, making climate policy but, rather, how improving disclosure helps all investors.

Mr. GENSLER. Well, it is because right now hundreds of companies and investors representing not trillions, but tens of trillions of dollars of assets under management, are in this conversation already. Investors get to decide. We are not a merit regulator. Some people think we might be; we are not. We are a disclosure-based regulator.

But investors today want to know about climate risk because it matters to the future path of the performance, financial and other performance. What are customers going to do? What is the supply chain going to do? What might happen around the globe? Because our U.S. issuers are operating in many jurisdictions around the globe.

So it really does go back into when I buy or sell a stock, or vote a proxy, climate risk matters to those investors. We have a role to help bring some consistency to those disclosures, so they are already happening.

Chairman BROWN. Your clearly saying you are not a merit regulator but a disclosure regulator is really important here, and I hope my colleagues remember that you said that and think that through as they ask their questions.

Let me ask about crypto in the last minute-and-a-half, the cryptomarkets type securities and banking and commodities laws. My colleagues developed legislation, as you know, that would give the CFTC jurisdiction over part of the cryptomarket. Remind us why it is important—I will ask two questions together, so you can take the last minute-and-a-half.

Remind us why it is important for financial regulators to coordinate oversight to make sure that gaps or loopholes do not exist. And, would you agree to continue to work with our Committee, the CFTC, and the banking regulators to make sure we get this right?

Mr. GENSLER. I do commit to that. Let me just say, when I say that it is important to protect and ensure that the $100 trillion securities market works, it is because that is the heart of how we price risk in our financial markets and how investors save. And this Committee and the House Financial Services Committee oversees that and wrote into law that there was one cop on the beat, one regulator.

The definition of securities should be, I think, kind of the exclusive remit of these two Committees—you know, I am looking across the aisle—and the agency that you set up. If we end up with that there is multiple Federal agencies defining what a security is and another agency tries to define it, it could undermine what we are doing as to when is a Treasury security a security, when is something else in the equity markets or elsewhere a security.

To your question about working together, we work together with the other Federal financial regulators. We just yesterday announced something in the Treasury markets that we worked hand in glove with the Treasury and the Federal Reserve. With the CFTC, I was honored to chair that agency. I love the Agency, the CFTC. I love the SEC. It is like my three daughters.

But I do want to say that we work closely with the CFTC with regard to a recent rule that we put out, and there are many parties in the markets that are dual registrants. We have dual broker-dealer registrants that are registered with the CFTC and us, so as

well on the fund advisory side. If Congress moved forward to give the CFTC greater authority, let us say over Bitcoin, then we would, of course, work together, but we have already worked together dually on a number of enforcement actions in the crypto space.

Chairman BROWN. Thank you. One brief statement: Your testimony mentioned the enforcement division shrank by 5 percent over the last 5 years; yet, despite that, the SEC has pursued new cases in crypto, focused on fraud and misconduct for financial professionals and securing admissions of guilt. That does not happen often enough. I thank you for doing that.

Ranking Member Toomey.

Senator TOOMEY. Thank you, Mr. Chairman.

Chairman Gensler, in your written statement, you acknowledge, as you have in the past, that there are some tokens that are not securities, and I know your view that whether or not a digital asset is a security is a facts-and-circumstances analysis. I know your view that the SEC has very broad authority, but you have also made it clear in the past that Bitcoin is not a security.

Now some SEC staff have also previously said that Ethereum is not a security. The SEC's DAO report characterizes Ethereum as decentralized.

So here is my question. Briefly, and without getting deep into the weeds on this—and I acknowledge your belief that most tokens have a large degree of central control. But, generally speaking, is it fair to say that a significant factor for you in whether or not a digital asset is a security is whether it is centrally controlled or decentralized?

Mr. GENSLER. Well, I look to the Supreme Court that has often written about this, probably close to a dozen times in 50 years. And it is whether the investing public is anticipating profits, and that includes anticipating profits from appreciation as well as from, as you mentioned, rights based upon a common enterprise——

Senator TOOMEY. Right.

Mr. GENSLER. —but the efforts of that common enterprise.

Senator TOOMEY. Right. So I guess another way to put my question, which you have not answered is: Is it possible to have a common enterprise if it is something that is decentralized? How could it have a common enterprise? I mean, isn't centralization necessary to constitute a common enterprise?

Mr. GENSLER. You could have some things that are quite open but still have if the public is anticipating a profit based upon that common enterprise. So I am being careful with my words here to be accurate as best I can. The common enterprise. Are you relying on a group of individuals?

And, look, these are not laundromat tokens. There is a group of people that are actually——

Senator TOOMEY. No, you are not answering my question, though. Let me try it this way. What is it about Bitcoin that causes you to conclude it is not a security?

Mr. GENSLER. Well, there is—one is there is no group of individuals in the middle.

Senator TOOMEY. Right. It is decentralized.

Mr. GENSLER. There is no group of individuals in the middle——

Senator TOOMEY. Right.

Mr. GENSLER. ——that are basically—and you are not—in essence, we are——

Senator TOOMEY. So——

Mr. GENSLER. The investing public is not betting on somebody in the middle or six people in the middle.

Senator TOOMEY. So you are choosing not to word—use the term "decentralized," but that is what you are describing. It is the decentralized nature of Bitcoin, I think, is really what you are getting at.

Here is my point, and I am going to run out of time here. But, there are a lot of projects, as you know, that—I mean, decentralization and centralization occurs on a continuum really, I think. And you have acknowledged that there are tokens, plural, that are not securities. I think it is because of the centralization that you come to this conclusion.

And my point is it is not reasonable to fail to provide clarity, to provide the definition of exactly where on this continuum you have a sufficient common enterprise that it qualifies as a security and where you do not.

You have said Bitcoin does not. Some of your colleagues have said Ethereum does not. But a reasonable developer who wants to comply with this does not know where that line is drawn.

Mr. GENSLER. So I think we might have differences. There are many factors, and so it is not one spectrum of centralization versus decentralization.

What the Supreme Court—and I try to stick to—they are the Supreme Court, and you know, there will be debates about other laws. I try to stick to what they say, a common enterprise. I think about a group of individuals in the middle. That developer is in the middle, and the investing public is betting on them, counting on them.

Even if the token might be on a thousand computers, that is not what the Supreme Court is looking at. It is not about the token being on a thousand computers. It is just like a group of developers in the middle.

Senator TOOMEY. If there is nobody controlling it in the middle, that is what we call decentralized, and that does happen.

As you know, of course, the Howey Test requires all four of the tests to be met in order for something to be defined as a security.

Let me move on to another related issue which is, as I said in my opening statement, I do not think that the SEC has provided a crypto-specific roadmap to the registration of crypto intermediaries. One example of the problem that arises is the SEC's consumer—customer protection rule was written in 1972 and does not address how a broker-dealer should hold a customer's blockchain private keys, for instance.

Now I know the SEC claims to have provided relief, but the relief has very onerous contingencies. It is time-limited, and my understanding is few, if any, broker-dealers have been able to comply.

So I know you have said many times you want to have the industry, the intermediaries come in and have a conversation with the SEC about this. But wouldn't it be better if the SEC came out and laid out how you would apply the rules and regulations to these novel devices?

Mr. GENSLER. So we are in conversations with a number of these intermediaries across the exchange, the lending, the broker-dealer, the custody space. As I said a year ago, in the lending space, people should make no mistake. And I think it sounds like, Senator, you and I might even agree that the lending platforms are——

Senator TOOMEY. Right.

Mr. GENSLER. ——under the securities laws.

Senator TOOMEY. Right.

Mr. GENSLER. But in the exchange space and the broker dealer space, I accept that people have not come in and used what was put in place under Chair Clayton, that broker dealer custody rule that you mentioned. And so I have said to staff, let us use everything in our regulatory tool kit, whether it is Exemptive Orders and others, to help facilitate and get this industry—people will not have trust in this space unless it comes into investor protection.

Senator TOOMEY. I am out of time, Mr. Chairman. So I would just say my concern is that the approach you are taking with these one-off discussions, if it did even result in an opportunity to comply, it would be this idiosyncratic Exemptive Order negotiated with a single company, and that is not a good way to pass rules. It ought to be through the APA and a very public process.

Mr. GENSLER. If the Chair would forgive me, I think we have been very clear through 70 or 80 actions, starting with that DAO Order, the Munchee Order, and many others, and they were full votes of the Commission, not just staff.

Second, I just look at other times in history. The SEC and the asset-backed securities market took 10 or 11 years where they did these, as you would say, Exemptive Orders or relief to individual issuers and did a rule at the end of that 10 or 11 years based upon all that experience. So we actually believe it is worthwhile to talk to the industry, talk to the market participants, and get them registered.

Chairman BROWN. Thank you, Chair.

Senator Tester of Montana is recognized.

Senator TESTER. Yeah, thank you, Mr. Chairman, and I want to thank you, Chairman Gensler, for being here as always.

Recently, I led a group of my colleagues writing to you about your process for a significant number of proposals that the SEC has been working on over the last year. I would think that you would agree that it is important there is sufficient opportunity for stakeholder input and feedback. One of those proposals that I have been hearing about is the enhancement and the standardization of climate-related disclosures for Investors.

You probably know that I am a farmer. My wife and I, this is our 45th harvest as a matter of fact. And as a working farmer, I can tell you that I can understand the importance of considering the impacts of climate change. This year was our second worst harvest due to drought. Last year, due to extreme weather conditions, was our worst harvest. So climate change is real, and it appears like it ain't going away. So we have got some issues to deal with.

I also know, though, that access to capital and markets to sell our product and to produce our product is really important, and I can tell you I understand the burden of reporting information. I get surveys nearly every day about what I am doing as a farmer. This

week, there were a number of farm groups that were in that I visited with virtually and in person, a number of banks, and they were concerned about this rule.

So from an ag production and agricultural standpoint, as you also know, I do not have a lot of options as a farmer. I tell folks, when I wake up in the morning and throw a couple hundred gallons of diesel fuel in a tractor, it is not like I have got an electric tractor in the garage that I can use. So I am pretty well locked into fuel, diesel fuel, carbon-based fuel at this moment in time.

So under this rule, what responsibility would folks in production agriculture, specifically Montana farmers, have for disclosing their emissions?

Mr. GENSLER. Thank you for that question. Presuming that those farmers are not public companies, they do not come under the rule, but we have heard from various farm bureaus and, of course, the American Farm Bureau Federation. Zippy Duvall, and I have talked about this, and other Members probably know Zippy.

Public companies would have an obligation under the proposal with regard to greenhouse gas emissions, their own emissions, and then we say in the rule that they estimate their supply chain emissions if it is material. So it has got a materiality catch, but it is just that they estimate. And we have heard some folks in the farm——

Senator TESTER. Community.

Mr. GENSLER. Community. Thank you. The farm community. That they are concerned. And so we are taking a very close look at that amongst our 14,000 other comments on this.

Senator TESTER. So let me give you a scenario. Markets are really important. I like to direct-market as much as I can, but not much is direct-marketed off of my farm. OK? I sell to publically owned companies. OK?

Let us just take wheat for example. I sell wheat to a publically owned company, and they start doing their assessment on climate impacts, which I certainly do not have a problem with, by the way. What am I—as a farmer who sold them grain, for example, or you could say cattle or pick a commodity, if the company says to me, look, if you are going to do business with me, I got to have all this information, what are my recourses?

Mr. GENSLER. So what we put out—and again, we got some very good comments, and we are working through this—is that that public company you sell to does not have any obligation to ask you, specifically. They either need to estimate or, if they do not have an estimate, just discuss how they are managing that Scope 3.

But I would say this is what the public comment process is about. We have heard from 14,000 other people but particularly in the farm community and how we sort of address this to lower the cost because the intent, Senator, is not that—whether it is the farm community or other community, if they are not public companies, they are not under this rule.

Senator TESTER. I have got it, but my concern, as I indicated with my previous statement, was we sell to public companies. I mean, the vast majority of the product that is sold is to a public company. And if the public—and I just bring this to your attention, and I do not want to repeat myself. But if the public company says,

hey, we need you, Jon Tester, T–Bone Farms, to tell us how much fuel you used, how much fertilizer you used, how much your inputs were and all that, it becomes an issue. It becomes an issue, especially for the little guy who is, you know, out there running a tractor or fixing that tractor and does not have a lot of time to sit in the house behind a computer.

Mr. GENSLER. And I will say two things. One is that is not the intent of what we did, particularly how we did it with a safe harbor and only estimates, but two, that is the benefit of public comment.

Senator TESTER. Sure.

Mr. GENSLER. That is why this helps us. And of course, we will put this hearing in the public record, in our public record as well.

Senator TESTER. Thank you, Chairman.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Tester.

Senator Tillis from North Carolina is recognized.

Senator TILLIS. Thank you, Mr. Chairman. I want to try and fulfill your expectation that some Republicans are going to bellyache during this hearing.

Chairman BROWN. Thrilled you listened to my opening statement.

Senator TILLIS. I did, and I also listened to Senator Toomey's. I have been watching this in my office and want to get back to something that Senator Toomey mentioned. You know, we sent an oversight request several months ago, I think a follow-up on July the 21st, looking for a written response to our oversight request.

Chairman Gensler, I know your office, in the initial response, provided a one-page response that suggested that we meet with staff. I am kind of curious when we could expect specific written response to the oversight request that Republicans have sent you.

Mr. GENSLER. Sir, we do stand ready, the staff, to meet with your staff, to walk through the process, the process that we have on any rule. We put out to the public—and that release was in hundreds of pages—our economic analysis and the rationale and reasons for that.

Senator TILLIS. I think about 500 pages long.

Mr. GENSLER. That is correct. That is correct. And we stand ready, again, to meet and walk through that process with you.

Senator TILLIS. Then I guess maybe we can just get a commitment. There may be other Members who are interested. But absent a written response, getting a commitment from you to meet so that we can go through and get the answers to the specific questions we had in the oversight request?

Mr. GENSLER. We stand ready to have staff meet to go through and generally talk about the process. I mean, I want to be careful because it is really about to talk about and try to address the questions that you have and the concerns.

But, again, this rule is rooted in decades of law, and it is about a conversation that is already going on between public companies and their investors. And investors, I think, would benefit if we can bring some consistency to this fragmented disclosure that is happening now.

Senator TILLIS. We may follow up with staff, but we are going to continue—first, again, congratulations on your confirmation, but

we are going to continue to press on answers to some of the specific questions, but thank you for that.

The U.S. Treasury market is the single-most important market in the world. Do you agree with that?

Mr. GENSLER. It is the base upon which the rest of our capital markets exist.

Senator TILLIS. It does a lot. It is important to monetary policy. It is important in protecting retirement savings for U.S. workers. We can run down a long list.

I think your recent SEC proposal could inadvertently curtail involvement and liquidity in the Treasury market. I am kind of curious. Did the Commission really intend to require customers to register as dealers?

Mr. GENSLER. We put out a proposal earlier this year based on a 1986 law about dealer registration.

Senator TILLIS. Yeah. My understanding is the proposal would classify any firm as a dealer if it transacts more than specific amount per month. Is that true?

Mr. GENSLER. There is two prongs, but yes, it had over $25 billion a month.

Senator TILLIS. So how would a pension fund that frequently transacts in the Treasury market and exceeds the trading threshold set by the Commission, in order to protect the retirement savings of its members, be considered a dealer under any commonsense interpretation?

Mr. GENSLER. It is about whether you hold yourself out—the statutory definition is about holding yourself out regularly and transacting in a marketplace. There is not—by the way, that number—and we go through this economics in the proposal—would not cover pension funds as we know it today.

Senator TILLIS. So the nature of the trading would matter, too?

Mr. GENSLER. It is the size and scale of the Treasury markets, as large as they are. It is also that their pension funds are not trading at those types of levels that you mention.

Senator TILLIS. I have got a series of other questions, but it would take me probably longer to ask it than I have time remaining, so we will be submitting several questions for the record.

And, again, I want to go back to the oversight request. We need to kind of figure out how we can get the specific answers to the question. I am happy to have my staff meet with you, but we would also like to get a formal written response to the request that we have now requested, a response in writing. A discussion is good, but we will continue to press for that. Thank you.

Mr. GENSLER. Thank you, Senator.

Chairman BROWN. Thank you, Senator Tillis.

Senator Menendez, you may proceed.

Senator MENENDEZ. Thank you, Mr. Chairman.

Chairman Gensler, the last time you came before the Committee, I asked you to move expeditiously to adopt the Asset Management Advisory Committee's recommendations on diversity, and last October, 22 Senators, including 9 Members of this Committee, sent you a letter supporting the recommendations and asking for immediate approval. Can you give us an update on the status of adopting these recommendations?

Mr. GENSLER. So I thank you, Senator. We have looked at—there was four recommendations, and there are some subpoints in those recommendations. And working—and I think we have informed your staff about this with regard to two important ones in there. One is a recommendation around guidance, staff guidance on how asset managers are selected and whether their years of service or their assets under management could be—need to be taken into consideration or not, and another one is with regard to EEO complaints and how those complaints are shared with other agencies and the like. And I think we have made some good progress on those two. I feel that staff will probably shortly be putting out that guidance, and we continue to look at the other two matters.

Senator MENENDEZ. Well, look, I appreciate that you are giving some of these recommendations serious attention, but at the same time I must say I am disappointed. In so many other areas, the SEC under your leadership has taken bold steps to protect consumers, to strengthen oversight of markets, such as your proposed climate risk disclosure rule. However, when presented with AMAC's noncontroversial, unanimous recommendations that would promote diversity in the asset management field, you have not been as aggressive. So can you commit to make concrete progress on these recommendations by the end of the year?

Mr. GENSLER. So, Senator, I take very seriously how important diversity, inclusion, equity is important broadly in our society but to the SEC as an agency. Our senior leadership is probably the most diverse and inclusive that we have ever been as an agency. We continue to lean in to try to make sure that at our agency everybody can bring their best self to work and work and that we get the benefit of the talent across this great Nation.

And in terms of policy, it is held up in court right now, but last year a self-regulatory organization, Nasdaq, put in place a listing requirement with regard to their boards of directors and diversity, and that was their decision, not ours. It predated me, but we approved that.

And on these four Committee recommendations, as I said, I think we have made some pretty good progress on two of them, I think that guidance will be out in the near term, and we continue to work on the others.

Senator MENENDEZ. Well, I would like to highlight one of AMAC's recommendations that I think would be particularly impactful. The AMAC recommended that the SEC require enhanced disclosure by investment companies and investment advisors regarding diversity within their workforce and leadership. You and I have spoken about the importance of leadership diversity at your confirmation hearing. I just heard your comments now. I think that disclosures about diversity are incredibly important, which is why I introduced the Improving Corporate Governance through Diversity Act.

Do you agree that enhancing diversity disclosures for advisory firms, investment company boards and consultants would empower investors and fund managers to make more informed decisions?

Mr. GENSLER. Again, as I said, I think that we benefit in our organization, at the SEC, and in our great Nation by tapping into the

talents across our diverse Nation, and we continue to look at this recommendation of AMAC with regard to disclosures.

Senator MENENDEZ. But one of the key findings of the AMAC study is that—and for my colleagues, AMAC is an advisory board that is created, you know, under the—I believe it is the SEC. So one of their findings is that, quote, Investment performance by diverse asset managers is equal to or greater than the investment performance of firms that lack diversity in ownership and senior leadership despite differences in size and length of track record. And that is why they recommended that the SEC issue guidance clarifying that fulfillment of fiduciary duty does not require automatic exclusion of asset managers who are new to the industry or do not meet a certain threshold of assets under management.

In your view, is it necessary for fiduciaries to automatically exclude new or smaller asset managers in order to fulfill their duty?

Mr. GENSLER. Senator, on that, on the guidance, I share that view, I think, that you just said, and I think that is the guidance that the staff is working to put. And you are right; the AMAC is a Federal advisory committee. It is under the FACA committee clause.

Senator MENENDEZ. Let me close by saying, fundamentally, using the excuse of fiduciary duty to exclude women- and minority-led firms runs contrary to the actual data. AMAC's study, along with a host of other studies by McKinsey, for example, and others, have repeatedly shown that diversity-led firms outperform their non-diverse counterparts.

And so given this data, I think that we can agree that new or smaller asset managers being automatically excluded under the guise of fiduciary duty is actually not helping investors; it is harming them. And so that is why I have been pressing on these issues and will continue to work with you. We hope to have a robust response by the Commission.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Menendez.

Senator Kennedy from Louisiana is recognized.

Senator KENNEDY. Thank you, Mr. Chairman.

Thank you, Mr. Chairman, for being here today. I want to also thank you for you and your good—your colleagues' good work on implementing the Holding Foreign Companies Accountable Act. Can you give us a quick overview about where we are? China, I understand, has come to the negotiating table, and you have negotiated a statement of protocol. Could you give us an update on the status of your good efforts?

Mr. GENSLER. Yes, and again, I want to thank you because Senator Van Hollen—just came in—and you, you shepherded that through. I think that the Holding Foreign Companies Accountable Act gave us the additional leverage to work with Chair Williams down at the PCAOB, and we had numerous meetings with the Chinese.

We said to the Chinese last August, a year-plus ago, that we would not be willing to send the inspectors over to China to look at the audit work papers and the like unless we could get a very detailed, prescriptive statement of protocol to effectuate the will of Congress, and at its core it said how can you trust the numbers

in these Chinese companies unless there is somebody in the U.S. who is auditing the auditor, so to speak, technically inspecting and investigating. They did sign that. We thought it was important to get that signed.

The PCAOB is sending inspectors over. I think they are on flights tomorrow because I think it starts Monday the 19th and it takes about 8 to 10 weeks to get through, so we will probably know somewhere around Thanksgiving or early December.

And I do not know if the Chinese are going to comply. They have told me—I mean, the Ministry of Finance has told me directly on Webex calls, and the Chinese Securities Regulatory Commission has said they will comply.

And it is pretty clear: No redactions in the work papers. Take testimony from whomever the PCAOB needs to take testimony from. They can onward share the information to us, and they can pick whichever companies they want to look at.

Senator KENNEDY. I am not sure they will comply either, but they moved further toward compliance than at any point in the past. Senator Van Hollen and I have a bill that has passed the Senate, as you know, being considered by the House, to move the deadline from 3 years to 2 years with respect to which if they do not comply we tell them to leave our exchanges, and I think that might help if we can get that passed. And I appreciate your good efforts there.

In my last 2 minutes, I wanted to shift gears on the climate risk disclosure, and I do not mean to be critical. I am trying to understand because I thought Senator Tester raised some very good questions. What is your best guess of the cost of compliance with your climate risk disclosure rules?

Mr. GENSLER. So, one, I do support your accelerating the Holding Foreign Companies Accountable Act——

Senator KENNEDY. Thank you.

Mr. GENSLER. ——to 2 years versus three because I think it will continue to have the right leverage. Even if the Chinese authorities and the Chinese regulators allow for compliance this year, what about next year, what about next year? So I do support that.

Senator KENNEDY. Thank you.

Mr. GENSLER. In terms of the climate rule, we lay out in this proposal all the economic analysis. And I do not mean to speak for the numbers in that, but by company——

Senator KENNEDY. What is your best guess, if you could? I am sorry to interrupt you here, but I have only got a minute left. What is your best guess of the cost of it to comply?

Mr. GENSLER. So, per company, we lay that out. And depending on the size—and I just do not want to misspeak—it is, you know, from a couple hundred thousand to—I apologize.

Senator KENNEDY. What is the total?

Mr. GENSLER. And the total cost, I think Senator Toomey accurately quoted it. You were not maybe in the room. It is measured in the single-digit billions across the entire economy. But what we benefit from is also people are coming in and——

Senator KENNEDY. Yeah, yeah.

Mr. GENSLER. ——you know, giving us critical analysis to whether we are accurate.

Senator KENNEDY. I understand. I am sorry to interrupt, but I am going to run out of time. Here is my question: It will cost billions of dollars to comply. Those are scarce resources. To the extent that people like Senator Tester has to spend the money to comply, they cannot spend the money on something else.

Presumably, the purpose of the rule is to focus investors' attention on the risk of climate change so that they will demand that companies do a better job, the purpose of which is to lower the world's temperatures. Am I doing OK?

Mr. GENSLER. Actually, it is—but that is not the purpose. The purpose—I mean, I can speak for the five-member Commission but also for myself. We are not a merit regulator. So the purpose actually is not to do what you said but just for investors to get the information.

Senator KENNEDY. I think the people supporting the rule, that is their intention.

Mr. GENSLER. That is not why I support it.

Senator KENNEDY. OK, fair enough, but I think that is what most people expect. You put pressure on the companies to disclose. Shareholders put pressure. People do a better job.

But I would like to see—while you are asking Senator Tester and the other people to estimate, I would like to see some sort of estimate of how much all this money spent on compliance is going to lower world temperatures. I mean, we are spending—I believe in clean air and bright water. You know, I want to be able to eat and live indoors.

But what bothers me is while we are spending these trillions of dollars of scarce resources India and China—China gets 60 percent of its energy from coal. China has 3,500 coal fueled power plants. We have got less than 100. We do not have any kind of agreement with India or China for them to reduce emissions. So we spend all of this money, and world temperatures are not reduced.

Can you give me your——

Chairman BROWN. Chair Gensler, answer the question briefly. Thank you.

Mr. GENSLER. The good news is that is not what our authorities are or what motivates this one commissioner. It is about actually helping investors get more consistent information. Even if they want to invest in what might be brown assets rather than green assets, they will get more consistent information and we will probably lower some of the greenwashing that is out there and other things like that.

Senator KENNEDY. Thank you for your indulgence, Mr. Chairman.

Chairman BROWN. Thank you, Senator Kennedy.

Senator Van Hollen of Maryland is recognized.

Senator VAN HOLLEN. Thank you, Mr. Chairman.

And, great to see you, Mr. Chairman. Great to see an SEC Chairman from the great State of Maryland.

Mr. GENSLER. It is great to see my Senator.

Senator VAN HOLLEN. Yeah, right. Let me just pick up on the first point that Senator Kennedy raised in terms of implementation of the Holding Foreign Companies Accountable Act. I just want to thank you and your team for pursuing that.

I also agree we should shorten the time period to 2 years, and I want to thank Senator Kennedy for his work on this. The idea, of course, was to make sure we protect American investors, especially smaller investors, by ensuring that all companies listed on our exchanges comply with our accounting rules.

And I know you had very tough negotiations with China. Thank you for keeping us informed. The ultimate proof is in the pudding, right? Their execution of it. But I do want to salute you and your team for all your efforts to date on that.

I also want to thank you for moving ahead on a rulemaking to crack down on abuses of 10b5–1, trading plans by insiders. At the beginning of this Congress, Senator Fischer and I introduced legislation directing the SEC to undertake such a rulemaking. You did it, and we are monitoring that carefully.

I do not know if you saw the *Wall Street Journal* article back in June, which I think, along with other studies, revealed clear abuses by insiders in these areas. And of course, when insiders benefit, it means the investors lose often because sometimes these are gamed to take the gains before the overall value of a company decreases stock value. So I want to thank you for that, and we are monitoring that.

I also want to thank you and your team for recognizing the real issue of fraudulent scams, securities scams, often directed against seniors. These amount to up to $3 billion every year. And we have a bipartisan bill here that I know the Chairman and the Ranking Member are probably tired of hearing of, but I appreciate their, I think, support for the bill which is to empower states to better crack down on this fraud by creating a grant, Federal grant, through the SEC to help them out. And we have heard testimony on behalf of state insurance commissioners and state securities commissioners strongly indicating their support.

So you recognize this as a big problem that we should deal with, do you not?

Mr. GENSLER. Oh, I do. I think that fraud, as you said in the elder community, or sometimes it is affinity-based fraud, we see all too much of it at the SEC in our weekly enforcement meetings.

Senator VAN HOLLEN. I am sure you do, and we want to pass this legislation just to better fortify states to crack down on this kind of fraud.

We are working with you on the TICKER legislation as well, Senator Scott from Florida and I.

I want to ask you about something you and I have spoken about before, which is country-by-country reporting disclosures by big, multinational corporations. We are seeing jurisdictions around the world, including the EU and now Australia, move toward increased disclosure requirements for large, multinational corporations to disclose the countries in which they book profits and pay taxes as a way to mitigate tax risk to investors. We have a changing international tax environmental, and clearly companies that have put a lot of eggs in putting their profits in sketchy tax havens, their investors are at risk, and that is why we believe as part of providing investors with necessary information we should provide country-by-country disclosures.

I was pleased to see the SEC take steps to protect investors' interest in May by allowing them to put forward a proposal at Amazon's shareholder meeting that would ask the company to disclose its country-by-country reporting.

So my question, Mr. Chairman, is: In this rapidly changing international cooperation tax landscape, can you look at this question about whether new investor disclosures are needed in this area?

Mr. GENSLER. So, Senator, I thank you. And we are looking at it, and as I discussed with you when we got together on the phone, the Financial Accounting Standards Board actually has a project, and we sometimes, you know, let them know. And I want to say publically here I support the Financial Accounting Standards Board's project around breaking out and disaggregating tax reporting for public companies.

I believe that—I do not want to speak for them, but—in the next handful of months they are going to go forward. And it breaks out I do not think every country, but I think the top, you know, couple of handfuls of countries. And then they will sort of promulgate that, get public feedback, and back and forth. But I think that that would be a productive approach, to have such disaggregation that FASB is considering right now and has an active project on.

Senator VAN HOLLEN. Thank you, Mr. Chairman. I may have some questions to submit for the record, but I appreciate it. Thank you.

Chairman BROWN. Thank you, Senator Van Hollen.

Senator Cortez Masto from Nevada is recognized.

Senator CORTEZ MASTO. Thank you.

Chairman Gensler, it is good to see you. Thank you for being here.

Mr. GENSLER. Good to see you.

Senator CORTEZ MASTO. Let me talk a little bit about crypto regulation. Under your tenure, the SEC has pursued enforcement actions against crypto asset insurers. However, few cases have been brought against the exchanges, and crypto assets are, as we know, traded primarily through the exchanges. The SEC has proposed that intermediaries should be regulated under the Exchange Act.

So could you address this? Why should crypto asset intermediaries and exchanges be regulated under the Exchange Act, and if you would, how would investors and market participants benefit from regulating crypto assets under the Exchange Act?

Mr. GENSLER. So, I thank you. It is actually fairly straightforward because of these 10,000 cryptotokens. Without prejudging any one of them, I believe that the vast majority are securities because there is a—somebody in the public is betting on a better future, betting on anticipating profits, on a common enterprise group of entrepreneurs in the middle. And then given that, these intermediaries that often have 50 or 500 tokens, or 150 tokens, they are going to have a bunch of securities on that platform.

How does it benefit the public? It is the time-tested protections that these crypto exchanges would protect against front-running and manipulation, and there is transparency as you go into the New York Stock Exchange or into Nasdaq or the like. This Committee has worked on laws long ago. I complimented Chair Fletch-

er, who was here in 1934 and did it, but long ago, for that very reason, the public benefits.

Right now, frankly, there is a fair amount of noncompliance, and so we are going to continue to try to work with the intermediaries, get them inside and regulated, if need be, use our tool kit, our regulatory tool kit to adjust and facilitate because there are some differences, as Senator Toomey and I talked about earlier.

Senator CORTEZ MASTO. Would you be able to, through the enforcement, also identify potential money laundering activity?

Mr. GENSLER. It is more the remit of the Department of Treasury. However, one of the key things under, as I understand, the money laundering laws, the SEC has a role that our registrants, the exchanges, the broker-dealers have certain compliance obligations over with the Financial Crimes Enforcement Network at Treasury. Once they register, or whether they should register—and I believe it is even if they do not register but they are legally required to—they have to comply with that.

Senator CORTEZ MASTO. Thank you. Let me jump back to—because I do think Senator Kennedy—and I appreciate his willingness to explore, to understand the issue of ESG and the requirement.

My understanding—and thank you for your position and how you perceive that regulation. But because now we have a whole new generation of investors that are really conscious about green and going green, there are new investors now that are looking for ways to invest to be consistent with their values in this role, correct?

Mr. GENSLER. There are. There are also investors that are just thinking, because of climate risk, it could affect the financial performance of a company; it could affect their supply chain; it could affect their competition; it could affect future regulations. So they are thinking about how to value today that future transition risk.

Senator CORTEZ MASTO. Thank you. And then there was also conversation—and I appreciate this as well—about the issue of greenwashing, and I know some major global asset managers and climate advocates have stated that the ESG integration label could pose greenwashing risk. Can you talk a little bit about that and address that?

Mr. GENSLER. So there are asset managers managing trillions of dollars that are saying to the public, we will invest your money, your money, in something that is carbon neutral or green and the like. And so to me it is about truth in advertising, and so we put out some proposals earlier this year to address what stands behind a name, literally the name of a fund, and are you living up to the obligations that you made or commitments you made to your investors when you ask for their money. And I think that is really important, about the integrity, and it would address some of this, what is sometimes called greenwashing.

Senator CORTEZ MASTO. All right. Thank you.

Thank you, Mr. Chair.

Chairman BROWN. Thank you, Senator Cortez Masto.

Senator Rounds from South Dakota is recognized.

Senator ROUNDS. Thank you, Mr. Chairman.

I was going to start out today visiting a little bit about farmers and ranchers, but I understand that Senator Tester beat me to it.

And I think the fact that we really do have a concern about the ambiguities that some of our farmers and ranchers have right now with what they are going to be expected to try to share with providers of products to them with regard to downstream environmental impacts, really is of concern, and the ambiguity which it has been left with what, you know, can be guesstimates and so forth is something that I really think you need to take a second look at. It is just——

Mr. GENSLER. Senator, I concur with you. As we talked in the anteroom earlier, we thought the proposal had the right balance because we said it is only an estimate. It is only public companies. It is only if it is material or they made a commitment to it and they have a big safe harbor.

But we heard a lot from the farm bureaus, and so we are taking—you know, that is what we do. We take a look of all the public comments and see how we can ensure that it does not touch those private actors.

Senator ROUNDS. And that is precisely what I really wanted to talk about. It is one thing with the rules. It is another thing when there is an expectation that once the rules have been established, if they are really ambiguous, then that means that each time they have to come back to a regulator to ask whether or not what they are doing is accurate or not. And I think—and that causes some serious concerns for people that want to invest. So I just simply say, look, if you are making rules on these, and clearly you are making rules, a lot of them, let us be as precise as we can in them, and I think that will eliminate a lot of the questions that are coming up, sir.

Let me go into just a couple of items very quickly here. In a speech that you delivered last week, you quoted Joseph Kennedy, saying, no honest business should fear the SEC. You went on to say that, given the nature of crypto investments, I recognize that it may be appropriate to be flexible in applying existing disclosure requirements.

Matt Levine openly questioned that sentiment in a column for Bloomberg, stating, the SEC has been suing crypto projects for illegally issuing securities for about 5 years now, but put in that time it has not issued any rules or proposed any rules or put anything on its rulemaking agenda about adapting the securities and disclosure rules for crypto projects.

I echo Mr. Levine's comments. It seems to me that you want to regulate an entire marketplace, but clearly, it does not appear that you have got rules in place to do so at this time. In my mind, this is simply unacceptable.

And I know that your background in the private sector is—you know, you have got a great history in the private sector, so this is kind of confusing to us. I have heard from a variety of companies who claim they try to work with you and with your organization but then you turn around and then you have hit them with some pretty enforcement actions or slow-walk the process.

Mr. Chairman, you keep telling crypto entrepreneurs and the companies to come in and to register. Has anyone actually tried to do that?

Mr. GENSLER. To answer your question, there is six companies that are actually registered under the disclosure regimes. I would say this; not liking the answer from the SEC does not mean there is not guidance, just with all fairness. And most of these tokens, a vast majority, are securities, and thus the intermediaries are likely to be in noncompliance with securities laws right now. So we are really trying to work with them. We are talking to a wide swath of these organizations right now to get them properly registered, to get them inside the remit, and this is what we do.

With all respect to Mr. Levine, we have been pretty clear; my predecessor, Chair Clayton, was through Commission actions and in his public voice in front of this Committee and others about this matter, and we are going to continue to protect the public as best we can.

Senator ROUNDS. Thank you. As of August 2022, the SEC had proposed 32 new rules in just 11 months and is preparing at least another 19 for release in the next year. These are complex rulemakings that will greatly impact markets and capital formation. In addition to that, these rules are being implemented in an overlapping timeline and affect the same or interconnected financial products and market sectors. However, despite the linkages between the various proposals, the SEC has assessed the economic impact of each rule independently and in isolation from the others. Implementing these proposals simultaneously, without consideration of the cumulative and cross-sector effects, will most certainly lead to unintended consequences.

Mr. Chairman, why has the SEC not considered the cumulative and the cross-sector effects when simultaneously implementing these proposals that most certainly could lead to negative and unintended consequences for our capital markets and broader economy?

Mr. GENSLER. Senator, we actually do consider cross, even within any one of the 30. It is actually as of yesterday 34, to bring you up to date.

Senator ROUNDS. Moving along.

Mr. GENSLER. Moving along. I would note that Chair Clayton, during his 4 years, did a little over 60 final rules. We have about 50 on our docket. So it is—and Chair Schapiro and Chair White were about the same, 40 to 60 range, during their 4 years. We might have been a little sooner getting them out to proposals.

But we do consider those cross issues. I mean, sometimes we even reopen proposals for that reason, like we did with stock lending and stock buyback, and we reopened because there was this cross consideration. We have done it in some other areas. We are even looking now whether we should do that in some areas and reopen some for that cross consideration.

But last, I would say we get comment letters after the comment period as well, and we—you know, this is over the years, and we do it now. Staff reads them. They put them in. It takes us—it tends to take us months, sometimes a year to 18 months to finalize a rule after it is proposed.

Senator ROUNDS. Thank you. I wish we could continue the conversation, but my time has——

Mr. GENSLER. I think you still have my cell phone number, so you can call me anytime, sir.

Senator ROUNDS. Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Rounds.

Senator Smith of Minnesota is recognized.

Senator SMITH. Thank you, Chair Brown and Ranking Member. It is interesting, just apropos Senator Rounds's comments and questions about crypto, I was not here earlier because I was at the Banking Committee, where we were having a conversation about issues—I mean, I was at the Ag Committee, pardon me. I know, where am I? See, I am a little confused. I have been running around.

Anyway, I just note that there are a handful of us, you, Senator Brown and Senator Warnock and I, that serve on both Agriculture and Banking, Housing. And as the issues of how we should create a regulatory framework for crypto commodities, digital commodities as well as digital securities, I think we have—you know, we have an important job to do here.

Chair Gensler, on the—I want to go to the question of materiality. On securities laws, they are grounded in the concept of materiality. And since we have emerged from the Great Depression, we have acknowledged that investing in the stock market comes with its risks, but investors ought to have information that they need to be able to prudently evaluate those risks and make good, informed decisions.

And this is especially important today as more than half of families have investments in the stock market, including their retirement nest eggs. So could you talk to the Committee just broadly speaking about how climate disclosures for public companies are material information for investors?

Mr. GENSLER. It is material because the Supreme Court says substantial likelihood a reasonable investor is considering it significant in their mix of information. And right now, it is really remarkable what has happened in the last 10 to 20 years. So many investors are considering it.

And why are they considering it? Because there is a future chance of transition risk. They might have to change their operations. Their competitors might change their operations. Laws might change. These companies that are listed here in the U.S. operate around the globe. On average, if you look at the top 500 or 1,000 companies, half their operations are overseas. And so it can affect all that, but it is material because, as the Supreme Court says, because investors get to decide what risk they take and investors are saying it.

In our comment file, if you look at the top 300 or 400 of the investors, the big asset managers, it adds up to $50 trillion of assets under management that have come in mostly supportive of this. I mean, I know that there is a lot of good discussion about what do we do about the farmers and not getting caught up in Scope 3, which is a good conversation we have had, but mostly the investor community has come in, in these 14,000 comments, supportive.

Senator SMITH. And it is good for those investors to be able to understand what those risks are in a more comprehensive and clear way.

Mr. GENSLER. Absolutely. And, investors get to decide. If somebody says, I think those risks are significant, but a company is managing it well. I should invest in it.

They might say that, you know, I think that the market is overpricing a stock, and they might say, I want to sell that stock——

Senator SMITH. Right.

Mr. GENSLER. —because I do not think this—I think that assets that are emitting a lot of emissions are still going to be really profitable. That is up to investors.

Senator SMITH. On another topic I want to touch base on, I was pleased to see the SEC take action to increase transparency and accountability in the private fund market. Private funds, including private equity and hedge funds, have an outsized presence in our economy, $18 trillion in assets, and a substantial portion of that again includes retirement savings held in pension plans for teachers and municipal employees and others. And in recent years, individual ownership of private funds has also been on the rise.

So, Chair Gensler, can you talk about the recently proposed amendments to Form PF and the private fund advisor rules and how they would—you know, how they interact with eliminating conflicts of interest issues, protect investors, and protect the integrity of the private fund market?

Mr. GENSLER. So we have done two sets of rules with regard to private funds, one, to promote greater efficiency. What that means is lowering the cost of this. It has actually grown since that number, about $21 trillion. And they probably take revenues of about $300 billion-plus, and that means those teachers, firefighters, those pensioners are getting a little lower, potentially, returns. So it helps them. So we are trying to promote greater efficiency, transparency of fees, performance, and side letters.

You mention a form called Form PF, Form Private Fund. That is something that was put in place after the '08 crisis. Congress thought the SEC and our sibling agency, the CFTC, should get more information about these funds with regard to mitigating and monitoring for systemic risk, the big crisis of '08, and we are updating those forms.

Senator SMITH. Thank you.

Thank you very much, Mr. Chair.

Chairman BROWN. Thank you, Senator Smith.

Senator Lummis from Wyoming is recognized.

Senator LUMMIS. Thank you, Mr. Chairman. Appreciate your holding this hearing on the important work of the SEC.

And, Chairman Gensler, it is great to see you again. So I want to dive into a component of the Lummis-Gillibrand bill, which you have had a chance to see, that deals with Section 301 of that bill. I agree with statements you and your predecessor, Jay Clayton, have made that initial coin offerings, where digital assets are sold to investors expecting to profit from the seller's efforts, should be considered investment contracts.

Senator Gillibrand and I share your concerns about information gaps that can arise when digital assets are later used and traded by others and the need to ensure users can make informed decisions in the market. So we believe that it is those that raise the money through an initial sale of digital assets and those that con-

tinue to provide essential managerial efforts should be held responsible to provide disclosures to the market and that innocent secondary purchasers of digital assets, that may or may not be aware that they are trading in securities, should not be subject to strict liability.

So in our Act, the Responsible Financial Innovation Act, rather than attempting to impose new, complex, difficult to apply rules on secondary purchasers not involved in fundraising transactions, Section 301 of our bill provides for robust technology-neutral disclosure obligations that would hold responsible those who benefited from that fundraising, not the innocent users of digital assets who have no way of knowing what the sponsor is up to.

So my question is this: Do you have any thoughts on the need for disclosures in the digital asset markets in Section 301 of our bill?

Mr. GENSLER. So I thank you for the question. It was good to meet with you and Senator Gillibrand and discuss these as well. I think that the disclosure, as you say, is key. We even recently just were setting up a new industry office to help the disclosure in this field in our corporate finance area.

I do think that, as you say, the innocent purchase. Let us say the public. The public does not have a disclosure obligation when they buy a stock on the New York Stock Exchange, and it is not the public that should have a disclosure obligation if they buy some crypto security token.

But the entrepreneurs, the sponsor, the promoter, the entrepreneurs, that is where the disclosure obligation ought to be, and I think we have authorities now to facilitate and actually have a different set of disclosures just as we have in other fields. We have different disclosures on something called asset-backed securities than we do for equities.

But I do think where I might respectfully differ from, I think, what might be in the question is that I think in the secondary market, 5 years after a stock is issued, you know, a stock of a great U.S. company is issued, there is still a disclosure obligation.

And I think that is what Congress did in 1933, passed a law saying you have got to make a disclosure if you raise money from the public.

But the Congress knew that was not enough, and in '34 they came back and said, you know what? We also have to cover the secondary market in two ways, cover the intermediaries, like the stock exchange and the broker-dealers, but also say that there has got to be what is known as periodic reporting. You know, the annual report.

And so—or maybe there is no difference here, but I think the investor should not have an obligation. It is the intermediaries, and then it is the common enterprise or the folks in the middle.

Senator LUMMIS. And are you thinking that that disclosure option or obligation would be similar for initial coin offerings under our bill, or should be under our bill, similar disclosure options as were instituted in 1934?

Mr. GENSLER. I think similar in kind, but probably there are some things—it might be a little bit different list. I mean, there might not be a board of directors and things like that. So I really

do think—your bill had a list. We might differ on that list. We might have other things to put on that list. But it is not necessarily, as you say, everything that a big multinational company is doing.

Senator LUMMIS. OK. Well, I want you to know that Senator Gillibrand and I want to continue to work with you and your staff to make sure that to the extent that we do not philosophically disagree, that any of those sorts of gaps that you have identified in our bill can be addressed because I do not see our bill having an avenue to come before this Committee or the Congress before the end of the year, but we do intend to have it—to reintroduce it in January. And we want to make sure that between now and January we have worked with you and your staff to make sure that we can address items that we can mutually agree need to be in the bill.

Mr. GENSLER. I look forward to that and particularly, as I said, in ways that we can ensure we do not undermine the $100 trillion capital market, the definition of security, the definitions of other things that really are under this Committee and stay under this Committee.

Senator LUMMIS. And we have talked about unintended consequences of our bill before with you. We want to address those unintended consequences. Obviously, you see things that maybe we do not because of your perspective.

Mr. Chairman, thank you.

Really appreciate your being here, Mr. Chairman.

Chairman BROWN. Thank you, Senator Lummis.

Senator Ossoff from Georgia is recognized.

Senator OSSOFF. Thank you, Mr. Chairman.

And, Chairman Gensler, great to see you. Thanks for your service. Thank you for your testimony.

Mr. GENSLER. Senator Ossoff, good to see you again.

Senator OSSOFF. I have routinely asked you this question. I have also put this question periodically to Chair Powell and to Secretary Yellen. What do you see as the most significant threats to financial stability, or to put it another way, what keeps you up at night?

Mr. GENSLER. You do not want me to say my daughters. OK.

Look, I think in terms of—we are living in uncertain times. I do not need to say this, but with the war in Eastern Europe and Ukraine, with central banks around the globe moving from accommodating to tightening, with the remaining, you know, challenges, geopolitical challenges between great Nations, and also with COVID and commodity prices, all of that in the mix, what I look at and think about is the relationship between the banking sector and the hedge fund sector and investors, the relationship between the banking sector and commodity traders. That is called a prime brokerage relationship, and those relationships I really do think a lot about.

I think about resiliency in the market, and that is why we have about a dozen or 15 projects in the Treasury market, what we are trying to do in money market funds and open-end funds, shortening the settlement cycle and the like. I think that if we do our job well at the SEC we will build greater resiliency for the stresses

that come in the future, and those stresses come because that is what an economy—we always have ups and downs in economies.

So we have these longer-term projects, but near-term, it is these issues that I just raised.

Senator OSSOFF. Well, let us talk a little bit about the Treasury market. You highlighted that in previous testimony. You issued proposed rulemaking in the last several days. Can you please break down into layperson's terms the nature of concern about illiquidity in Treasury markets and how the actions you are proposing to consider taking would address them?

Mr. GENSLER. So I would say to the American public it is a big market. It is a quarter of our entire capital markets, $24 trillion. You can think of it as the base. It is sort of the foundation of our financial house. Everything else is built upon the Treasury market.

And what we have found is we have had real disruptions. Call them jitters. I hate to say it; in the house way, it is like there are some termites somewhere in the foundation, every few years. We had them in the 1980s and 1990s, and we had them in the last 6 years. And it put some pressure on our central bank, the Federal Reserve that sometimes then opens up and provides, using its balance sheet liquidity to the marketplace sort of as a lender of last resort.

I think that we can lower the risk in that marketplace by bringing—ensuring that all the dealers, the high frequency trading dealers are registered and regulated; second, that where the trading happens—these are trading platforms—are regulated, and some of those are not; and really importantly, getting the benefits of something that sounds boring, but it is called clearing. It is the back office, which lowers risk in the system.

So those are the main things. We have worked really closely with Secretary Yellen and her team, and Chair Powell and his team, on those proposals.

Senator OSSOFF. Do you think that the persistent concern about illiquidity in the Treasury markets threatens the Fed's ability to execute open-market operations in a crisis?

Mr. GENSLER. I think, if I might say, if we do this suite of proposals in the Treasury market, it will bring greater competition. There, historically, was a group of primary dealers. Then that started to broaden out to these principal trading firms, high frequency trading firms, and others. And I think that we will build greater resiliency and also increase some competition in the marketplace——

Senator OSSOFF. OK. Let us follow up on this, and I will have my office get with yours.

Mr. GENSLER. Please. I would love to have a meeting.

Senator OSSOFF. Great. And with my brief remaining time, I want to ask about something of particular concern to Georgians. We have thriving military communities, base communities, veteran communities in Georgia. The SEC has, in the past and as recently as December of 2021, filed emergency action to shut down a multi-million-dollar Ponzi scheme that targeted retirement funds held by veterans. I would like to ask for your commitment that under your leadership the SEC will redouble and intensify its efforts to ensure

that within your jurisdiction you are identifying and cracking down on schemes that could defraud or harm America's veterans.

Mr. GENSLER. You have that. And I would also say to all Georgians and veterans, if you see something, you know, we have a tips, complaints, referrals system. We have a whistleblower system. Please let us know. Let the SEC know. We are a little understaffed. I think we should have more staff, but let us know. We will try to follow up and pursue those leads as people see them.

Senator OSSOFF. We will pass that along. Thank you.

Chairman BROWN. Thank you, Senator Ossoff.

Senator Hagerty from Tennessee is recognized.

Senator HAGERTY. Thank you, Chairman Brown.

Chair Gensler, I was reviewing your testimony last night, and I was struck by a term that you used as you described the Nation's securities laws and regulations. You described them as the "gold standard," and I do not believe that is true anymore. What we have seen here in America over the past two decades is the number of publically listed companies decline by more than 40 percent. If you look at the U.S. share of global IPOs, we have shrunk to less than 20 percent in the past decade.

Why is that? It is because every new regulatory requirement that you impose on public companies adds to the already crippling costs of operating as a public company. So the consequence of all these regulations is to encourage companies to stay private or to look abroad to do their IPO.

You have rolled out 32 proposed rules in the past year, including your ESG disclosure rule, which will cost hundreds of millions of dollars a year in compliance cost and it has created tremendous uncertainty in the marketplace. This will undoubtedly make matters worse.

America had such a big lead in terms of having the world's best capital markets, capital markets that have allowed businesses to succeed here and thrive, but it has been in spite of, not because of, this increasingly crushing red tape. More regulation is a recipe for the preeminence of American capital markets to die a slow death. If we continue down this path, there will not be any investors left to protect. American workers, American consumers, and retirees cannot afford that.

So, Chairman Gensler, under your tenure at the SEC, you have rolled out an unprecedented slate of aggressive rule proposals. Among the many troubling trends in your short term as Chairman has been an expansion of the SEC's purview into sophisticated markets under the guise of, quote, consumer protection.

Because not all markets are accessible to retail investors, the SEC has traditionally adopted differentiated levels of paternalism depending on the given market, but the two most egregious examples of this creep that is happening right now are the private funds rule and the SEC's announcement that it would begin to force significant disclosure requirements on fixed income securities, including those that are regulated under Rule 144A.

And your staff claims that these new rules will then, quote, enhance investor protection, but as you know, the qualified investors that invest in these products are not unsophisticated. They do not need handholding in performing their own due diligence. Yet, these

new rules will pose significant new costs, and they will act as an impediment to American innovators who need early stage capital to grow.

So my question to you is: Do you think that the distinction between large and mostly institutional investors versus mom-and-pop investors is somehow unimportant? Or, is there some other motivation that is driving the SEC under your guidance to dedicate so many resources to go after these larger investors, these investors that all of your predecessors, I think rightly, have given a degree of autonomy to?

Mr. GENSLER. So, Senator, I think that there is a distinction between what is called accredited investors and non accredited investors. But I do think in the private funds rule, if I can address that, this is now a $21 trillion assets under management that the general partners, the asset managers, who oppose what we are doing—I understand that, but those asset managers probably collect over $300 billion a year in revenue.

And what does that mean? That means the issuers on one side and the investors on the other side have that $300-plus billion in the middle.

Now I think that you gave us a responsibility to look to promote competition and efficiency in these markets. You did it in 1976 in law; you did it in 1996 in law twice, that we have that responsibility.

So in that proposal, it is we took a lot of the recommendations from a group of limited partners, state pension funds, state treasurers, and a group called ILPA, and we looked at them and said, how can we promote greater competition through transparency to those investors, those sophisticated investors? That is what we are trying to do.

Senator HAGERTY. Your suggestion is that this is going to lower the cost of investment? This is going to increase the cost because it increases regulatory requirements. Where are you going with this?

Mr. GENSLER. Yeah, I think that we might have a healthy debate on this, but I think that actually when you have got general partners that are taking $300 billion out of the economy this will help promote greater competition——

Senator HAGERTY. Increases regulatory cost, promotes greater competition in the sophisticated market, I do not buy that one bit.

Mr. GENSLER. It is greater transparency to the investors of the fees and performance.

Senator HAGERTY. These are sophisticated investors, Mr. Chairman. This is damaging to the marketplace. I have been on the other side of the table there. Small companies that need to access capital to grow are going to be deprived of that capital because of this type of overreach.

Thanks, Mr. Chairman.

Chairman BROWN. Thank you, Senator Hagerty.

Senator Warner from Virginia is recognized.

Senator WARNER. Thank you, Mr. Chairman.

I want to stay on this topic for a moment, Senator Hagerty's point. But you know, I do think from a historic basis, as we have talked—and good to see you again, Mr. Chairman—you know, that

you are in that range of what your predecessors have done. But I do think, you know, it is an aggressive agenda, and candidly, a lot of it I support. I may disagree with some of my colleagues on the other side.

But because you have been moving quickly, one of the things I would like—and this falls a little bit on Senator Rounds's comments. I would like you to fill in a little more both on how you make sure that you determine appropriate comment times—and I know in some of these regulations you have extended the comment times. Some of them I do feel have been have too short.

But I would like you to also give me a little more specificity about this interaction, not simply in terms of total economic costs, but possible conflict for I am going to come back and follow up for a moment on cybersecurity areas. I just would like to get the sense. If all of these regs actually get passed by the Commission, how are you holistically looking at their interoperability? Drill down on it a little bit.

Mr. GENSLER. No, no, I think it is a good question. We do it proposal by proposal in the economic analysis. We benefit from the public comment. And I would say we have a long tradition of, regardless of what the comment period is, 60 days or whatever the comment period is, when comments come in after the comment period, we still—the staff considers it. We write it up. We put it in, I mean, you know, if it comes in, you know, not at the 1 day before we are finalizing it. Generally, on average, it takes a year, year-and-a-half to finalize these things. So I encourage people to continue to say, if you see that interaction.

But second, we also occasionally—publically, we reopen something, and we did that earlier this year on—there was a security lending and a stock buyback, and we sort of reopened, and we sort of said: Well, those are so closely interrelated. Let us do that as well.

Senator WARNER. And again, that is as you are focusing within your purview.

Let me give you an area that I have got. You know, I think too well-intentioned rules, but I worry about conflict. The Chairman of the Intelligence Committee—I think the cybersecurity issues. In my litany of things that keep me up at night, that is one of the ones. Matter of fact, I am surprised we have not seen more from Russia in light of the invasion of Ukraine.

We worked in a bipartisan way really hard to get an across the-board, mandatory, cyber incident reporting legislation through and trying to find the right timing of when you make that report and making sure that you do not interfere with a criminal investigation.

You have got a similar SEC public company requirement. Because I do believe a lot of these cyber incidents fall into materiality—but take a few minutes, and I wanted to get to one another quick question after this. Take a moment or two and tell me how you do that potential interaction between something that is outside your purview, this DHS CISA requirement, versus your SEC cybersecurity requirement.

Mr. GENSLER. It is a very good question because the securities laws are about those investors understanding a material risk and

material events, and so we put out a proposal, as you said, about corporate public companies making cyber disclosure, how they manage cyber risk and when they have a material incident—it has got to be a material incident—and then report that within 4 days.

We have also been in conversation directly with the Department of Justice and with the Department of Homeland Security—you know the particular leadership there—and had really good conversations. We included one important question in that proposal about national security, and we could tell you about—you know, it would take more than 50 seconds to tell you about that, but—and working with the Department of Justice on that.

Senator WARNER. Well, the more you can, I think, spell out, maybe not just here, but how you—the process of this intersection between, you know, an agenda again that I generally support, I think would make sense.

And you know, to show that, I want to use my last 30 seconds to touch on a topic that I have. You know, candidly, your predecessor, Jay Clayton, started down this path, and you and I have talked about a lot before and actually encourage more action, and that is in human capital reporting. I think we have discussed many times.

I think many of my colleagues have heard me go through this litany about how assets on a balance sheet have changed dramatically from, you know, tangible assets to intangible. A lot of that is human capital. Chair Brown and I have some disclosure legislation on this. I have been a big advocate of a human capital R&D tax credit.

Talk to me a little bit about how you think moving forward because I do believe human capital investment is extraordinarily material for all these companies that say their workforce is the most important asset. Speak to that.

Mr. GENSLER. So you are right; Chair Clayton did put out a rule. We now have 2 years of, you know, following of that rule around human capital. We are looking at those first 2 years and seeing what worked, what did not work, and everything.

But I know this from my days when I was on Wall Street. When you bought or sold a company, there were those two or three key pages with the key statistics about the workforce, you know, turnover rates, what they got paid, were they—what were the benefits, et cetera, what is the training like, are they unionized. I mean, these were the key things when you buy and sell a company. And so why shouldn't the public shareholders also get that similar information?

And you had wrote recently about a letter that I think a number of former SEC commissioners, from Joe Grundfest to Rob Jackson and others, wrote, and we are taking a look at that letter as well.

Senator WARNER. Well, I would encourage you and look forward to working with you on that.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator from Virginia.

Senator Daines from Montana.

Senator DAINES. [off microphone.] Chairman, thank you.

Chair Gensler, glad to have you here.

Mr. GENSLER. Good to see you again, Senator.

Senator DAINES. [off microphone.] I want to talk about the [inaudible]. The light is on, but nobody is home.

Chairman BROWN. We did not do that on purpose, even though you probably think we did.

Senator DAINES. I hope not. I would never assume that, Mr. Chairman.

Chairman BROWN. Thank you, Senator Daines.

Senator DAINES. All right, all right. Chairman Gensler, I want to cut right to the chase here. I know some of my colleagues have already talked about the proposed climate disclosure rule. I have looked at it. I think it truly is beyond unreasonable, and I would recommend it be withdrawn. The massive burdens that it will place not just on large companies, but also smaller companies, is going to have, I think, major downstream impacts on the companies with whom they also do business.

And I really want to zero in on the Scope 3 emissions problem. The question: Do you really think it is reasonable to ask companies to collect, analyze, reconcile, report on things, literally, such as whether the company car of an employee is a Tesla or a pickup? I mean, that is, in essence, what the Commission is doing when it expanded now the Scope 3 rules in emissions.

Mr. GENSLER. So, Senator, what we have right now in America is that we have many companies, hundreds, that are disclosing greenhouse gas emissions to the public, and they are including also—not all of them, but many of them—something around the Scope 3. So this is—for the public listening, this is the downstream or your suppliers and the like.

And so what we are trying to do is to bring some semblance to that, some standardization. So what we have said is, it is not a mandate, but if you have a commitment, if you have publically said you are managing it or if you publically feel it is material——

Senator DAINES. Just to make sure I am—excuse me. So it is not a mandate? So the rule would give the companies leeway whether they need to expand to Scope 3 or not?

Mr. GENSLER. Yes. It is only a proposal. The adoption has still not happened. But the proposal was a mandate on what was called Scope 1 and Scope 2 and then we took a different approach on Scope 3. And we said if the company deems that it is material or if the company already has made a public commitment to manage Scope 3, like if they have—and that is totally voluntary on their part. Then we said you had to estimate.

Look, we have gotten a lot of comments on this, and there is no goal to like touch—we had a good conversation with Senator Tester and Senator Rounds. There is no goal to touch farmers in any of the states that you represent, or ranchers, and Senator Lummis——

Senator DAINES. So would that be carved out explicitly because it is—I mean, when you talk Scope 3, it is a very, very wide net as you know.

Mr. GENSLER. But it is from the public company's point of view. Are you making a commitment to the public on how you are managing it? This public company. And then how are you estimating it? And we did say, estimating it. We said there was a safe harbor, so we put some legal protections on it.

But again, we are looking at these 14,000 comments. We are trying to balance this out.

The one thing is that we have to ensure that the public companies that are saying this or that about Scope 3 are not, you know, frankly, misleading the public.

Senator DAINES. Yeah. Well, I hope you hear us out. I think you have heard a lot of concern from the Committee here on both sides on it.

Mr. GENSLER. And I look forward to more conversations.

Senator DAINES. Yeah. I have just watched—we all watch—what is going in Europe and California, where it just moves from a passion for climate change to go into climate insanity in terms of dealing with baseload issues and creating truly existential threats to their economies, their national security, and I just do not want to see our country follow the same path that we have seen in Europe. I spend a lot of time talking to European leaders, and they wish they had a redo on this.

Mr. GENSLER. Yeah. I actually think this is one of the reasons that we could come together. And we want something here in the U.S. that we adopt a rule and it is sustained in court because, if we do not, large U.S. issuers will probably have to comply with that European regime because the European regime says if you have more than 150 million euro of sales in Europe you have got to comply with their regime.

Senator DAINES. Yeah. Well, they are going to have a really, really tough winter, and we say our prayers at night and pray for a warm winter in Europe.

Chairman Gensler, I want to talk about BDCs for a moment, business development companies. They play an indispensable role in providing credit to middle market businesses in Montana as well as around the country. One pressing issue that has impacted BDCs and investors for several years is the application of the SEC's Acquired Fund Fees and Expenses (AFFE)—you are getting acronyms—rules to BDCs. But simply, when you apply the AFFEs to BDCs, it over-counts the true cost of investing in BDCs, thereby, I think, misleading investors.

Senator Menendez and I have introduced the Access to Small Business Investor Capital Act, which permits BDCs to move 100 percent of those AFFE disclosure to a footnote in lieu of a fee table.

Let me just cut to the chase here on the question. Does the SEC plan to fully address the misleading disclosure that AFFE creates for BDC investors in lieu of the current unworkable rule the SEC has proposed, and would you agree that BDC investors deserve the parity in disclosure with REITs. That is a lot there.

Mr. GENSLER. There is a lot there. Why don't I say this; I look forward to helping with technical assistance on your bill.

But also, on business development companies being owned by other funds, mutual funds, there is transparency in what—there was a 2006 rule on this, way before I got here, that there was this transparency that the investors in the mutual fund need to sort of see all those costs and rolling up in those costs, and I think that is what you are trying to address in your statute.

Senator DAINES. Right.

Mr. GENSLER. Yeah.

Senator DAINES. Thank you. I am out of time here.

Is it Chairman Toomey here or it is Chairman Reed? Oh, Chairman Brown is still there. Chairman, I did not see you. I am good. Thank you.

Chairman BROWN. Senator Reed from Rhode Island is recognized.

Senator REED. Thank you very much, and Mr. Chairman, welcome. Senator Cortez Masto and I have introduced legislation, S. 4857, Private Markets Transparency and Accountability Act. Basically, our legislation would require the Nation's largest, most important private companies to register with the SEC, and they would then be subject to appropriate disclosure requirements. I think it is necessary because we are seeing the decline in public registrations and an extraordinary increase in private companies that are controlling some public companies, some other companies.

Can you describe the main differences between the public markets and the private markets when it comes to investor protection?

Mr. GENSLER. We benefit in this country, vibrant capital markets, both public markets and private markets. My dad never had a company that would be caught up in your bill, but he had a small business that had 30, you know, employees. And so I think that has been very helpful.

But there is a difference in disclosure and a difference in, as you said, investor protection because Congress gave this Agency a remit about those public companies and to protect against—that the disclosure is there, that it is truthful, and we protect against fraud and manipulation. That is, of course, different if it is a private company. Not that my dad would have done this, he was buying and selling the stock with his partners.

Senator REED. But I mean, again, I think in the—when the SEC came about, most of the private companies were relatively small, family owned, and that is not the case today. Huge financial——

Mr. GENSLER. No, no. It is estimated by outside public sources there is about 1,200 companies in the U.S. that are what is called "unicorns," that are worth more than a billion dollars and that the total market value is about $4 trillion.

Senator REED. And the disclosure and the investor protections for those companies are not at the same level of strength as public companies?

Mr. GENSLER. It is interesting. It is not—it is not under our remit, but the disclosures to the holders or whatever, you know, is privately negotiated between the holders and those companies, and so it is not at the same level.

Senator REED. I just want to quickly shift gears a bit because this is the 20th anniversary of the Sarbanes-Oxley Act. I think you are quite familiar with that. And it was a response to the scandals of Enron and WorldCom, and it demonstrated why investors need gatekeepers in our financial markets, especially accountants. But one concerning trend is that the big four accounting firms provide also lucrative consulting services to public companies that they are also responsible for auditing. So what steps is the SEC taking to ensure that auditors prioritize independence over seeking non-audit revenue?

Mr. GENSLER. Yeah, I thank you because I was sitting in the seats behind the Chair and Ranking Member when it was Senator Graham and Senator Sarbanes sitting there.

Senator REED. I was over there.

Mr. GENSLER. And you were over here. But I think what Senator Sarbanes—and Senator Graham voted for that bill, actually. So what they tried to do in that bill was to ensure that there was some separation between the audit function and consulting and so forth.

I have asked—because I think that there has been some lessening of that separation over those 20 years, I have asked a number of things, the Office of Chief Accountant at the SEC, and I have also asked the board at the PCAOB. I have told all five of the members there, could you put on your agenda as well to update the standards, the PCAOB standards and the SEC standards, about this separation and the independence? And I also know our acting Chief Accountant, Paul Munter, has given some speeches on this recently and leaned into this.

Senator REED. Just a final question, there have been several major cases with accounting firms over the past year, ethical lapses, professional problems, but those findings are basically not disclosed to the public. They are maintained by the regulatory agency. And Senator Grassley and I have legislation that would make them public, and I think that is important. I think it is important to know whether a firm has been engaged in——

Mr. GENSLER. I think it would be. It was one of the compromises laid between Senator Enzi and Senator Sarbanes as I remember it.

Senator REED. So, thank you.

Chairman BROWN. Thank you, Senator Reed.

Senator Warren from Massachusetts is recognized.

Senator WARREN. Thank you, Mr. Chairman.

So in March, the SEC proposed a climate risk disclosure rule that takes a big step toward increasing the efficiency of the economy and the financial markets by requiring companies to inform investors about the climate-related risks that affect their businesses. Now as part of this rule, the SEC proposes that companies disclose their greenhouse gas emissions and companies' submissions are classified into three different categories called Scopes.

So, Chair Gensler, just so we can set a baseline here, let us run through an example. Let us say I am Exxon. My Scope 1 emissions would be from things like my company's vehicles and methane leaks that occur at the wellhead of the wells that I own. Scope 2 emissions would be those from electricity I purchase, for example, in order to power my operations. Scope 3 would cover upstream emissions from the production of what I buy, like the chemicals I use to refine my oil into gasoline or diesel fuel and the downstream emissions from what I sell, like the refined gas or the diesel my customers buy at the pump. Do I basically have that right, Chair Gensler?

Mr. GENSLER. Yes.

Senator WARREN. Good. So you need all three Scopes because otherwise a company could just stop doing the filthiest part of their business and hire some smaller, nonreporting company to do the same filthy work, and then report themselves as greener.

So, Chair Gensler, for a fossil fuel company like Exxon, what percentage of their total emissions are Scope 3 emissions?

Mr. GENSLER. I suspect you might know that better than I. I have not looked, but it is often over half. It could well be in some companies—I do not know Exxon. Some companies, it is as much as 90 percent.

Senator WARREN. Well, you are close on that number. According to an S&P global analysis, about 88 percent of the emissions of these fossil fuel companies like Exxon are Scope 3 emissions. So in other words, oil and gas companies have Scope 3 emissions that, on average, as you say, it is about 90 percent of their total emissions.

Now the rule the SEC proposed in March already gives companies, in my view, way too much wiggle room in disclosing Scope 3 emissions, but evidently, that wiggle room is not enough benefit for Exxon. They and their trade association, the American Petroleum Institute, have been fiercely lobbying the SEC to drop Scope 3 disclosures entirely from the final rule.

So Exxon wants to change the SEC proposal so the company would have to tell about emissions when their own work trucks were on the road but not about emissions from all the other trucks that are fueled by Exxon diesel when they are on the road, or, to say it another way, companies like Exxon do not want to have to tell investors or the public about nearly 90 percent of their emissions.

And, if Exxon and the American Petroleum Institute get their way, investors would remain in the dark about how companies would be affected down the line when policymakers get serious about tackling climate change and, for example, put significant restrictions on trucks that are powered by fossil fuels.

So, Chairman Gensler, if a company discloses only 12 percent of their total emissions to investors, do you think that investors have all of the information that they need in order to evaluate whether or not that company is well positioned to succeed in a greener economy with much stricter regulations on emissions?

Mr. GENSLER. So I look at it this way, that many companies today are already making commitments about all three of these Scopes. More are making commitments about Scope 1 and 2, but many are also making commitments. And our proposal was, if you are making a public commitment about how you are managing it, you ought to measure it because how do you manage that which you do not measure. And then we also said, if it was material, using a Supreme Court test of materiality, that you would have to measure it. But we did get a lot of comments on this; you are right.

Senator WARREN. So I understand this, but the question I am asking you is actually much narrower. It is a straightforward investor question. If climate emissions are going to become more important in valuing businesses as the regulatory environment changes, if you only have to disclose 12 percent of your emissions, does an investor have the information they need to make a good investment decision?

Mr. GENSLER. So again, I will quote from our comment file, if we look at the top three or four hundred investor letters that we got that manage tens of trillions of dollars of assets, most—I do not re-

member the percent—most are supportive to have all three Scopes part of this disclosure. So that is straight from the investors rather than from me.

Senator WARREN. Actually—and I think that is exactly the right point because for months now the big banks, the pension funds, and the investment management companies have been asking for this Scope 3 information because it is crucial to making good investment decisions.

I appreciate that you are working to protect investors and not some particular industry because that is the job of the SEC, and we are counting on you to do that.

Mr. GENSLER. Thank you, Senator.

Senator WARREN. Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Senator Warren.

Senator Toomey has a couple, the last two questions, a couple questions.

Senator TOOMEY. Thank you, Mr. Chairman.

You know, I have made no secret about my concern that there are people in this Administration, in this Congress for that matter, who wish to use financial regulators as the tool by which they will advance a liberal agenda, and I have criticized this, among other reasons, because it is so undemocratic, right. It is so undemocratic to have unelected, unaccountable agency bureaucrats making the tough decisions that should be made by the accountable parts of our Government. I have criticized the Fed, the CFPB.

And, Mr. Chairman, I am putting you in this category, and the climate disclosure rule, I think, is the example. You know very well the Supreme Court held in the West Virginia v. EPA case that the EPA lacked the authority under the Clean Air Act to regulate greenhouse gas emissions. In coming to that conclusion, they relied on the Major Questions Doctrine. In that, the Court held that given the economic and political significance of the asserted authority the Agency must point to clear congressional authorization.

Now among the factors they used to decide that something is a major question, yeah, the major question, the Court noted it involved a novel approach, it involved technical and policy expertise not traditionally needed by the Agency, such a consequential decision is unlikely to have been left by Congress to Agency discretion, and the Agency had adopted a scheme that Congress had considered and rejected multiple times.

Mr. Chairman, it looks to me that the climate rule that you have proposed, under the Major Question Doctrine, just does not have the congressional authority. So my question is: In light of the EPA v. West Virginia case, have you given any consideration to rescinding that rulemaking?

Mr. GENSLER. Thank you, Senator. We take seriously the courts and particularly the Supreme Court, and so we are considering 14,000-plus comments in that comment docket, and we are considering it in light of our authorities and the law. I would say most of the comments are supportive.

Investors are using this information now, and they want the information. And I think it does fit into our 80- or 90-year history of how we do disclosures, that the disclosures are already being made. And so what I just want to finish on is I think we have a

role to ensure that there is not only investor protection but, as the law said, fair dealing, that the actual disclosures are not misleading and the like.

Senator TOOMEY. Well, as I predicted, I think if you go ahead with something substantively similar to the proposed rule, you are going to find a very unsympathetic Court with regard to the authority that you have.

Chairman BROWN. Thank you, Senator Toomey.

Thank you, Chair Gensler, again, for joining us.

For Senators who wish to submit questions for the record, those questions are due 1 week from today, Thursday, September 22nd.

Chair Gensler, per our Committee rules, we ask you respond to any questions within 45 days from the day you receive them. Thank you again.

The Committee is adjourned.

[Whereupon, at 12:06 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 back Chair Gensler.

Workers and their families don't measure the economy by the stock market, and neither should we.

It's why in the Senate and in the Biden administration, we are working to create an economy that delivers results for people who get their incomes from a paycheck, not an investment portfolio—rising wages and good-paying jobs and lower costs.

That means fighting the corporate price gouging that hurts consumers, and the unfair labor practices that hurt workers.

It means investing in American manufacturing and the workers who drive it.

And it means making sure our financial watchdogs keep our markets and economy stable.

At the SEC, that includes going after companies that try to cheat the market. It means strengthening corporate disclosures to stay ahead of risks like climate change. It means looking into the practices of private equity and hedge funds, as they stretch their tentacles into more and more areas of our economy.

It's been an eventful year.

This summer, the Senate confirmed President Biden's two nominees to the SEC. I know both new Commissioners got right to work on the many issues before the agency. And the Commission and its dedicated staff have been busy.

Republicans on this Committee have bellyached about your ambitious agenda.

If Wall Street and its allies are complaining, it probably means you're doing your job.

You put Americans' savings first and you focus on fairness and transparency—two concepts critical to making sure our markets work for everyone, not just insiders and corporate executives.

The SEC must continue making enforcement a priority.

Bad actors are always coming up with new schemes to separate people from their hard-earned money, or to cheat the rules to gain a little more for themselves.

Under your watch, the SEC has increased prosecutions for insider trading, which under the Trump administration had fallen to the lowest level in a generation.

In April, this Committee considered a Reed and Menendez bill that would outlaw insider trading in statute. The House has already passed a similar bill. Now the Senate must pass it.

Last month, we saw the successful results of bipartisan work of our Committee Members to improve transparency and fight fraud.

In 2020, Sens. Kennedy and Van Hollen pushed for the passage of the "Holding Foreign Companies Accountable Act", a bill to stop the U.S. stock exchange trading of foreign companies with China-based auditors that refused to comply with our oversight laws.

Because that law jumpstarted negotiations, the Public Company Accounting Oversight Board (PCAOB) signed an agreement with Chinese authorities that will—finally—allow auditors to begin inspections.

In March, President Biden signed an Executive order establishing a whole-of-Government strategy for digital assets.

While agencies across our Government look at how we respond to the growth of crypto, and best protect people's money, we know the SEC continues to enforce the law-going after cryptotokens that violate securities laws, shutting down crypto Ponzi schemes, and charging insider trading crimes in crypto.

Over the last year in this Committee, we have looked at how crypto assets are used in scams and fraud, and play a role in illicit finance. We also heard from the Treasury Under Secretary testify on the President's Working Group report on stablecoins.

This morning, the Agriculture Committee is considering a crypto bill sponsored by Sens. Stabenow and Boozman that focuses on digital commodities. I appreciate their work to create regulation in the crypto space.

It's critical that we are careful and deliberate in drawing jurisdictional lines.

In this kind of regulation, we have to prevent gaps and close loopholes that can be exploited or abused. That's not easy, and it's why action by the Agriculture Committee and CFTC is welcome. But it's not enough.

When Congress wrote Dodd-Frank, we fixed the problems in the oversight of the over-the-counter derivatives market. That's a lesson we need to remember when it comes to crypto—all our regulators need to work together, and to make sure investors, consumers, and market stability comes first.

The SEC's work on climate risk disclosure is also an important example of how to improve the market's understanding of risks and to provide transparency and comparability. Clarity and uniformity are key.

If only a subset of companies provides disclosure, and they do so in whatever form they want, that doesn't serve anyone. Investors outside the U.S. already benefit from standardized climate risk disclosures; it's time the U.S. market did as well.

The SEC's recent rule proposal to require more disclosure about corporate stock buybacks will also bring much-needed transparency to the market.

We know stock buybacks are a big problem—they distort the market, and they funnel profits to executives at the expense of long-term investment in workers and innovation.

And the process allowed for these buybacks has only made them more manipulative. For decades, companies have been able to announce stock buybacks to juice their stock price, but then only provide details months later on how, when, and even whether they ever completed their plans.

Under the SEC's new proposal, the market and the SEC would understand when companies are buying their stock, and if executives are buying or selling at the same time.

Taken together with our unprecedented step in the Inflation Reduction Act to finally tax these buybacks, these are the first real steps we've seen in years to rein in this Wall Street scheme.

Chair Gensler, I look forward to hearing more about other ways the SEC is working to hold bad actors accountable, and protect Americans who invest their hard-earned money in our markets.

PREPARED STATEMENT OF SENATOR PATRICK J. TOOMEY

Mr. Chairman, thank you. And welcome, Chairman Gensler.

The SEC has a critical role to play in protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. Unfortunately, some of the SEC's recent actions—and inactions—raise concerns about how well it's carrying out this important mission.

Take for example the SEC's handling of crypto lending platforms, like Celsius and Voyager. Celsius and Voyager were offering interest rates as high as 18 percent if customers would lend their digital assets to them.

The firms would then lend that crypto to other larger investors to make short-term bets on cryptomarkets. But once the crypto selloff began, many borrowers couldn't pay their debts, and these platforms froze customer accounts.

The SEC took enforcement action against BlockFi for similar activities last winter, yet somehow let Celsius and Voyager continued through this spring, when both companies blew up and found themselves in bankruptcy, with investors staring at billions in losses. Where was the SEC?

And where's the SEC been in clarifying the rules of the road for cryptomarket participants? The Chairman insists in his written testimony that "the vast majority" of cryptotokens are securities.

But he has also acknowledged Bitcoin is not. Presumably that's because Bitcoin is so decentralized. That naturally raises the question, where on the decentralization continuum does a token cease to be a security?

Most of these tokens don't even have a financial claim on the issuer. Doesn't that make these tokens very different from the vast majority of securities?

And if the Chairman is right that most tokens should be considered securities, then as he himself states in his written testimony, "it follows that many crypto intermediaries . . . are transacting in securities and have to register with the SEC in some capacity." However, crypto transactions typically can be settled in real-time on-chain and without intermediaries.

As a result, crypto intermediaries often serve different customer needs, have different business models, and pose different risks than traditional securities intermediaries. That raises the question, what is the crypto-specific roadmap for these crypto intermediaries to register?

Stepping back, there's a larger problem here. As Bloomberg columnist Matt Levine put it: "[Chairman] Gensler's posture is that he should be in charge of writing the rules for crypto, but not write them. I don't see how that can work." I agree.

Given the novel nature of these tokens, Congress ought to step in to provide clarity. In particular, we need to revisit the definition of "security" as part of a larger effort to tailor a regulatory framework that is calibrated to the unique risks and activities of the cryptomarket?

As I've said, cryptotokens have varying degrees of decentralization, usually do not have a financial claim on the issuer, and typically can be settled in real-time without intermediaries. These are important differences from traditional securities. And they merit a clearly stated and tailored regulatory framework.

While the SEC has failed to provide regulatory clarity in the cryptomarkets, it has been issuing numerous controversial and burdensome rules and proposed rules in the ordinary securities market. At the top of the list is the SEC's climate disclosure rule.

Public companies are already legally required to disclose material climate change information. The proposed rule however would go much further to require disclosure of exceedingly extensive global warming data.

This data will be enormously expensive to collect, but almost none of it will be material to a business's finances. For annual reports alone, the SEC estimates that aggregate external compliance costs for issuers increases from $1.9 billion per year to $5.2 billion per year as a result of the SEC's proposed climate disclosure rule.

The SEC itself estimates that the external compliance cost of a company going public will increase by more than five times, at a time when excessive regulatory costs are resulting in ever fewer companies going public. The cost of compliance will be more material to the investor than the information itself.

But of course the climate disclosure rule isn't about an informed investment decision. It's about equipping climate activists with data to run political pressure campaigns against companies, often to the detriment of shareholders.

The endgame is to discourage capital investment in oil, natural gas, and other traditional energy industries. We've seen how that worked out for Europe.

The SEC is wading into controversial public policy debates that are far outside its mission and its expertise and without the legal authority to do so. In doing so, the SEC risks politicizing the agency, slowing economic growth, increasing inflation, and even undermining national security.

Given the importance of these issues, Banking Committee Republicans have written to the SEC asking basic questions about how the SEC developed the climate disclosure rule. Instead of providing real answers, the SEC has unacceptably stonewalled.

The SEC may not want to answer to Congress on its climate disclosure rule. But, ultimately, the SEC will have to answer to the courts, which should make it nervous.

The Supreme Court has repeatedly held that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." This summer the Supreme Court applied this sensible principle in West Virginia v. EPA.

There it ruled that the Executive branch and its agencies, cannot use novel interpretations of existing law to pretend they have legal authority to support sweeping policy changes, including on climate change, that Congress never intended. Well, that's precisely what the SEC appears to be trying to do with its climate disclosure rule.

The SEC should consider itself to be on notice by the Court that the separation of powers still exists and will be upheld.

PREPARED STATEMENT OF GARY GENSLER

CHAIR, U.S. SECURITIES AND EXCHANGE COMMISSION

SEPTEMBER 15, 2022

Testimony of Gary Gensler
Before the United States Senate
Committee on Banking, Housing, and Urban Affairs
Sept. 15, 2022
Washington, D.C.

Good morning, Chairman Brown, Ranking Member Toomey, and members of the Committee. I'm honored to appear before you today as Chair of the Securities and Exchange Commission. I'd like to thank this Committee for helping to confirm our two new Commissioners, Mark Uyeda and Jaime Lizárraga. 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.

The Gold Standard of Capital Markets

I'd like to open by discussing two key years in policymaking: 1933 and 1934.

It was the middle of the Great Depression. President Franklin Delano Roosevelt and Congress addressed this crisis through a number of landmark policies.

Amongst them, Congress and FDR came together to craft the first two federal securities laws. Additionally, in 1933, President Roosevelt formally suspended the use of the gold standard. The next year, institutions were prohibited from redeeming dollars for gold.

In other words, in those two key years, one could say we replaced one gold standard with another gold standard: the securities laws.

I believe the core principles of the securities markets have contributed to America's economic success and geopolitical standing around the globe.

Our $100-trillion capital markets — the largest and most innovative in the world — represent about 40 percent of the globe's capital markets, exceeding our 24 percent share of the world's GDP.[1] The U.S. has been known for decades as the destination of choice for large issuers around the globe.

Though no other country's capital markets currently match our own, we cannot take our leadership for granted. Even gold medalists — especially gold medalists — constantly train to stay ahead of the competition.

Further, the nature of finance itself will constantly challenge even a gold standard. In recent years, we've seen as much — whether the market events of March 2020, the meme stock-related volatility, or the collapse of Archegos Capital Management, among other events. New financial

[1] *See* Securities Industry and Financial Markets Association, "2022 SIFMA Capital Markets Fact Book" (July 2022), *available at* https://www.sifma.org/wp-content/uploads/2022/07/CM-Fact-Book-2022-SIFMA.pdf.

technologies and business models, from predictive data analytics to crypto, continue to change the face of finance.

As markets have evolved, our rules have continued to evolve as well. That helps us maintain the gold standard. That helps us sustain our geopolitical edge on the world stage. I think it also supports the standing of the U.S. dollar around the globe.

I think we should do everything we can to maintain and enhance that gold standard of our capital markets.

Maintaining the Gold Standard

There are two broad ways to do that, in my view.

One is to ensure that the SEC is adequately resourced so we can remain the cop on the beat protecting investors and promoting trust in our capital markets. The SEC is deficit-neutral, collecting fees on securities transactions at a rate intended to fully offset our appropriation.

The other way is to work with the Commission and staff both to drive efficiencies in our capital markets and to modernize our rule sets for today's markets and technologies as we execute our mission: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[2] We must remain vigilant to opportunities to enhance competition, transparency, fairness, and resiliency.

Last year, in my testimony before this Committee, I covered some of the broad areas from the SEC's policymaking work,[3] along with that of our Divisions of Enforcement and Examinations and our resources. Today, I will provide an update on those items.

Market Structure

In every generation, we have to look at how we can revisit our rule sets to better enhance the efficiency of 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 and increases returns.

Technology has transformed and continues to transform our markets. This has led to many good things. For example, retail investors have greater access to markets than in any time in the past.

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[2] *See* Gary Gensler, "Dynamic Regulation for a Dynamic Society" (Jan. 19, 2022), *available at* https://www.sec.gov/news/speech/gensler-dynamic-regulation-20220119.

[3] *See* Gary Gensler, "Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs" (Sept. 21, 2021), *available at* https://www.sec.gov/news/testimony/gensler-2021-09-14.

This technological transformation, though, also has led to challenges, with respect to efficiency, competition, transparency, fairness, market integrity, and resiliency.

Thus, I have asked staff to take a look market structure-based projects across our $100 trillion capital markets: the bond markets, equity markets, security-based swaps markets, and crypto asset markets.

Bond markets

Let me begin with the $50 trillion-plus U.S. bond markets.

The bond markets are incredibly important to individuals, companies, and governments in the U.S. and around the world. U.S. fixed income markets, particularly Treasury markets, money markets, and repurchase agreements ("repos"), are integral to how the Federal Reserve and other banks around the globe administer monetary policy. As individual investors start to approach retirement, they often turn to fixed income as a lower-risk investment.

The $24 trillion Treasury market[4] — the deepest, most liquid market in the world — 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 integral to monetary policy. 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 Rally." In the fall of 2019, we had significant dislocations in Treasury funding markets, called the Treasury repo market.

The SEC's staff have worked, in consultation with our colleagues at the Department of the Treasury and the Federal Reserve, on proposals designed to enhance competition and resiliency in these markets. These proposals include:

- Ensuring that certain significant Treasury market platforms, including certain interdealer brokers, come into oversight and register;[5]
- Further defining certain activities that would cause someone engaging in those activities to register as a dealer; thus, principal trading firms engaging in important

[4] *See* statistics from Securities Industry and Financial Markets Association, *available at* https://www.sifma.org/resources/research/statistics/us-treasury-securities-statistics/#:~:text=Outstanding%20(as%20of%20August)%20%2423.7,%2C%20%2B8.0%25%20Y%2FY

[5] *See* Gary Gensler, "Statement on Government Securities Alternative Trading Systems" (Jan. 26, 2022), *available at* https://www.sec.gov/news/statement/gensler-ats-20220126.

liquidity-providing roles in the securities markets, including in the U.S. Treasury market, would have to register with the SEC;[6]

- Ensuring that some of the most active participants in our markets be required to become a member of a national securities association;[7]
- Enhancing standards for clearing agencies of Treasuries regarding their membership requirements and risk management, and amending the broker-dealer customer protection rule regarding margin held at Treasury clearing agencies;[8] and
- Strengthening the governance of clearing agencies.[9]

I believe that, all told, these rules would enhance the resiliency, risk management, efficiency, transparency, and competition of our capital markets.

I also support consideration of work undertaken by the Financial Industry Regulatory Authority (FINRA) to bring greater efficiency and transparency to the nearly $30 trillion non-Treasury fixed income markets.[10] These critical markets are more than 2.5 times larger than the commercial bank lending market. America turns more to bonds than to banks to fund their projects. Thus, it's worth considering how to ensure these markets are as efficient, competitive, and transparent as possible.

Equity markets

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

We haven't updated key aspects of our national market system rules, particularly related to order handling and execution, since 2005. Think about that. When you reach into your pocket, you likely will find a phone that did not exist 17 years ago. How would you fare in your work and life if you still were using the latest technology from 2005?

Right now, there isn't a level playing field among different parts of the market: wholesalers, dark pools, and lit exchanges.[11] Further, the markets have become increasingly

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[6] *See* Gary Gensler, "Statement on the Further Definition of a Dealer-Trader" (March 28, 2022), *available at* https://www.sec.gov/news/statement/gensler-statement-further-definition-dealer-trader-032822.

[7] *See* Gary Gensler, "Statement on Re-Proposed Amendments Regarding Exemption from National Securities Association Membership" (July 29, 2022), *available at* https://www.sec.gov/news/statement/gensler-proposed-amendments-exemptions-national-securities-association-072922.

[8] *See* Sunshine Act Notice for Sept. 14, 2022, Open Commission Meeting: https://www.sec.gov/os/sunshine-act-notices/sunshine-act-notice-open-09142022

[9] *See* Gary Gensler, "Statement on Proposal to Enhance Clearing Agency Governance" (Aug. 8, 2022), *available at* https://www.sec.gov/news/statement/gensler-statement-proposal-enhance-clearing-agency-governance-080822.

[10] *See* Gary Gensler, "The Name's Bond" (April 26, 2022), *available at* https://www.sec.gov/news/speech/gensler-names-bond-042622.

[11] *See* Gary Gensler, "Market Structure and the Retail Investor" (June 8, 2022), *available at* https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822.

hidden from view. In 2009, off-exchange trading accounted for approximately one-third of U.S. equity volume.[12] On February 9, 2021, during the height of the meme stock events, the percent of shares traded-off exchange was greater than 50 percent.[13] The average daily portion of shares traded off-exchange over the period from January 4, 2022, through February 26, 2022, was 47 percent.

Thus, last year I asked staff to take a cross-market view of how we might update our rules and drive greater efficiencies in our equity markets, particularly for retail investors.

So far, the Commission has voted to propose rules to strengthen the transparency of short positions for the investing public and regulators.[14] We also proposed rules for the public's feedback around enhancing central clearing, including shortening the settlement cycle to one day.[15]

Furthermore, staff is considering possible recommendations related to best execution; disclosure of order execution quality; the National Best Bid and Offer; minimum price increments ("tick size"); exchange access fees and rebates; payment for order flow; and order-by-order competition.[16] I think we should continue efforts to make our equity markets as fair, efficient, and competitive as possible for investors.

Security-based swaps markets

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. Since I was with you last year, security-based swap dealers began to register with the SEC; the market also began to report security-based swaps data to swap data repositories. In February, certain data became available to the public.[17] In addition, the Commission proposed to increase the transparency and enhance the integrity of the security-based swaps market, in particular through security-based swap execution facilities.[18]

Crypto markets

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[12] *See* Cboe Global Markets data, *available at* https://www.cboe.com/us/equities/market_share/.
[13] Ibid.
[14] *See* Gary Gensler, "Statement on Rules to Increase Transparency of Short Sale Activity" (Feb. 25, 2022), *available at* https://www.sec.gov/news/statement/gensler-statement-rules-increase-transparency-short-sale-activity-022522.
[15] *See* Gary Gensler, "Statement on Rules Regarding Clearing and Settling" (Feb. 9, 2022), *available at* https://www.sec.gov/news/statement/gensler-statement-rules-regarding-clearing-settling-020922.
[16] *See* "Market Structure and the Retail Investor."
[17] *See* "Statement on Public Dissemination of Security-Based Swap Transactions" (Feb. 16, 2022), *available at* https://www.sec.gov/news/statement/gensler-public-dissemination-sbs-transactions-202202.
[18] *See* "SEC Proposes Rules for the Registration and Regulation of Security-Based Swap Execution Facilities," (April 6, 2022), *available at* https://www.sec.gov/news/press-release/2022-59.

Next, I'll turn to crypto assets.[19]

The core principles from the securities laws apply to all corners of the securities markets.[20] Investors and issuers in crypto markets ought to benefit from the same gold standard that has made our capital markets the most liquid and innovative in the world.

Of the nearly 10,000 tokens in the crypto market, I believe the vast majority are securities. Offers and sales of these thousands of crypto security tokens are covered by the securities laws, which require that these transactions be registered or made pursuant to an available exemption. Thus, I've asked the SEC staff to work directly with entrepreneurs to get their tokens registered and regulated, where appropriate, as securities. Given the nature of crypto investments, I recognize that it may be appropriate to be flexible in applying existing disclosure requirements.

Stablecoins have features similar to, and potentially competing with, money market funds, other securities, and bank deposits. Currently, they primarily are used as means to participate in, or as so-called settlement tokens inside of, crypto platforms. Depending on their attributes, such as whether these instruments pay interest, directly or indirectly, through affiliates or otherwise; what mechanisms are used to maintain value; or how the tokens are offered, sold, and used within the crypto ecosystem, they may be shares of a money market fund or another kind of security. If so, they would need to register and provide important investor protections.

Given that most crypto tokens are securities, it follows that many crypto intermediaries — whether they call themselves centralized or decentralized (e.g., DeFi) — are transacting in securities and have to register with the SEC in some capacity. I've asked staff to work with crypto intermediaries to ensure they register each of their functions — exchange, broker-dealer, custodial functions, and the like — which could result in disaggregating their functions into separate legal entities to mitigate conflicts of interest and enhance investor protections.

I also have asked staff to work with firms that have been operating in other well-regulated markets that want to enter the crypto market. Such traditional financial intermediaries have expressed an interest in providing services to investors in the crypto market and to do so in compliance with time-tested investor protection rules. Existing crypto security intermediaries need to do so in compliance with investor protection rules as well.[21] All intermediaries in our capital markets deserve to compete — and comply — on a fair playing field.

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[19] *See* Prepared Remarks of Gary Gensler On Crypto Markets, Penn Law Capital Markets Association Annual Conference (April 4, 2022), *available at* https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422. *See* Gary Gensler, Remarks at Aspen Security Forum (Aug. 3, 2021), *available at* https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03.

[20] *See* Gary Gensler, "Kennedy and Crypto" (Sept. 8, 2022), *available at* https://www.sec.gov/news/speech/gensler-sec-speaks-090822.

[21] *See* Gary Gensler, "The SEC Treats Crypto Like the Rest of the Capital Markets," *available at* https://www.wsj.com/articles/the-sec-treats-crypto-like-the-rest-of-the-capital-markets-disclosure-compliance-security-investment-mutual-fund-protections-blockfi-bankruptcy-bitcoin-11660937246.

As I have stated previously, a small number of tokens likely are crypto non-security tokens, though they may represent a significant portion of the crypto market's aggregate value. Thus, I have asked staff, in working to register crypto security intermediaries, to recommend a pathway to allow both the crypto security and crypto non-security tokens to trade versus or alongside one another. To the extent that crypto intermediaries may need to one day register with both the SEC and the Commodity Futures Trading Commission (CFTC), I would note we currently have dual registrants in the broker-dealer space and in the fund advisory space.

I look forward to working with Congress on various legislative initiatives related to crypto markets, while maintaining the robust authorities we currently have. Let's ensure that we don't inadvertently undermine securities laws underlying $100 trillion capital markets. The securities laws have made our capital markets the envy of the world.

Predictive Data Analytics

The next area is predictive data analytics.[22] I think the use of predictive data analytics in the 2020s is as transformative as the internet was in the 1990s. Coupled with differential marketing, differential pricing, and individually tailored behavioral prompts, these technologies — what we've called digital engagement practices (DEPs) — are increasingly shaping many parts of our economy. Finance is no exception. These DEPs are integrated into robo-advising, wealth management platforms, brokerage platforms, and other financial technologies.

To that end, the Commission last year put out a request for comment on DEPs. Based on that feedback, I've asked staff to make recommendations for the Commission's consideration around how to address conflicts of interest and sales practices in light of the increased use of predictive data analytics.

Issuers and Issuer Disclosure

Next, I will turn to work related to issuers and issuer disclosure.

Disclosures

For the last 90 years, our capital markets have relied on a basic bargain.[23] Investors get to decide which risks to take as long as companies provide full, fair, and truthful disclosures. Congress tasked the SEC with overseeing this bargain. We do so through a disclosure-based regime, not a merit-based one. Over the decades, we have updated our rule set to elicit disclosures of information relevant to investors' decisions.

Increasingly, over the last number of years, investors are making investment decisions based upon factors that include the risks and opportunities related to climate and cybersecurity.

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[22] *See* Gary Gensler, "Investor Protection in a Digital Age" (May 17, 2022), *available at* https://www.sec.gov/news/speech/gensler-remarks-nasaa-spring-meeting-051722.

[23] *See* Gary Gensler, "Remarks at Financial Stability Oversight Council Meeting" (July 28, 2022), *available at* https://www.sec.gov/news/speech/gensler-statement-financial-stability-oversight-council-meeting-072822.

Today, climate-related factors and risks as well as cybersecurity risks both can affect a company's bottom line and its future, and therefore an investor's decision to buy, hold or sell a security or how to vote a proxy. Today, investors are already making decisions based upon information about climate and cyber risks. Hundreds of companies are already disclosing such information, pursuant to disparate frameworks, in a manner that lacks consistency and reliability.

Thus, the SEC has issued proposals to help bring investors greater consistency, comparability, and decision-usefulness to such disclosures and enhance the conversation that is already going on between issuers and investors. In March, we put out for comment a proposal to require disclosures from public companies about climate-related risks, and we received more than 14,000 comments.[24] In addition, in March, the Commission proposed rules that would enhance issuers' cybersecurity disclosures to help ensure investors are adequately informed about a company's cyber-related risks.[25] We received over 140 comments on that proposal.

China

It's a privilege for foreign issuers to access our markets — the largest, deepest, most liquid markets in the world. If foreign issuers want access to our public capital markets, they must be on a level playing field with U.S. firms. Investors in U.S. markets should be protected — and have trust in a company's financial numbers — regardless of whether an issuer is foreign or domestic.

More than 50 jurisdictions have complied with the requirements that the Public Company Accounting Oversight Board (PCAOB) inspect and investigate audit firms of U.S. public companies, regardless of where the audit firm is based. Two have not: China and Hong Kong.

In August, the PCAOB signed a Statement of Protocol with the China Securities Regulatory Commission and the Ministry of Finance of the People's Republic of China that provides a framework for PCAOB inspections and investigations of audit firms based in China and Hong Kong.[26] The agreement brings specificity and accountability to effectuate Congress's intent, under the Holding Foreign Companies Accountable Act of 2020 (HFCAA), to ensure PCAOB inspection access across all relevant jurisdictions.

Make no mistake, though: The proof will be in the pudding. This agreement will be meaningful only if the PCAOB actually can inspect and investigate completely audit firms in China. If the PCAOB cannot, roughly 200 Chinese-based issuers will face prohibitions on trading of their securities in the U.S. if they continue to use those audit firms.

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[24] *See* "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (March 21, 2022), *available at* https://www.sec.gov/news/press-release/2022-46.
[25] *See* "SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies" (March 9, 2022), *available at* https://www.sec.gov/news/press-release/2022-39.
[26] *See* Gary Gensler, "Statement on Agreement Governing Inspections and Investigations of Audit Firms Based in China and Hong Kong" (Aug. 26, 2022), *available at* https://www.sec.gov/news/statement/gensler-audit-firms-china-hong-kong-20220826.

I thank this Committee for its leadership, and all of Congress, for your continued attention to these important matters.

Other topics

There are a number of other important topics relating to issuers that I'd like to highlight. These include proposals related to special purpose acquisition companies,[27] share repurchase disclosure,[28] beneficial ownership (Regulation 13D-G),[29] and trading by company insiders (10b5-1 plans).[30] Across these areas, I think we have opportunities to enhance market integrity, transparency, and fairness in our markets.

Funds and Investment Management

The next area I will discuss is how we can drive greater efficiency, integrity, and resiliency in the funds and investment management space.

Efficiency

Private fund advisers, through the funds they manage, touch so much of our economy. These funds, including hedge funds, private equity funds, venture capital funds, and liquidity funds, currently have approximately $21 trillion in gross assets.[31] These funds matter because of what, or who, stands on either side of them. The funds pool the money of other people, including retirement plans, university endowments, and others. The people behind those funds and endowments often are teachers, firefighters, municipal workers, students, and professors. And who are the people on the other side of the private funds? They're entrepreneurs, small business owners, and managers of late-stage companies.

That's why I think it is important, using the tools of competition and transparency, to drive greater efficiencies in the private funds market. In this space, there may be somewhere in the range of $250 billion in fees and expenses each year.[32] Thus, the Commission proposed rules to enhance transparency for private fund investors, such as with respect to advisers' fees, performance metrics, and side letter arrangements.

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[27] *See* "SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections" (March 30, 2022), *available at* https://www.sec.gov/news/press-release/2022-56.

[28] *See* "SEC Proposes New Share Repurchase Disclosure Rules" (Dec. 15, 2021), *available at* https://www.sec.gov/news/press-release/2021-257.

[29] *See* "SEC Proposes Rule Amendments to Modernize Beneficial Ownership Reporting" (Feb. 10, 2022), *available at* https://www.sec.gov/news/press-release/2022-22.

[30] *See* "SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures" (Dec. 15, 2022), *available at* https://www.sec.gov/news/press-release/2021-256.

[31] This represents registered investment adviser (RIA) private fund gross asset value reported on Form ADV as of December 2021.

[32] *See* Gary Gensler, Prepared Remarks At the Institutional Limited Partners Association Summit, Nov. 10, 2021, *available at* https://www.sec.gov/news/speech/gensler-ilpa-20211110.

Integrity

In promoting integrity in our markets, it is crucial that investors can evaluate what stands behind a fund's marketing. Recently, we've seen a growing number of funds market themselves as "green," "sustainable," "low-carbon," and so on. What information stands behind those claims?

Thus, we proposed modernizing the 21-year-old Names Rule to help ensure that a fund's name aligns with the fund's characteristics and investing strategy.[33] As the fund industry has developed, gaps in the current Names Rule may undermine investor protection. The proposal would modernize this key rule for today's markets. Concurrently, we proposed a rule enhancing the disclosure requirements for advisers and investment companies marketing themselves using Environmental, Social, and Governance (ESG)-related labels.[34] This would help ensure that investors can see the information that stands behind funds' and advisers' claims.

Resiliency

The nature, scale, and interconnectedness of funds pose issues for financial stability. We've seen such risks emanate from various fund sectors during the 2008 financial crisis, at the start of the COVID crisis in March 2020, and in 1998, when the hedge fund Long-Term Capital Management failed.[35]

Therefore, the Commission has proposed various rules related to resiliency.

In December, the Commission voted to propose amendments designed to increase resiliency of money market funds.[36] There were challenges in this market during the 2008 financial crisis. The SEC sought to address structural issues in these funds through a series of reforms adopted in 2010 and 2014. The events of March 2020, though, suggest that more can be done to improve the resiliency of money market funds.

Next, in response to the 2008 financial crisis, Congress mandated the SEC and CFTC to establish reporting requirements for advisers to private funds through Form PF, an important reporting tool used to protect investors and monitor systemic risk. We've learned a lot, though, since Form PF was first adopted. Thus, over the last year, the Commission has proposed two sets of rules regarding Form PF.

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[33] *See* "SEC Proposes Rule Changes to Prevent Misleading or Deceptive Fund Names" (May 25, 2022), *available at* https://www.sec.gov/news/press-release/2022-91.
[34] *See* "SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices" (May 25, 2022), *available at* https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522.
[35] *See* "Statement before the Financial Stability Oversight Council on Money Market Funds, Open-End Bond Funds, and Hedge Funds" (Feb. 4, 2022), *available at* https://www.sec.gov/news/speech/genseler-fsoc-statement-020422.
[36] *See* Gary Gensler, "Statement on Money Market Fund Reform" (Dec. 15, 2021), *available at* https://www.sec.gov/news/statement/gensler-mmf-20211215.

In January, the Commission proposed amendments to the SEC-only sections of Form PF.[37] That proposal would, among other things, require certain advisers to private funds to provide current reporting of key events, and enhance reporting requirements for large private equity and large liquidity fund advisers. In August, we proposed to amend the SEC and CFTC's joint portions of Form PF to expand the reporting requirements for large hedge fund advisers on their large hedge funds, among other things.[38] Together, these proposals, if adopted, would improve the quality of the information we receive from filers, including hedge funds and private equity funds.

Third, in February, the Commission proposed new rules that would require registered investment advisers, registered investment companies, and business development companies to enhance their cybersecurity practices.[39] Such rules would improve advisers' and funds' cybersecurity risk management and incident reporting.

Finally, with respect to open-end funds, I've asked staff whether there are improvements we can consider to enhance fund liquidity, pricing, and resiliency during periods of stress.

Enforcement and Examinations

Maintaining the gold standard of the capital markets means examining against the rules and being the cop on the beat. About half of SEC staff work in the Divisions of Examinations and Enforcement, ensuring that firms are inspected and wrongdoers are held accountable for their misconduct.

Without examination against and enforcement of our rules and laws, we can't instill the trust necessary for our markets to thrive. Preventing fraud, manipulation, and abuse lowers risk in the system. It protects investors and reduces the cost of capital. The whole economy benefits from that.

The Commission has brought a number of important cases based on allegations of books and records violations, complex products, and crypto assets.[40] That being said, the Division of Enforcement shrank 5 percent from Fiscal Year (FY) 16 to FY21. The number of full-time

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[37] *See* "SEC Proposes Amendments to Enhance Private Fund Reporting" (Jan. 26, 2022), *available at* https://www.sec.gov/news/press-release/2022-9.

[38] *See* "SEC Proposes to Enhance Private Fund Reporting" (Aug. 10, 2022), *available at* https://www.sec.gov/news/press-release/2022-141.

[39] *See* "SEC Proposes Cybersecurity Risk Management Rules and Amendments for Registered Investment Advisers and Funds" (Feb. 9, 2022), *available at* https://www.sec.gov/news/press-release/2022-20.

[40] *See*, e.g., "JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges" (Dec. 17, 2021) (settled order), *available at* https://www.sec.gov/news/press-release/2021-262; "SEC Charges Allianz Global Investors and Three Former Senior Portfolio Managers with Multibillion Dollar Securities Fraud" (May 17, 2022) (settled orders as to Allianz; civil action pending as to certain individual defendants), *available at* https://www.sec.gov/news/press-release/2022-84; "SEC Charges Infinity Q Founder with Orchestrating Massive Valuation Fraud" (Feb. 17, 2022) (civil action pending), *available at* https://www.sec.gov/news/press-release/2022-29; "SEC Charges Archegos and its Founder with Massive Market Manipulation Scheme" (April 27, 2022) (civil action pending), *available at https://www.sec.gov/news/press-release/2022-70* and "BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product" (Feb. 14, 2022) (settled order), *available at* https://www.sec.gov/news/press-release/2022-26.

equivalents (FTEs) supported by the FY23 budget request for the agency would still be 1 percent shy of where we were in 2016.

While the Division is doing more with less, we do need more resources. For example, more cases are being litigated and going to trial. The SEC has tried the same number of cases to verdict in federal courts in FY22 (14) as we did in the prior three fiscal years combined.

Further, in FY21, we received 46,000 tips, complaints, and referrals from members of the public, up from about 16,000 five years earlier.

Moreover, the Division of Examinations' work is essential to ensuring strong compliance across the board. For example, that includes work to test for compliance with Regulation Best Interest, which helps to ensure retail customers receive unbiased recommendations from their broker-dealers that are truly in the customer's best interest. The Division also plays a key role in monitoring risk and informing policy, which are especially important during times of increased market volatility, geopolitical turmoil, and interconnectedness.

In the most recent completed fiscal year, this Division exceeded the previous year's numbers by completing more than 3,000 examinations and hundreds of non-exam registrant engagements responding to market events.[41] The Division of Examinations grew modestly (4 percent) since FY16. The FY23 budget request supports an additional 4 percent increase in FTEs compared with FY21.

Resources

The SEC oversees 24 national securities exchanges, 99 alternative trading systems, 10 credit rating agencies, seven active registered clearing agencies, five self-regulatory organizations and other external entities. We review the disclosures and financial statements of more than 8,200 reporting companies.[42]

Markets don't stand still. The world isn't standing still. Our resources can't stand still, either.

For example, since 2016, the number of private funds managed by registered investment advisers has increased 40 percent, to 50,000.

In addition, the amount of data that the SEC processes has swelled by 20 percent annually for each of the last two years.

And yet, our agency has shrunk. Last year, the agency had 4 percent fewer staff than it did in 2016. We can't shrink when we're trying to maintain a gold standard.

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[41] *See* Division of Examinations, 2022 Examination Priorities, *available at* https://www.sec.gov/files/2022-exam-priorities.pdf.

[42] *See* Gary Gensler, "Testimony at Hearing before the Subcommittee on Financial Services and General Government U.S. House Appropriations Committee" (May 17, 2022), *available at* https://www.sec.gov/news/testimony/gensler-testimony-fsgg-subcommittee.

Thanks to the work of the remarkable staff, the SEC has faced the challenges of limited resources well. For the SEC to continue to succeed in carrying out our mission, our personnel level must continue to grow commensurate with the expansion and complexity in the capital markets around the world. To fund our operations, the agency collects fees on securities transactions at a rate intended to fully offset our appropriation.

Our capital markets are a national treasure. We, at the SEC, must work to maintain them as the envy of the world. But we can't do it alone. We need the help of Congress.

Conclusion

In considering how to maintain the world's best markets in the 2020s and the 2030s, I can't help but think about the establishment of the federal securities regime in the 1930s. These foundational laws help us maintain our competitiveness on the world stage. They are the gold standard. Let's do everything we can to keep them that way in the future.

I'm often asked to prioritize the remaining items on our rulemaking agenda. When will we vote on what?

At their core, those questions are more about sequencing than prioritization. Staff is working diligently on remaining proposals and possible adopting releases. When they and my fellow Commissioners think proposals are ready, we'll put them out for public comment and, when appropriate, finalize items.

In all our work, we are anchored by the laws Congress has passed, the courts' interpretations of those laws, economic analysis, and public input.[43] As a Commission, we benefit greatly from that public input. As staff prepares recommendations for the Commission, they take those comments into close consideration and consider changes based upon that public feedback.

Every day, as we consider these policy areas, we are motivated by our three-part mission, as directed by Congress: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

Thank you and I look forward to answering your questions.

[43] *See* "Remarks at Financial Stability Oversight Council Meeting."

Committee on Banking, Housing, and Urban Affairs
"Oversight of the U.S. Securities and Exchange Commission."
September 15, 2022

Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Ranking Member Patrick J. Toomey:

Pace of Rulemaking

1. **There are more than 50 rulemakings on the SEC's short-term agenda. Many of these have relatively short comment periods, especially in light of the significant work involved in commenting on so many proposed rules that often have overlapping comment periods.**

   a. **How does the SEC's cost-benefit analyses assess the interactions and other effects across these concurrent rulemakings?**

The Commission has long considered efficiency, competition, and capital formation, in addition to investor protection and the public interest. In Commission rulemakings, the SEC conducts an economic analysis that examines the costs, benefits, and other economic effects of that particular rulemaking. The Commission's economic analysis of a proposed regulatory action compares the current state of the world, including the problem that the rule is designed to address, with the expected state of the world with the proposed regulation (or regulatory alternatives) in effect. In particular, to the extent that rules that are adopted impact market conditions through their costs, including cumulative costs, this impact is incorporated in the economic analysis (i.e. current and expected states of the world) of any new rule proposal or adoption. For more information on the costs and benefits of rules proposed or adopted by the Commission, please see the SEC's website, www.sec.gov/rules.

2. **The SEC recently finalized a rule that was proposed on November 18, 2021 and had a 30-day comment period that expired on December 27, 2021 (Proxy Voting Advice, Release No. 34-93595 (Nov. 17, 2021)). This comment period was not only short, it overlapped with major holidays.**

   a. **Is a short comment period that overlaps with major holidays consistent with a good process for soliciting stakeholders' views?**

The 30-day comment period is consistent with the requirement that Congress set forth in the Administrative Procedure Act. I value public feedback on the Commission's proposals. The Commission reviewed and considered the numerous comment letters received in response to the proposed amendments, including five comment letters submitted after the comment period deadline. I believe that the comment period on these proposed amendments provided adequate opportunity for interested parties to share their views, especially given the targeted nature of those amendments.

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b. Do you think some potential commenters were deterred from submitted comments by the short comment period?

No. I do not believe potential commenters were deterred from submitting comments. Many commenters submitted comments during the comment period, and the five comment letters received after the comment period deadline were considered.

Rule 15c2-11

3. In October 2020, the SEC amended the Exchange Act's Rule 15c2-11 to ensure that issuers of securities quoted in the over-the-counter market make current financial information publicly available. In December 2021, SEC staff confirmed that the Rule 15c2-11 would apply to fixed-income securities, including debt securities issued for resale under Rule 144A (144A fixed-income securities). While Rule 15c2-11 does not distinguish between debt and equity securities, market participants have long understood that Rule 15c2-11 was not intended to apply to fixed-income securities. Acknowledging the change amounted to a new policy, the SEC has phased in compliance with the new regime through time-limited no-action relief announced in December 2021. Beginning January 4, 2023, broker-dealers will be required, as a condition to publishing quotations, to verify that issuer financial information is publicly available for 144A fixed-income securities.

a. Why has SEC staff changed the SEC's approach to application of Rule 15c2-11 to fixed-income securities?

Since its adoption in 1971 through notice and comment rulemaking, Rule 15c2-11 has applied to securities.[1] The term "security" is defined under section 3(a)(10) of the Securities Exchange Act of 1934 and specifically includes, among others, notes, bonds, and debentures and certificates of deposit, which are commonly known as fixed income securities. The obligation on broker-dealers to comply with the applicable requirements of Rule 15c2-11 in connection with publishing or submitting quotations, in a quotation medium other than a national securities exchange, as part of a Rule 144A transaction existed when Rule 144A was adopted in 1990.[2]

In 2019, the Commission, as part of the notice and comment rulemaking that led to the adoption of amendments to Rule 15c2-11, requested public comment specifically on Rule 15c2-11's

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1 *Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, Release No. 34-9310 (Sept. 13, 1971), [36 FR 18641 (Sept. 18, 1971)].

application to fixed income securities.[3] Although commenters provided extensive responses to the Commission's request for comments, no commenters responded to these questions. Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule.

b. Has the SEC ever taken action to enforce Rule 15c2-11 against a participant in the secondary market for fixed-income securities?

The SEC has not filed any enforcement actions charging a participant in the secondary market for fixed-income securities with violating Exchange Act Rule 15c2-11.

c. To what extent has the SEC staff considered the adverse effects of applying Rule 15c2-11 to 144A fixed-income securities?

When the Commission adopted amendments to Rule 15c2-11 in 2019, it did not change the scope of the securities covered by the rule, which has included fixed income securities since its adoption in 1971. At the proposing stage, the Commission solicited comment on the scope of rule and included relevant questions for comment, which included: Question 86 (asking whether certain categories of issuers or securities that are unlikely to be involved in fraud in the OTC market also should be excepted from Rule 15c2-11); Question 87 (asking whether debt securities, non-participatory preferred stock, or investment grade asset-backed securities should be excepted from the requirements of the Rule); and Question 122 (asking whether the application of the Rule should be limited to equity securities).

d. Is the SEC considering amendments to its December 2021 no-action relief or other guidance to mitigate the negative effects of applying Rule 15c2-11 to 144A fixed-income securities?

As discussed above, the obligation on broker-dealers to comply with the applicable requirements of Rule 15c2-11 in connection with publishing or submitting quotations in a Rule 144A transaction existed when Rule 144A was adopted.[4] When the Commission adopted amendments to Rule 15c2-11 in 2019, it did not change the scope of the securities covered by the rule, which

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[3] *Publication or Submission of Quotations Without Specified Information*, Release No. 34-87115, (Sept. 25, 2019), [84 FR 58206 (Oct. 30, 2019)] ("2019 Rule 15c2-11 Release"), at 84 FR 58230, 58239.

[5] https://www.sifma.org/wp-content/uploads/2022/06/ABA-BPI-and-SIFMA-SAB-121-Letter-6.23.22.pdf

has included fixed income securities since its adoption in 1971. In December 2021, the staff issued a no-action letter stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good-faith transition into compliance with the amended Rule. Consistent with the limitations regarding all staff actions, footnote 9 of that letter states the following: "This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person." Commission staff continues to carefully consider the concerns raised by market participants.

Digital Assets

4. **At the Banking Committee hearing on September 15, 2022, in response to questions, you mentioned that six digital assets have been registered with the SEC under the securities laws. With respect to each such digital asset, please identify:**

   a. **The name of the issuer of the security**

Nine crypto assets have been registered with the SEC, of which five have been registered under the Securities Exchange Act of 1934 and four have been registered or qualified under the Securities Act of 1933. The issuers of these crypto assets are as follows:

Securities Exchange Act of 1934:
- Blockchain of Things, Inc.
- Carrier EQ, LLC (d/b/a Airfox)
- Enigma MPC, Inc.
- ParagonCoin Limited
- Salt Blockchain Inc.

Securities Act of 1933
- Blockstack PBC (n/k/a Hiro Systems PBC)
- Ceres Coin LLC
- INX Limited
- YouNow, Inc. (n/k/a Open Props Inc.)

   b. **Whether the registration was under the Securities Act or the Exchange Act**

See response to (a.) above.

c. Whether the holder of the digital asset had a contractual entitlement against the issuer to a dividend or other payment

Holders of the crypto assets issued by Ceres Coin LLC and INX Limited have a contractual entitlement to dividends or other payments. Holders of the crypto asset issued by Carrier EQ, LLC (d/b/a Airfox) may receive dividends or other payments, but such dividends or other payments are not a contractual entitlement (i.e., they are in the sole discretion of the issuer).

d. Whether the registration was in response to, or otherwise in connection with, an enforcement action or other inquiry by the SEC

The five crypto assets registered under the Securities Exchange Act identified in the response to (a.) above were registered in response to SEC enforcement actions.

5. Please list all no-action letters, arranged in chronological order, issued since September 14, 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.

There have been no such no-action letters issued since September 14, 2021.

6. Please list all exemptive orders, arranged in chronological order, issued since September 14, 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.

There have been no such exemptive orders issued since September 14, 2021.

7. Please list all publicly-disclosed enforcement actions, arranged in chronological order, taken since September 14, 2021 through the date of your response, that reference cryptocurrencies, tokens, digital assets, and similar items.

A list of SEC enforcement actions concerning crypto-asset securities and related conduct filed from September 14, 2021 through October 12, 2022 is attached hereto as Exhibit A.

8. In March 2022, the SEC issued Staff Accounting Bulletin 121 (SAB 121), guidance that sets forth the SEC staff's views regarding the accounting treatment for entities that safeguard crypto assets. The guidance, which was issued without public notice and comment, discusses the technological, legal, and regulatory risks associated with safeguarding crypto-related assets. In response to these risks, SEC staff believes these assets should be reflected as liabilities and corresponding assets on the custodian's

balance sheet. This guidance seems to ignore or misunderstand the capital, liquidity, and other prudential requirements already in place for banks, which help to guard against the identified risks. Because of these requirements, holding crypto assets in custody would be uneconomical for banks.

A former SEC Chief Accountant noted that "[g]enerally, before a SAB is issued, the general content and staff views to be expressed in the SAB are discussed with registrants, accounting firms, standard setting bodies, trade groups, other impacted regulatory agencies, all relevant SEC offices and divisions, and other interested parties."[5] However, a recent press report indicated that the SEC "did not consult the banking regulators when issuing the guidance."[6]

a. Why didn't the SEC staff consult with staff of the Federal Reserve Board, Office of the Comptroller of the Currency, or Federal Deposit Insurance Corporation before issuing SAB 121?

Staff Accounting Bulletins ("SABs") represent accounting interpretations and practices used by staff in the SEC's Office of the Chief Accountant ("OCA") and Division of Corporation Finance ("CF") when administering the disclosure requirements of the federal securities laws. SEC staff published SAB 121 to provide guidance for entities to consider when they have obligations to safeguard crypto assets held for their platform users.

The staff routinely engages with other federal regulators, regulated entities, and additional stakeholders on accounting and reporting issues, as well to monitor developments in the markets. In recent years, this staff engagement also has included discussions on issues pertaining to crypto assets.

b. Do you have any concerns that this action could actually impede the feasibility of highly regulated U.S. institutions, like banks, from safely taking custody of Americans' digital assets?

The SEC's mission is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

Separately, bank regulatory agencies are charged with ensuring the safety and soundness of financial institutions.

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[5] https://www.sifma.org/wp-content/uploads/2022/06/ABA-BPI-and-SIFMA-SAB-121-Letter-6.23.22.pdf
[6] https://www.reuters.com/technology/us-secs-crypto-guidelines-push-up-costs-lenders-disrupting-projects-2022-09-16/

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Because the SEC does not have supervisory or regulatory oversight of banking activities (including bank capital requirements), any questions regarding the safety and soundness of the federal banking system would best be addressed by the federal banking regulators.

c. Are custodians required to treat any other assets as on-balance sheet assets?

Under current accounting guidance, determination of whether assets should be reported on-balance sheet or off-balance sheet requires a careful consideration of the specific facts and circumstances of the arrangements.

As highlighted in SAB 121, the SEC staff believes that arrangements to safeguard crypto assets involve unique risks and uncertainties—including technological, legal, and regulatory risks and uncertainties—not present in arrangements to safeguard non-crypt assets.

9. During your testimony at the September 15, 2022 hearing, you stated "you could have some things that are quite open but still have" the elements of an investment contract.

a. Could you please elaborate the elements you consider would make cryptocurrencies "quite open"?

Certain crypto assets are issued and transferred on permissionless public blockchains using publicly-available protocols. With respect to these types of crypto assets, anyone using a computer technically can use the software to interact with such a blockchain to issue and transfer such crypto assets. The technology used to create, transfer, or otherwise reflect an asset does not affect whether that asset is a security.

b. Would any of these elements factor into the prongs of the *Howey* test? If so, which ones?

Under the *Howey* test, an "investment contract," which is a security, 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. Whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances.

All the facts and circumstances are relevant. As I have stated before, however, the determination whether an asset is a security does not depend on the underlying technology. Crypto assets are not laundromat tokens: Promoters are marketing and the investing public is buying most of these tokens anticipating profits based on the efforts of others. Without prejudging any one token, most crypto tokens are investment contracts under the *Howey* Test.

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10. At the Banking Committee hearing on September 15, 2022 hearing, you stated that "there's no group of individuals in the middle" when it comes to Bitcoin.

a. Please describe all other properties that you lead you to conclude Bitcoin does not qualify as a security.

I cannot comment on any particular crypto asset. In general, a crypto asset should be analyzed to determine whether it has the characteristics of any product that meets the definition of "security" under the federal securities laws. The term "security" includes an "investment contract," as well as other instruments such as stocks, bonds, and transferable shares. The U.S. Supreme Court's *Howey* decision 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. As to crypto assets, the focus of the *Howey* analysis is not only on the form and terms of the asset itself but also on the circumstances surrounding the crypto asset and the manner in which it is offered, sold, or resold (which includes secondary market sales). No single fact is determinative; rather, the analysis requires examination of all the facts and circumstances.

b. Are there any other token networks that share these properties?

I cannot comment on any particular token or any particular blockchain or network.

11. If a cryptocurrency provides a reward in that cryptocurrency for validating transactions or providing a useful service on its network, does this circumstance, absent any further detail, result in an "investment of money" as required under the *Howey* test? If so, how so?

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. As to crypto assets, the focus of the *Howey* analysis is not only on the form and terms of the asset itself but also on the circumstances surrounding the crypto asset and the manner in which it is offered, sold, or resold (which includes secondary market sales). No single fact is determinative; rather, the analysis requires examination of all the facts and circumstances.

12. In the SEC's analysis, if a network is operated by an unaffiliated, dispersed community of network users, is this a factor that would weigh for or against the arrangement meeting the "common enterprise" prong of the *Howey* test? Similarly, how might this factor weigh for or against the "reasonable expectation of profits derived from the efforts of others" prong?

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Please see the above answer to Question #11.

13. When a holder of a governance token actively engages in changes to the network, under the Commission's analysis of the *Howey* test, to what extent is the holder relying on his own efforts, rather than the efforts of others?

Please see the above answer to Question #11.

14. Does the SEC view a proof of stake consensus mechanism as qualifying as ongoing reliance for profits derived primarily from the efforts of others, as required under the *Howey* test?

Please see the above answer to Question #11.

15. Please list the actions the SEC has taken to collaborate with state regulators on the determination that digital assets could be a security.

Coordination and cooperation among federal and state regulators concerning the introduction of new types of financial products and services occurs through a number of long-established channels. From the SEC's perspective, these include formal arrangements, such as the meetings specified in Section 19(d) of the Securities Act of 1933, as well as the many informal and ongoing interactions between SEC staff with state securities regulators, among other state regulators, pertaining to crypto assets.

Each state has its own securities laws, which determine whether a particular financial service or product is a security under that particular state's laws.

SEC staff has ongoing interactions with state securities regulators, among other state regulators, about securities law issues involving crypto assets that may affect the citizens of their states. These interactions also concern additional securities law issues, such as relating to token offerings, crypto-asset trading platforms, and crypto-asset investment pools, as well as the operations of state-regulated entities.

State and federal regulators play an important role in protecting investors, including retail investors, against fraudulent and illegal activities. We will continue to work with state securities regulators as we examine this evolving area and pursue illegal and improper activities.

16. Since you believe the "vast majority" of tokens on the market are securities do you think that as a consequence these tokens will always be securities? Is it possible that

an investment contract involving a token ceases at a point in time, and as a result, the token or arrangement involving the token may no longer be securities offerings?

Please see the above answer to Question #11.

17. Who should register a decentralized exchange with the SEC that is not controlled by any single entity or group, and is in fact only code on a decentralized network?

Given that many crypto tokens are securities, it follows that many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity. Crypto intermediaries—whether they call themselves centralized or decentralized (e.g., DeFi)—often are an amalgam of services that, in the rest of the securities markets, typically are separated from each other: exchange functions, broker-dealer functions, custodial and clearing functions, and lending functions.

Platforms that match orders in crypto security tokens of multiple buyers and sellers using established non-discretionary methods meet the regulatory criteria for being an exchange. Crypto investors should benefit from exchange rulebooks that protect against fraud, manipulation, front-running, wash sales, and other misconduct.

Activity by platforms of engaging in the business of effecting transactions in crypto security tokens for the accounts of others makes the platforms brokers. Activity by platforms of engaging in the business of buying and selling crypto security tokens for their own account makes them dealers. Crypto investors should get the protections they receive from regulated broker-dealers.

Additionally, many crypto intermediaries provide lending functions for a return. If a lending platform is offering and selling securities, it too comes under SEC jurisdiction.

If a platform falls into any of these buckets, I would urge those operating the platform to come in, talk to us, and register.

Section 3(a)(1) of the Exchange Act defines "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities . . . and includes the market place and the market facilities maintained by such exchange." Section 5 of the Exchange Act provides: "It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of the Exchange Act,

or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange . . ."

Investors receive important protections when they trade on registered exchanges. Investor protection becomes a greater concern if investors are being invited to trade on unregistered exchanges.

Treasury Market Structure

18. **On March 28, 2022, the SEC issued a proposed rule that would amend the statutory definitions of "dealer" and "government securities dealer." If amended as contemplated by the proposed rule, the Exchange Act's Rules 3a5-4 and 3a44-2 would require a person to register as a dealer or government securities dealer, respectively, if the person triggers one of several qualitative and quantitative standards indicative of certain dealer-like roles. Due in part to ambiguity around the qualitative standards, the proposed rule would appear to require hundreds of hedge funds (if not more) to register as a dealer or government securities dealer.**

    a. **Does the SEC intend to require hedge funds and other private funds to potentially register as a dealer or government securities dealer, regardless of whether a private fund has customers?**

The Commission has proposed new rules that would require market participants that assume certain dealer-like roles—by providing an important liquidity provision function in today's securities markets—to register with the Commission, become a member of a self-regulatory organization, and comply with federal securities laws and regulatory obligations. If adopted, new Rules 3a5-4 and 3a44-2 under the Securities Exchange Act of 1934 would further define the phrase "as a part of a regular business" in Sections 3(a)(5) and 3(a)(44) of the Act. This further definition would identify certain activities that would cause persons engaging in such activities to be "dealers" or "government securities dealers," which would be subject respectively to the registration requirements of Sections 15 and 15C of the Act.

The Commission requested comment on the impact of registration on market participants, including private funds. Staff is considering the public comments received as part of evaluating recommendations for the Commission's consideration.

19. **The costs for private funds to register as a dealer or government securities dealer could be substantial, and the proposed rule does not attempt to estimate the potential impact on market efficiency, competition, and market participation if the rule is finalized as proposed. The SEC instead states that these potential impacts are "uncertain" when the net effect will likely be a meaningful reduction in market**

liquidity as hedge funds limit their trading and investing activity to avoid dealer registration, the costs that come with it, the loss of customer status, and investors ultimately withdrawing their capital from the fund.

a. Has the SEC considered the impact the proposed rule will have on market liquidity as private funds limit their trading and investing activity?

In Commission rulemakings, the SEC conducts an economic analysis that examines the costs, benefits, and other economic effects of that particular rulemaking. The SEC's analysis of the effect of the proposed rule on efficiency, competition, and capital formation can be found in the economic analysis section of the proposal, which is available on the SEC's website, www.sec.gov, and available also at 87 FR 23054.

This analysis states that the proposed rule could promote competition by standardizing the regulatory treatment of all firms engaged in liquidity provision, including private funds, and that the effects on competition could be offset to the extent the proposed rules encourage or discourage market participation. The release states that any net effect on competition would likely be small because the SEC understands that liquidity provision in securities markets is reasonably competitive, even among currently registered dealers. The analysis also states that if important and informed market participants permanently reduce their market activity or their pursuit of certain investment strategies, market efficiency may decline in the markets for some securities. On the other hand, improved investor confidence might lead to greater market participation that improves market efficiency.

The Commission requested comment on the impact of registration on market participants, including private funds, and staff is considering the public comments received as part of evaluating recommendations for the Commission's consideration.

20. The proposed rule states that the benefits of registering private funds as dealers "might be very small," yet the SEC proceeded with including private funds within the scope of the rulemaking. It is unclear, however, how the dealer regulatory framework could be layered on top of an existing private fund.

a. How does the SEC envision asset management businesses in the private fund sector would be able to comply with the registration requirement? Would it even be feasible for private funds and their advisers to register as dealers?

As the Commission stated in the proposing release, the identification and registration of market participants that engage in liquidity-providing activities similar to those traditionally performed by dealers—including those that are not currently regulated as dealers, such as private funds—would provide regulators with a more comprehensive view of the markets through regulatory oversight. It also would enhance market stability and investor protection.

The Commission sought comment in the proposing release from market participants, including asset management businesses, seeking information on the utility and practicability of dealer registration. The Commission has received comments from market participants, including those in the asset management industry. Staff is carefully considering these comments in evaluating recommendations for the Commission's consideration.

b. Why did the SEC include private funds within the scope of the proposed rule while excluding registered investment companies when private funds and their advisers are also subject to an extensive regulatory framework, particularly when the proposed rule acknowledges that the benefits of registering private funds as dealers "might be very small"?

The Commission explained in the proposing release that it did not exclude private funds from the proposed rules because it seeks to take a similar approach to regulating dealer activity across market participants. The Commission also stated that it believes that the proposed rules may create a more-level competitive landscape by applying similar rules to all activities that meet the proposed standards. The proposed rules may also promote market efficiency and capital formation by strengthening market stability and investor protection.

The Commission requested comment on all aspects of the proposed rules, including whether private funds should be excepted or excluded. Staff is carefully considering these comments as it evaluates potential recommendations for the Commission's consideration.

Climate Disclosure Rule

21. The SEC's proposed climate disclosure rule would apply to business development companies (BDCs), which could result in BDCs having to rely on their portfolio companies to report the required information. Many of these portfolio companies are private companies.

a. What is the justification for the application of the proposed climate disclosure rule to BDCs?

The proposed climate disclosure rule would apply to all filers of Form 10-K, including BDCs. While the Commission preliminarily included BDCs within the scope of the proposed climate disclosure rule, the Commission solicited comment on whether BDCs should be excluded. The Commission also recognized that BDCs would be subject to both the proposed climate disclosure rule as well as the Commission's proposed rules requiring enhanced disclosures by certain investment advisers and investment companies about environmental, social, and governance investment practices ("ESG rule"). The staff will consider commenters' responses to these

requests for comments as it prepares recommendations for the Commission regarding the climate disclosure and ESG rules.

22. As you know, all Republican members of this Committee sent you a letter on June 15, 2022 requesting both records and answers to straightforward questions pertaining to the proposed climate disclosure rule by no later than June 29. In response, on July 12, you provided a perfunctory one-page response, which neither included a single written answer to our specific questions nor any of the requested records. Instead, your one-page response offered to arrange a briefing by SEC staff that we did not request.

As a result, we sent you a follow-up letter on July 21 explicitly rejecting your offer of a briefing as a substitute for the records and written answers we requested and reiterating our request for you to promptly provide these records and written answers to our questions. You never responded to this second letter, and to date you have not provided a single requested record or a single written answer to any of our specific questions

a. Why have you chosen not to provide any of the requested records or any written answers to our straightforward questions in the more than 90 days since our initial letter?

Please see below response in 22(e).

b. We have received no indication from you or anyone else at the SEC that the SEC is working to provide any of the info we have requested more than 90 days ago. What efforts, if any, has the SEC undertaken to date to comply with our June 15 request for records and written answers to questions?

Please see below response in 22(e).

c. Has the SEC conducted a search reasonably calculated to locate the responsive records? Please answer "yes" or "no."

Please see below response in 22(e).

d. Has the SEC begun drafting any written answers to our straightforward questions? Please answer "yes" or "no."

Please see below response in 22(e).

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e. What records and written answers are you planning to provide, if any, and when should we expect to receive any such response?

I very much appreciate this Committee's work, including its important oversight responsibilities. As you know, in responding to Congressional requests, the Commission follows the longstanding accommodations process and precedent established by our fellow regulators and applied by many other agencies. Our approach—which is supported by Department of Justice guidance from multiple administrations—endeavors to meet Congress's legitimate oversight needs while, as much as possible, avoiding diverting resources from our core mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

I'm proud of the efforts that staff in the SEC's Office of Legislative and Intergovernmental Affairs and other subject matter experts across the agency have made since the start of this administration to provide Congress with responsive information. During this session of Congress alone, we have responded to numerous letters from Congressional Committees and from individual members. Some requests seek discrete, readily available information that can easily be provided in a responsive letter. Other requests are broader or seek information that is harder to gather or distill efficiently. In those cases, we've offered a briefing with subject matter experts who are well equipped to answer questions about the areas of inquiry. This approach often is successful either at obviating the need for a voluminous written response or, at the very least, narrowing the scope of the questions so that we can respond more expeditiously.

My staff has offered your office a briefing with subject matter experts in response to your June 15 and July 21 request letters, and that offer still stands. I remain hopeful that a substantive conversation on the issues would address, or at least narrow, your questions and avoid the need for a more time-consuming and burdensome document production, allowing staff to focus the agency's limited resources on its core mission.

23. Because we did not receive a written response from you after our July 21 follow-up letter, Senator Tillis asked you during this hearing to explain when we should expect to receive a written response from you. In response, you declined to commit to providing a written response or any records, but instead merely reiterated your offer to provide an SEC briefing about the rule.

Why have you chosen to repeatedly offer us a briefing in lieu of our request for records and written responses to our questions, even after we have made clear to you that a briefing is not a substitute for the records and written answers we requested?

a. Is it your view that members of the Banking Committee are not entitled to receive *any* records or *any* written answers to our questions from the SEC about the SEC's proposed rule? Please answer "yes" or "no."

Please see below response in 23(c).

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i. **If "yes," on what basis is the SEC choosing not to provide any requested records or any written answers to questions from members of the Banking Committee?**

ii. **If "no," then why has the SEC chosen not to provide any records or any written answers to our questions in more than 90 days since the original request?**

b. **Do you acknowledge and respect Congress's oversight role over the SEC? Please answer "yes" or "no."**

Please see below response in 23(c).

c. **Do you acknowledge that, in order to carry out this oversight role effectively, Congress routinely requests and receives records and written answers to questions from the agencies it oversees, and that a briefing is not a substitute for records and written answers? Please answer "yes" or "no."**

I respect the important oversight role that the Committee provides. As I reiterated during my testimony, subject matter experts from the SEC staff stand ready to meet with your staff to discuss the notice and comment process as well as substantive issues concerning the climate disclosure rulemaking. I remain hopeful that a substantive discussion with our subject matter experts on the issues you raised would help narrow your request and avoid the need for a more time-consuming and burdensome document production, allowing staff to focus the agency's limited resources on its core mission.

24. **Will you commit to providing written answers to all of our questions and producing all the requested records? Please answer "yes" or "no."**

a. **If "yes," when should we expect to receive these records and written answers to questions.**

b. **If "no," why not?**

As explained in response to your question above, when the agency receives a request for information that is broad in nature or hard to gather or distill efficiently, our staff has, in those cases, offered a briefing with subject matter experts who are well-equipped to answer questions about the areas of inquiry. This approach is often successful either at obviating the need for a written response or, at the very least, narrowing the scope of the questions so that we can respond more expeditiously.

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My staff offered a briefing with subject matter experts in response to your June 15 and July 21 request letters, and that offer still stands. I remain hopeful that a substantive conversation on the issues would address, or at least narrow, your questions and avoid the need for a more time-consuming and burdensome document production, allowing staff to focus the agency's limited resources on its core mission.

Acquired Fund Fees and Expenses

25. As applied to business development companies (BDCs), the SEC's requirements with respect to disclosures of acquired fund fees and expenses (AFFE) may tend to overstate, and thereby mislead investors as to, the cost of investments in BDCs. Bipartisan legislation (S. 3961 and H.R. 5598) would address this issue by permitting BDCs to report their AFFE disclosure in a footnote instead of a fee table.

a. What is the status of the SEC's effort to address the risk that existing AFFE disclosure requirements might be misleading as applied to some BDCs?

The requirement to disclose AFFE obligates funds to include information in their fee tables to reflect the portion of the fund's fees and expenses attributable to investments in other funds. An investor in such a fund of funds pays expenses at two levels for the management of portfolio investments. The requirement to disclose AFFE does not impose or regulate any fees or expenses—it requires only that funds tell investors about the fees and expenses an investor will bear at each fund level.

As part of a broader rulemaking package that addressed the disclosure framework for open-end funds, the Commission proposed certain changes to open-end funds' prospectus disclosure in 2020, which in part addressed how funds disclose AFFE. This October, the Commission adopted certain aspects of the 2020 proposal: final rule amendments that update and modernize open-end funds' shareholder reports and that make certain other updates regarding how registered investment companies and BDCs advertise to investors. Regarding the aspects of the 2020 proposal that relate to the disclosure requirements for a fund's prospectus, Chair Gensler has asked staff to continue discussions with market participants given the broad range of comments we received.

GSE Corporate Debt

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 Fed. Reg. 23,577 (May 4, 2021). "In 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

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> **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 C.F.R. 1242.5(b)(2).**

Following last year's oversight hearing, I asked you the following question for the record:

> **Given 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, will SEC regulations governing money market mutual funds, registration requirements, or other market activity continue to give the Enterprises special treatment?**

You answered:

> **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. The Enterprises currently are in conservatorship, *and FHFA, an agency of the U.S. government, is the conservator of each Enterprise.* 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. (emphasis added)**

However, despite the ongoing conservatorships, neither Enterprise is "acting as an instrumentality of the U.S. Government pursuant to Congressional authorization." The Supreme Court established in *Lebron v. National Railroad Passenger Corp.* that a company is an instrumentality of the United States only when, in addition to two other conditions, the "federal government retains for itself *permanent* authority to appoint a majority of the [company's] directors....." 513 U.S.C. 374, 400 (1995) (emphasis added).

Citing *Lebron*, FHFA has consistently taken the position that, when acting in its capacity as conservator of an Enterprise, the federal government has no such permanent authority, and therefore the Enterprise is not an instrumentality of the U.S. Government.[7] Indeed

[7] *See, e.g., Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751 (1st Cir. 2021).

many of FHFA's actions as conservator of each Enterprise—including FHFA's recently announced plans to cause each Enterprise to subsidize mortgage loans based on borrowers' racial self-identification[8]—would raise questions under the Equal Protection Clause, the Due Process Clause, or the First Amendment were an Enterprise to be deemed acting as an instrumentality of the U.S. Government when FHFA acts on behalf of the Enterprise as conservator.

a. **In light of *Lebron*, and contrary to FHFA's consistent litigation posture, why does the SEC view each Enterprise to be "acting as an instrumentality of the U.S. government"?**

The current view of SEC staff is that securities issued by the Enterprises constitute "government securities" for purposes of Section 2(a)(16) under the Investment Company Act of 1940 (the "1940 Act"). SEC staff's views are solely for purposes of the 1940 Act. At this time, the Enterprises remain in conservatorship, and FHFA, an agency of the U.S. government, is the conservator of each Enterprise.[9] 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 1940 Act and its rules as they arise.

FOIA Requests

27. **The Freedom of Information Act (FOIA) is a critical mechanism to ensure that the Federal Government functions in a transparent manner. According to government-wide data posted by DOJ, the SEC appears to rank dead last among all reporting agencies in processing "complex" FOIA requests."[10] For fiscal year 2021, the SEC reported that its median processing time for "complex" FOIA requests was 670 days, and that it took an average of 697 days to complete such requests.[11] As you know, the FOIA statute requires agencies to issue FOIA determinations within 20 business days and no later than 30 business days when "unusual circumstances" exist. It is concerning that requests that the SEC determines to be "complex" are taking nearly two years to complete.**

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[8] Freddie Mac, EQUITABLE HOUSING FINANCE PLAN 19 (June 2022) ("Freddie Mac may make its SPCP program accessible to anyone who self-identifies as Black, Latino or American Indian/ Native American."); Fannie Mae, EQUITABLE HOUSING FINANCE PLAN 8 (June 2022) ("The initial focus of our Plan will be on the needs of Black homeowners and renters.").

[9] *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.

[10] www.foia.gov

[11] www.sec.gov/files/2021-foia-annual-report.pdf

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a. Why was the SEC dead last among reporting agencies in processing "complex" FOIA requests in fiscal year 2021?

We believe our performance in fiscal year 2021 was strong. The SEC processed more than 12,000 FOIA requests during that time. Our average response time to complete 99.9% of those requests was 16.23 days, which is below the 20-day statutory time limit. Only 17 of the more than 12,000 requests processed in fiscal year 2021 were classified as "complex."

The criteria currently in use by the SEC have resulted in placement of only the most voluminous, difficult-to-process requests in the complex processing track. This, in turn, has disadvantaged the SEC in the "complex" requests processing time category. These requests (1) often seek thousands of emails, including large attachments, which were generated more than a decade ago; and (2) are processed on a first-in, first-out basis. These two factors have resulted in a complex processing track populated by only the most laborious requests, all of which require a commensurate level of time and effort to complete.

i. In your view, is it acceptable for the SEC to be dead last in this regard?

The SEC processes FOIA requests according to FOIA law and the SEC's own FOIA regulations, as required. The SEC always is looking for ways to improve operations, and actively is examining its request classification process to ensure requests are placed in the appropriate processing track upon receipt.

b. Please explain how the SEC determines whether a FOIA request is "complex."

Pursuant to 5 U.S.C. § 552(a)(6)(D)(i), agencies may provide for multi-track processing of requests for records based on the amount of work, time, or both involved in processing requests. The SEC's regulation implementing multi-track processing is located at 17 CFR § 200.80(d)(4). The SEC has placed requests in its complex processing track if the volume of responsive records exceeds three (3) boxes of hard copy records, or the digital equivalent. Requests may also be placed in the complex processing track if the estimated search and review time necessary to complete the request would exceed 32 hours.

c. What steps, if any, is the SEC currently taking to improve the agency's response time to "complex" FOIA requests?

The SEC is looking at leveraging technology, working with requesters, and streamlining its processes to reduce its response times. In addition, to better reflect the staff's workload and performance, the SEC is looking at what criteria other agencies use to classify requests as "complex and is planning to adopt new criteria. We understand that many other agencies treat as

"complex" requests that we have treated as "simple and that difference leads to the appearance that we are not processing complex requests as effectively as some other agencies. .

d. Will you commit the SEC to fully abiding by the FOIA law during the remainder of your chairmanship?

The SEC has abided and continues to abide by the FOIA law. The FOIA law provides that agencies may promulgate regulations to establish a system for multitrack processing of requests for records based on the amount of work, time, or both involved in processing requests. FOIA requests submitted to the SEC are assigned to different processing queues depending on the complexity of the request.

i. If so, will you commit the SEC to significantly reducing the median and average processing time for completing "complex" FOIA requests during the remainder of your chairmanship?

The SEC is committed to processing the longest-outstanding FOIA requests as well as reducing the median and average processing times for completing FOIA requests in our complex processing track. Aligning our practices with peer agencies will better reflect our workload and performance in this area.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Elizabeth Warren:

1. **Wall Street and the securities industry as a whole encourages Americans to trust their financial professional with their retirement savings. But few investors understand that the securities industry does not mandate protections to ensure investors can be made whole after successfully proving a claim for recoverable losses against their financial advisor. Nearly 30% of all FINRA awards in customer claimants' favor in 2020 went unpaid.[30] These unpaid claims irreparably damaged the financial wellbeing of untold number of savers and families.**

    a. **Please describe SEC and FINRA's plans to ensure that 100% of FINRA awards in customer claimants' favor are paid.**

SEC and FINRA rules impose significant consequences on broker-dealers and associated persons for having unpaid arbitration awards. For example, under the SEC's net capital rule, if a broker-dealer does not have the ability to pay an arbitration award, it must immediately cease doing business. Also, FINRA rules allow it to suspend from the brokerage industry any member firm or associated person who fails to pay an arbitration award.

More recently, the SEC approved FINRA rules that are designed, in part, to strengthen the tools available to FINRA to address unpaid awards. Among other things, the approved rules create: (1) a rebuttable presumption that an application for new FINRA membership would be denied if the applicant or its associated persons was subject to a pending arbitration claim, and (2) a new requirement for a member firm to consult with FINRA before making certain business changes, including expansions, if the member or its associated persons had specified unpaid arbitration awards or settlements.31

In addition, the SEC approved FINRA rules for a new program designed to identify higher risk firms, so-called "restricted firms," and incentivize them to improve behavior. Under these rules, once identified, such firms would have to perform one if not both of the following: "lock up" specified funds or securities; and comply with additional conditions and restrictions to their business operations, pending improvement. Withdrawals of "locked up" funds or securities would be contingent upon a commitment to pay down specified pending arbitration claims or unpaid arbitration awards.32

SEC staff continues to meet regularly with FINRA regarding arbitration. We are committed to continuing to engage in a constructive dialogue, including with a view to identifying other ways to improve recovery rates for investors, impose consequences on firms and individuals that do not pay, and improve disclosures to investors regarding bad actors.

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[30] Public Investors Advocate Bar Association, "FINRA Arbitration's Persistent Unpaid Award Problem," September 29, 2021, Hugh Berkson and David P. Meyer, https://piaba.org/system/files/2021-09/PIABA%20Report%20-%20FINRA%20Arbitration%27s%20Persistent%20Unpaid%20Award%20Problem%20%28September%2029%2C%202021%29.pdf

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2. Section 956 of the Dodd-Frank Act required the SEC and other agencies to engage in rulemaking within nine months of the law's passage to prohibit incentive-based compensation in certain financial institutions that "encourages inappropriate risks." Twelve years later, we do not have a final rule even though there is widespread agreement that the structure of incentive-based compensation was a central contributor to the 2008 financial crisis.

a. Please describe the status of this rulemaking and the Commission's expected timeline to finalize this important and long-overdue rule.

As you know, Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act generally requires the SEC, along with the OCC, the Federal Reserve, FDIC, NCUA, and FHFA (the "Agencies"), to jointly issue regulations or guidelines that, among other things: (1) prohibit incentive-based payment arrangements at covered financial institutions that the Agencies determine encourage inappropriate risks by providing excessive compensation or that could lead to material financial loss; and (2) require those covered financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate Federal regulator.

I am committed to working with my counterparts at the Agencies to address such incentive-based payments and compensation, as required by Section 956. Along those lines, SEC staff is members of an inter-Agency working group, which has monthly calls regarding Section 956.

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[31] See Exchange Act Release No. 88491 (Mar. 26, 2020), 85 FR 18299 (Apr. 1, 2020) available at https://www.sec.gov/rules/sro/finra/2020/34-88482.pdf.

[32] See Exchange Act Release No. 92525 (Jul. 30, 2021), 86 FR 42925 (Aug. 5, 2021) available at https://www.sec.gov/rules/sro/finra/2021/34-92525.pdf.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Kyrsten Sinema:

1. **As we have previously discussed, I continued to be concerned about the overall pace and process of the SEC's regulatory agenda, including the increased utilization of shorter (30-day and 45-day) comment periods for proposed rulemakings and the increased use of staff interpretations in lieu of formal rulemaking processes. With respect to 30-day and 45-day comment periods, which are shorter than comment periods offered at the SEC during the Obama Administration, what level of staff follow-up is being undertaken with respect to stakeholder comments? Do you stand by the level and quality of outreach that stakeholders receive when they engage with the Commission, or do you believe there is room for improvement?**

The Administrative Procedure Act (APA) requires that agencies provide interested parties with notice of proposed rulemaking and a reasonable and meaningful opportunity to participate in the rulemaking process through submission of written data, views, or arguments. As we implement the federal securities laws, we will continue to comply with our obligations under the APA and other applicable requirements.

I believe that the comment periods we have used for our rulemakings are consistent with our obligations under the APA and provide interested parties fair and ample time to comment on proposed rules. In addition, we publish any proposed rule on our website immediately after a vote occurs. This provides additional time for interested parties to formulate a response before the release is published in the federal register, a process that can frequently take two or more weeks.

Staff and I have had robust engagement with interested parties on the Commission's rulemakings. Consistent with the APA and in keeping with the Commission's commitment to the administrative process, staff carefully read and analyze each letter and comments are addressed in any adopting release. Often, interested parties ask to meet with staff to explain their comment letters or offer additional comments.

Outreach to the public is a core part of my job, just as it is for staff engaged in rulemaking. I believe public outreach improves staff recommendations as well as the Commission's decision making.

2. **Some stakeholders have criticized your utilization of no-action letters, interpretive guidance, and staff bulletins, claiming that the impact to capital markets in some instances is substantial enough to justify a formal rulemaking process. When weighing a formal rulemaking versus a staff interpretation, do you consider the potential economic impact of the proposed change? If so, how?**

Staff statements such as staff no-action letters, Q&As, and legal or accounting bulletins are not rules, regulations, or statements of the Commission. They have no legal force or effect—they do not alter or amend applicable law, and they create no new or additional obligations for any

person. Unlike staff statements, Commission rules that impose binding legal obligations are accompanied by an analysis of their potential economic impacts and typically are adopted after notice and an opportunity for public comment.

3. **Recently, SEC staff sent a no-action letter to FINRA, stating in part that the SEC would be applying Rule 15c2-11 under the Exchange Act to fixed-income securities, including those pursuant to Rule 144A. This likely creates new public disclosure obligations for private issuers. I've heard from Arizona manufacturers and companies that play vital roles in building our domestic supply chains that utilize Rule 144A as a crucial and affordable source of debt financing that these new reporting obligations will raise the cost of capital, potentially raising distribution costs for Arizona small businesses and prices of groceries and gas for Arizona families. Have you been made aware of these concerns, and have you met with these stakeholders? What is your response to their concerns?**

The staff no-action letter to which you refer is not an agency action and has no legal force or effect. Consistent with the limitations regarding all staff actions, footnote 9 of that letter states the following: "This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person."

Since its adoption in 1971 through notice and comment rulemaking, Rule 15c2-11 has applied to "securities."[22] The term "security" is defined under section 3(a)(10) of the Exchange Act and specifically includes, among others: notes, bonds, debentures, and certificates of deposit, which are commonly known as fixed income securities.

Further, in 2019, the Commission, as part of the notice and comment rulemaking that led to the adoption of amendments to Rule 15c2-11, requested public comment specifically on Rule 15c2-

[22] *Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, Release No. 34-9310 (Sept. 13, 1971), [36 FR 18641 (Sept. 18, 1971)].

11's application to fixed income securities in the proposing release.[23] Although commenters provided extensive responses to the Commission's request for comments, no commenters responded to these questions. Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11 after notice and comment rulemaking, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule.

4. **I support efforts to provide greater transparency and disclosure in the SPAC market, but I have heard concerns that the liability provisions in your SPAC proposal could potentially be applied retroactively to deals that have already been closed. While it is**

reasonable and within the SEC's purview to consider questions of liability on a prospective basis, it strikes me as unfair to market participants to apply these liability provisions retroactively. My staff has spoken to your staff about this issue and had constructive conversations, but stakeholder concerns remain. Can you provide clarity on your intentions for how these provision will be enforced – specifically, can you rule out retroactive enforcement?

The federal securities laws protect investors in registered offerings by providing a strong private right of action against parties that may have misrepresented material facts, including signatories to a registration statement, directors of the issuer, experts, and anyone acting as an underwriter. The purpose of these liability provisions is to incentivize materially accurate and complete disclosure, and to help ensure that the potential defendants take seriously their roles as disclosure drafters and gatekeepers to the financial markets. The Commission does not enforce liability provisions such as Section 11 or Section 12 of the Securities Act. They are enforced only by private plaintiffs in private rights of action.

I would also like to draw a distinction between provisions of our rule proposals that would create new obligations or liabilities for market participants versus those provisions that seek to clarify existing obligations or liabilities under current statutes and case law. In Release No. 33-11048, *Special Purpose Acquisition Companies, Shell Companies, and Projections,* the Commission proposed amendments to clarify which participants in certain stages of a SPAC's life cycle would meet the statutory definition of "underwriter" under the Securities Act of 1933. This portion of the release draws attention of market participants to existing standards in case law of when a party becomes an underwriter for purposes of the Securities Act. This an example of the Commission seeking to clarify existing liability, and the staff is considering comments on this and all portions of this release.

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[23] *Publication or Submission of Quotations Without Specified Information*, Release No. 34-87115, (Sept. 25, 2019), [84 FR 58206 (Oct. 30, 2019)] ("2019 Rule 15c2-11 Release"), at 84 FR 58230, 58239.

5. The SEC recently issued a staff accounting bulletin (SAB 121) that requires entities, including banks, that perform crypto asset custodial activities, to record a liability with a corresponding asset. There is concern that the costs associated with this activity exceed the margin that entities can charge to perform custodial activities (including as sub-custodians on a contractual basis), which is generally small. In that world, it is likely that the only market for crypto asset custodial activities would exist offshore and outside the purview of U.S. regulation, which generally offers fewer protections for customers. Have you or your staff been made aware of these concerns, and if so, what is your response?

SAB 121 does not specifically address the applicability of its accounting guidance to "banks . . . that perform crypto asset custodial activities." SAB 121 provides the views of SEC staff on accounting by certain entities that have obligations to safeguard crypto assets held for platform users. SEC staff inform me that, to date, they are unaware of banks that have engaged in such

activities.

The Commission's financial reporting requirements are neutral as to whether an entity should or should not engage in the activities to safeguard crypto assets. When those activities are material to the registrant, however, they may present unique risks and uncertainties. U.S. GAAP and the Commission's rules require registrants to account for and disclose adequately those risks and uncertainties, so that investors may make informed decisions about their capital allocation.

The staff issued the SAB 121 to assist registrants in meeting those obligations. As detailed in footnote 1 of SAB 121, the staff express no views with respect to other legal or regulatory requirements beyond those referenced in the SAB itself.

I note that the staff of the Commission is available for consultation on the accounting for safeguarding activities, and our staff has communicated their willingness to engage with banking registrants (and their primary regulators). SEC staff informs me that, to date, no bank registrants have approached the staff for such a consultation with respect to safeguarding crypto assets.

6. **I believe in strong, robust corporate governance, including the ability for shareholders of all backgrounds to participate in, influence, and improve the management of America's publicly-traded companies. As you know, activist shareholders have played an important role in improving corporate governance and even rooting out waste, fraud, and abuse, most notably in the case of Enron. I have heard concerns about Proposed Rule 10B-1 and Proposed Rules 13D/G, which decrease the time and reduce the ways in which shareholders seeking to participate in a company's governance decisions can do so without publicly declaring their position and indicating their intentions. I appreciate the SEC's interest in this information, consistent with its mission, but am concerned that the public availability of such information may deter or diminish meaningful shareholder engagement and activism. Why is it important that this information contemplated in the aforementioned proposed rules be publicly available, rather than simply reported to the SEC?**

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Title VII) was enacted in part to bring greater public transparency and market accountability to the financial system for swaps and security-based swaps. In furtherance of those goals, Title VII gave the SEC responsibility and a number of important tools to increase transparency, oversee the security-based swap markets, and better protect investors in the security-based swap markets.

One of those tools was the Commission's new authority in Section 10B of the Exchange Act to adopt rules requiring the reporting of large positions in security-based swaps. The Commission proposed Rule 10B-1 under that authority.

Proposed Rule 10B-1 would require reporting of a position only when its size is large enough to be material to market participants and regulators. Once that threshold is triggered, the information that would be reported would include information that is not included in the Regulation SBSR data, such as: (1) certain large positions in security-based swaps; (2) positions in any security or loan underlying the security-based swap position; and (3) positions in any

other instrument relating to the underlying security or loan or group or index of securities or loans.

In proposing Rule 10B-1, the Commission recognized that transparency can be beneficial to market participants so that they can act in an informed manner to protect their own interests. Additional transparency regarding large security-based swap positions could alert market participants—including counterparties as well as issuers of securities and their security holders—to the risk posed by the concentrated exposure of a counterparty. Such transparency could enhance risk management by security-based swap counterparties and inform pricing of the security-based swaps. Finally, transparency about security-based swap positions could play an important role in protecting market integrity, including by providing the Commission and other regulators with access to information that may indicate that a person (or a group of persons) is building up a large security-based swap position.

The comment period for the Rule 10B-1 proposal generated a robust comment file, including with respect to the public nature of the reports. Staff is in the process of analyzing the comments and developing final recommendations. Although I cannot commit to any one course of action, I can promise that the Commission will duly consider the comments for and against public dissemination in any final rule.

In addition, as you mentioned, the Commission proposed various amendments to the rules in Regulation 13D-G. Those proposed amendments, which were intended to modernize the rules governing beneficial ownership reporting, would, among other things, accelerate the filing deadlines for Schedules 13D and 13G beneficial ownership reports. As with proposed Rule 10B-1, the comment period for those proposed amendments has closed and the staff is in the process of analyzing the comments and developing final recommendations. As such, I cannot commit to any one course of action with respect to those proposed amendments either.

It is important to note, however, that according to statute, the beneficial ownership reports on Schedules 13D and 13G must be filed publicly, and nothing in the proposed amendments would alter that statutory requirement. The Federal securities laws currently do not allow, and never have allowed, for those beneficial ownership reports to be filed confidentially with the Commission. Instead, Congress determined at the time it enacted Exchange Act Sections 13(d) and 13(g) that beneficial ownership reports are intended to notify the public, including companies and their shareholders, of an investor's accumulation of a large stake in a company's shares. Allowing for the confidential reporting of that information to the Commission would, therefore, be directly contrary to the Congressional intent regarding those statutory provisions.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Jon Ossoff:

1. **Please provide an overview of systemic risks associated with the relationships between banks and hedge funds, to which you alluded in your testimony.**

The nature, scale, and interconnectedness of hedge funds and their counterparties could contribute to systemic risk.[21] Broker-dealers trade, extend margin through prime brokerage relationships, and enter into secured transactions with hedge funds. These transactions may be bilaterally settled between the broker-dealer and the hedge fund or cleared through a central counterparty clearing house.

If a hedge fund is not able to meet its financial obligations to the broker-dealer, the hedge fund and the broker-dealer may need to liquidate positions to generate liquidity. Such forced liquidations may lead to broader adverse price changes impacting market functioning. This "fire sale" risk could ultimately affect other market participants and thereby impact financial stability. If a broker-dealer suffer losses as a result of the failure of a hedge fund, the broker-dealer also could fail and potentially default on its obligations to other market participants.

2. **Please provide an overview of systemic risks associated with the relationship between banks and commodities traders, to which you alluded in your testimony.**

Similar to the systemic risk that exists between hedge funds and their counterparties, the nature, scale, and interconnectedness of commodities traders and their counterparties could contribute to systemic risk.

3. **Please provide a breakdown describing how each component of the SEC's proposed rulemaking (File No. S7-23-22) regarding standards for covered clearing agencies for U.S. Treasury securities and application of the broker-dealer customer protection rule with respect to U.S. Treasury securities is meant to address concerns about the U.S. Treasury market.**

[21] Gensler's speech at FSOC. SEC.gov | Statement before the Financial Stability Oversight Council on Money Market Funds, Open-End Bond Funds, and Hedge Funds

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As the Commission stated in the proposed rulemaking, the increasing volume of non-centrally cleared transactions in U.S. Treasury securities may render covered clearing agencies (also known as clearinghouses) serving the U.S. Treasury market more susceptible to member defaults from risks outside the transactions cleared by the covered clearing agency. As a result, the Commission proposed to amend Exchange Act Rule 17Ad-22(e)(18), which addresses participation requirements for covered clearinghouses. In particular, the Commission proposed amending Rule 17Ad-22(e)(18) to require covered clearinghouses in the U.S. Treasury market to address their direct participants' non-centrally cleared transactions, both for repurchase agreements and certain categories of cash transactions. The Commission believes that the amendments, if adopted, would help reduce contagion risk to the covered clearing agency and bring the benefits of central clearing to more transactions involving U.S. Treasury securities, thereby lowering overall systemic risk in the market. These benefits include centralized default management, increased multilateral netting, and reduction of settlement fails. The Commission also believes that increasing the volume of transactions submitted for central clearing is consistent with promoting the prompt and accurate clearance and settlement of securities transactions.

The Commission also proposed to impose additional requirements on how covered clearinghouses in the U.S. Treasury market calculate, collect, and hold margin posted on behalf of customers who rely on the services of a member of a covered clearing agency to access the covered clearinghouse's services. The Commission believes that such requirements also will improve the risk management practices at U.S. Treasury securities covered clearinghouses and incentivize and facilitate additional central clearing in the U.S. Treasury market, thereby lowering systemic risk. Individually and collectively, these two proposals should further incentivize and facilitate additional central clearing.

In addition, the release states that the Commission recognizes that the proposal could cause a substantial increase in the margin broker-dealers must post to a U.S. Treasury securities covered clearing agency resulting from their customers' cleared U.S. Treasury securities positions. Currently, broker-dealers are not permitted to include a debit in the customer reserve formula equal to this amount of margin or, more generally, to use customer cash or customer fully paid or excess margin securities to meet a margin requirement. To address this, the Commission proposes an amendment that, subject to certain conditions, would allow the broker-dealer to include a debit in the customer or PAB reserve formula when delivering customer cash or U.S. Treasury securities to meet the margin requirement at an entity providing CCP services in the U.S. Treasury market.

As the release states, the Commission believes that, although this proposal will not, by itself, necessarily prevent future market disruptions, the proposal will support efficiency by reducing counterparty credit risk and improving transparency. Moreover, the Commission believes that enhancing the membership standards applicable to covered clearinghouses in the U.S. Treasury market should improve the resilience of such clearinghouses by expanding their ability to manage the risks arising from direct participants who currently engage in non-centrally cleared transactions away from the clearing agency. In addition, the Commission believes that the risk

management standards should facilitate and incentivize additional central clearing, thereby bringing the benefits of additional central clearing to the market for U.S. Treasury securities.

The release further states that the Commission believes that these changes should lower systemic risk in the U.S. Treasury market by increasing the volume of transactions that are subject to central clearing and ensuring that those additional transactions are subject to standardized risk management. The Commission also believes that increased central clearing would provide greater transparency into the market and could potentially facilitate all-to-all trading. The Commission believes that these benefits arising from central clearing should help improve the functioning of the U.S. Treasury market.

4. **Do you view financial regulation as inefficiently fragmented between agencies with overlapping jurisdiction? If so, how? Please be specific and provide details.**

Congress determines the jurisdiction of each federal financial regulatory agency. Within that framework, the SEC coordinates closely with its colleagues at the federal bank regulatory agencies and the Commodity Futures Trading Commission, as well with securities and derivatives market regulatory authorities at the state and local levels and around the world. The Commission's jurisdiction over and expertise in both securities and derivatives markets give it a broad view of financial products, markets and market participants, whether old, new or simply repackaged in a new technology.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Raphael Warnock:

1. **Please describe in detail the regulatory gaps in the crypto market that Dodd–Frank Wall Street Reform and Consumer Protection Act, does not sufficiently cover.**

Currently, there is no federal market regulatory oversight for spot market trading of crypto non-security tokens. I have stated that to the extent the Commodity Futures Trading Commission (CFTC) needs greater authorities with which to oversee and regulate trading of crypto non-security tokens and related intermediaries, I look forward to working with Congress to achieve that goal—and achieve it in a manner consistent with maintaining the SEC's regulation of crypto-asset securities and related intermediaries.

2. **Would applying existing disclosure requirements to firms that operate in the digital asset industry provide sufficient transparency for consumers and investors to evaluate these firms?**

The disclosure requirements of the federal securities laws are largely principles based. This means that the forms and rules under the Securities Act and the Securities Exchange Act are intended to facilitate comparison of securities from issuers across the full range of industries and sectors. SEC staff has worked closely with other industries before to develop disclosures that are appropriate for investors in particular types of instruments and in particular industries.

To date, there have been several issuers of crypto-asset securities that have either registered the offer and sale of their crypto assets under the registration requirements of the Securities Act or have relied on Regulation A+ in having their exempt offer and sale of crypto-asset securities qualified for sale. SEC staff has worked closely with these issuers to assure that the disclosures were relevant and appropriate to the investment, in order to provide investors full and fair disclosure about the crypto-asset securities they were purchasing. I've asked the SEC staff to work directly with entrepreneurs to get their crypto assets registered and regulated, where appropriate, as securities.

Given the nature of crypto investments, I recognize that it may be appropriate to be flexible in applying the existing principles based disclosure requirements. SEC staff has previously worked with industry and issuers to develop tailored disclosures elsewhere—for example, when asset-backed securities were first introduced over 30 years ago, SEC staff worked closely with issuers to develop appropriate disclosures. Our existing forms and rules have worked for the issuers that have registered with the Commission, but we will continue to engage with issuers and look for places where additional guidance may be necessary. These disclosures differ from ones for equities or debt, and instead are tuned to the particular issues and risks that investors in these securities need to make informed investment decisions. The fundamental principles of full and fair disclosure—to provide investors with the information necessary to make informed investment decisions—apply to all securities, regardless of type or form.

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3. If not, is there a timeline for when the SEC will make tailored disclosures available for the market?

As I stated above, I recognize that it may be appropriate to be flexible in applying the existing principles based disclosure requirements. SEC staff has previously worked with industry and issuers to develop tailored disclosures elsewhere—for example, when asset-backed securities were first introduced over 30 years ago, SEC staff worked closely with issuers to develop appropriate disclosures. Our existing forms and rules have worked for the issuers that have registered with the Commission, but we will continue to engage with issuers and look for places where additional guidance may be necessary.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Mike Crapo:

1. **Agriculture is one of the largest contributors to Idaho's booming economy, accounting for nearly 20 percent of the state's economic output. Many of Idaho's farmers and ranchers are participating in voluntary, incentive-based programs to reduce greenhouse gas emissions. The food and agriculture industries are working to reduce greenhouse gas emissions to benefit other industries like we want them to do, both in Idaho and across the nation. How does the SEC's proposed rule allow for producers to demonstrate to investors that they are responsible for those greenhouse gas emissions reductions?**

To the extent that the producers are public companies, there is nothing in the SEC's current rules, nor anything in the rule proposal, that would prohibit companies from describing the climate-related opportunities they are developing. This may include, among others things, describing how they have or are working towards effective GHG emissions reductions in their supply chain. To that end, the Commission noted the following in its proposing release:

Efforts to mitigate or adapt to the effects of climate-related conditions and events can produce opportunities, such as cost savings associated with the increased use of renewable energy, increased resource efficiency, the development of new products, services, and methods, access to new markets caused by the transition to a lower carbon economy, and increased resilience along a registrant's supply or distribution network related to potential climate-related regulatory or market constraints. A registrant, at its option, may disclose information about any climate-related opportunities it may be pursuing when responding to the proposed disclosure requirements concerning governance, strategy, and risk management in connection with climate-related risks. The Commission proposed to treat this disclosure as optional to allay any anti-competitive concerns that might arise from a requirement to disclose a particular business opportunity.[12]

In addition, GHG emissions reductions by the types of companies you describe may affect disclosures that other companies may make either voluntarily or under the proposed rule.

2. **Earlier this year, I, along with my Republican colleagues on this committee, called on you to withdraw the proposed climate disclosure rule. We cited concerns that the rule exceeds the SEC's scope of regulatory authority and would impose significant compliance burdens on companies. In June we followed up, asking that the SEC provide more information related to its climate disclosure rule. The responses we have received provide no real answers to any of our questions demonstrating a lack of transparency by the SEC, so I'd like to revisit some of these questions today with you:**

   - **Has the SEC evaluated the costs associated with the proposed rule, especially in relation to energy prices?**

In Commission rulemakings, the SEC conducts an economic analysis that examines the costs,

benefits, and other economic effects of that particular rulemaking. The analysis of the costs associated with the proposed rule can be found in the Economic Analysis section of the proposing release which can be found on the SEC's website, www.sec.gov, and is also available at 87 FR 21334.

- **Has the SEC made any effort to coordinate with other agencies on the policies in the proposed rule?**

SEC staff often engages and consults with other federal agencies in connection with the preparation of proposed rules. Agencies also engage with the SEC through the public comment process; see EPA letter.

[12] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release No. 34-94478 (Mar. 21, 2022) [87 FR 21334 (Apr. 11, 2022)], *available at* https://www.sec.gov/rules/proposed/2022/33-11042.pdf. Quotation available on p. 63.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Tim Scott:

1. **U.S. capital markets are the global gold standard and provide a system where the average American working family can invest their savings into projects and earn a tangible economic reward, enabling their dreams of buying a house, sending their children to college, and retiring with economic security. A little over a year ago, we both strongly agreed on one point in particular: increased retail investor market participation is a good thing for America and I was encouraged to see eye-to-eye about the benefits of more people beginning to gain access to this powerful wealth building engine.**

    i. **Do you still agree with that statement? Is more main street investors getting involved in the market a positive thing?**

Of course. As I have said previously, our capital markets are the finest in the world, and I believe it is a good thing when more members of the public—from every background and every generation—invest in our markets and the companies that stand behind them. Our capital markets touch many Americans' lives, whether they're saving for the future, borrowing for a mortgage, taking out an auto loan, or working for a company that raises money to fund growth or innovation.

Investing in our capital markets to build one's financial future depends, however, on the SEC taking the necessary steps to fulfill our mission from Congress: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. It is through the SEC's three-part mission that we can build and maintain the trust needed for our capital markets to function, which benefits all investors, including retail investors.

2. **It seems like Congress and the SEC should be focused on finding ways to encourage – not discourage – the types of competition and innovation that have revolutionized the ease and cost for everyday investors to access markets.**

    i. **Do you agree that we should pursue policies that help lower, not raise, the barriers for more retail investors to actively participate in the American Dream?**

Markets work best when they are transparent and competitive. Issuers and investors alike benefit from that competition because it lowers the cost of capital and increases returns. The market structure-related projects that I have asked staff to consider would include looking at competition in our capital markets.

Lowering barriers to participation is a good thing, so long as we also maintain the standards that make our capital markets the envy of the world. I also note that statistics usually show that, while investing is good for investors' financial future, higher-frequency trading often is not.

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3. **The driving force behind this expanding participation in the market is an obvious one: the lower cost of opening a brokerage account and trading. These lower costs have been made possible thanks to business models that don't rely on fees and commissions for revenue. Changing the existing market structure could lead to the reintroduction of trading fees or other disruptions (e.g. account minimums, penalties for smaller trades, trading minimums) that would hurt investor access.**

    i. **Do you believe that returning to upfront commissions that eat into a customer's investment returns would be a good thing for retail investors?**

Investors trading in the equity markets can incur two types of transaction costs: explicit costs and implicit costs. Explicit costs are readily assessed by investors and include any commissions or fees that are disclosed to them. Implicit costs, in contrast, are embedded in the transaction prices at which investor orders are executed, and therefore are far more difficult for investors to assess. For example, if an investor receives a less than fully competitive price when the investor buys a stock, and therefore pays a higher price to buy, the investor has incurred an implicit cost of trading that is higher than it would otherwise be in a fully competitive market. Both explicit and implicit transaction costs reduce investor returns. I am focused on promoting a fully competitive market structure that minimize total investor transaction costs and maximizes investor returns.

4. **You've talked about hidden costs and conflicts of interest associated with order routing revenue but multiple independent academic analyses have found zero evidence that the practice leads to retail investors getting worse prices on stock trades.**

    i. **Has the SEC actually conducted its own analysis and collected data that would indicate this is not true?**

    ii. **Do you plan to do extensive cost-benefit analysis before proposing any new rules that would change the way retail investors' orders are executive?**

    iii. **Will you commit to doing this study? If not, why?**

In Commission rulemakings, the SEC conducts an economic analysis that examines the costs, benefits, and other economic effects of that particular rulemaking. The Commission's economic analysis of a proposed regulatory action compares the current state of the world, including the problem that the rule is designed to address, with the expected state of the world with the proposed regulation (or regulatory alternatives) in effect. In particular, to the extent that rules that are adopted impact market conditions through their costs, including cumulative costs, this impact is incorporated in the economic analysis (i.e. current and expected states of the world) of any new rule proposal or adoption.

5. **I have previously asked you to "trust Americans to make their own decisions on their own investments and not have a paternalistic regime helping protect Americans**

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because they can't figure it out for themselves." As your agenda has begun to take shape, and grown to 53 items, my concerns have also grown. I am concerned that the paternalistic approach to regulation for individuals is carrying over into most of your agenda.

This agenda – Private Funds, Dealer Definition, Form PF, 13D, 10B – attacks the tools or business models of active management. Raising the cost of doing business is also a silent attack on emerging managers, many of whom are women and minority-owned. So, I see it as three sides of the same coin: 1) hurting access to equity investments for individuals, 2) hurting those who are lucky enough to have managed retirement accounts or pensions, and 3) hurting their ability to enter one of America's most lucrative industries.

Active managers do the hard work of supporting the retirement security of millions of pensioners and rooting out corporate fraud in our capital markets. And as you know, most of the biggest scams in history were missed by the SEC until active managers uncovered them.

i. Will you heed the calls from asset managers, insurance companies, pensions, private funds, primary dealers, academics – Republicans and Democrats- to return to the traditional comment periods of 90 to 120 days?

The Administrative Procedure Act (APA) requires that agencies provide interested parties with notice of proposed rulemaking and a reasonable and meaningful opportunity to participate in the rulemaking process through submission of written data, views, or arguments. As we implement the federal securities laws, we will continue to comply with our obligations under the APA and other applicable requirements.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Thom Tillis:

1. **The Commission's proposed changes to the longstanding definition of a "dealer" and "government securities dealer" will capture not only traditional dealers but also some of the markets' largest customers and public companies. Subjecting these market participants to new onerous regulations will force many to withdraw rather than register. The proposed *qualitative* criteria are extremely broad and ambiguous, likely classifying many investors as "dealers" merely by engaging in the routine buying and selling of any securities. As written, the proposal would effectively require private funds merely participating in financial markets as *customers of dealers* to have to register as *dealers* themselves – simply for being a counterparty of a trade as part of their daily operations. The proposal would force substantial sums of investment capital to curtail standard practices of hedging and trading to consider curtailing activity to avoid registration, likely exacerbating the reduction of liquidity and increase of volatility during periods of stress. Additionally, the Commission has no way of knowing how the proposal's equally arbitrary one-size-fits-all, quantitative $25 billion threshold for government securities trading volume will impact insurance companies or private funds – making it impossible for the Commission to credibly assess the costs and benefits of the proposal. I hope the Commission will heed the concerns of asset managers, insurance companies, pensions, private funds, primary dealers, and academics and withdraw this proposal – and I have significant concerns with the Commission's judgment in directing staff to draft a rule that will clearly, yet inadvertently, capture many unintended participants:**

    a. **Will you provide the written assessment from the Office of the General Counsel assessing the Commission's legal authority to promulgate this rule?**

    b. **Will you provide an exhaustive list of market participants that would be required to register under the proposal?**

It is important that market participants whose securities activities fall within the broad definitions of "dealer" and "government securities dealer" are registered and regulated under the Exchange Act.

The statutory authority for this rulemaking can be found in the "Statutory Basis" section of the proposed rule release. Statutory authority for a rulemaking may also be addressed elsewhere in the release, and may be subject to revision in the final rule release.

As the Commission stated in the proposing release, while the proposed rules would establish standards that identify when a person is acting as a dealer or government securities dealer, whether a person's activities meet these standards would remain a facts and circumstances determination. The Commission also stated that the proposed rules are not the exclusive means of establishing that a person is a dealer or government securities dealer—to the extent consistent with the proposed rules, existing Commission interpretations and precedent will continue to

apply. As such, whether a particular market participant is required to register is a facts and circumstances determination that should be conducted by the market participant based on whether it meets the activity-based standards set forth in the proposed rules or existing Commission interpretations and precedent.

Further, as I mentioned before, the Commission requested comment on all aspects of the proposed rules, including its impact on market participants, and staff continues to carefully consider these comments as it develops potential recommendations.

2. **User data is rapidly becoming the single most important economic input in the digital economy. This is particularly the case with the largest, consumer social media platforms, where constant collection and AI-fueled aggregation of user-generated data allows for more targeted placement of related ads. The largest social media platforms generate substantially all of their revenue through the sale of targeted advertisements based on user data, making it critical to understanding the financial performance and position of those social media companies. The lack of uniform and consistent disclosure standards on user data deprives investors of material information needed to make informed investment or voting decisions.**

   What is the SEC doing to ensure that investors have this decision-useful information in a consistent and comparable format?

User data can be an important asset to certain companies, and disclosures regarding user data may be required pursuant to the Commission's existing disclosure requirements. For example, disclosure regarding a company's use of consumer data may be required in the Business, Risk Factors and the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) sections of company filings. The Division of Corporation Finance selectively reviews companies' filings under the Securities Act of 1933 and the Securities Exchange Act of 1934 to evaluate compliance with disclosure and accounting requirements. In reviewing such filings, Division staff may consider whether a company's disclosure regarding user data is materially deficient and issue comments to elicit further explanation or information, as appropriate. Some companies may also be subject to statutory and regulatory provisions related to user data, including from states and other jurisdictions. These companies may also have to consider whether the impacts of these provisions would merit disclosure under existing SEC requirements.

3. **Some social media companies provide disclosure on user data as key performance metrics and others do not.**

   What is the SEC doing to address this lack of transparency and consistency in disclosures?

The Division of Corporation Finance selectively reviews companies' filings under the Securities Act of 1933 and the Securities Exchange Act of 1934 to evaluate compliance with disclosure and

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accounting requirements. In reviewing company filings, Division staff may review and issue comments on key performance indicators and other metrics, including those related to user data to help ensure investors receive the information they need to make informed investment and voting decisions. In 2020, the Commission issued guidance on MD&A, which emphasized the importance of disclosing key performance indicators and metrics in company filings.[24] In the release, the Commission reiterated prior guidance that companies should identify and discuss key performance indicators, including non-financial performance indicators, that management uses in their business and that would be material to investors. In reviewing company filings, staff may consider whether a company's disclosure regarding key performance indicators is materially deficient and issue comments to elicit further explanation or information, as appropriate.

4. **The federal securities laws require public companies to provide disclosure on critical variables which presents the pulse of the business in the Management's Discussion and Analysis, known as the "MD&A".**

   For those companies whose revenue models are dependent on such user data but fail to provide required disclosures on this key performance metric, what is the SEC doing to enforce these disclosure failures?

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[24] *See* Commission Release No. 33-10751 (February 25, 2020) Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, *available at* https://www.sec.gov/rules/interp/2020/33-10751.pdf.

Financial fraud and issuer disclosure cases are an important component of the SEC's enforcement program. The SEC has filed a number of enforcement actions in recent years concerning issuers' disclosures related to non-GAAP key performance indicators.[25]

Our investigations and enforcement actions in this space apply longstanding legal principles when assessing whether conduct violates well established law. The staff typically evaluate disclosures to determine whether they are false or misleading under Section 10(b) of the Securities Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933. These are the general anti-fraud provisions of the federal securities laws. Section 10(b) and its accompanying Rule 10b-5(b) prohibit "any untrue statement of a material fact" or omissions of "a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(2) similarly prohibits "obtain[ing] money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

Other laws and rules also apply to disclosures, such as Section 13(a) of the Securities Exchange Act of 1934 and its accompanying rules. In general, these rules require public companies to file annual and periodic reports, and to include in these reports material information that may be necessary to make the statements made therein not misleading.

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The Division of Enforcement will continue to assess issuer disclosures based on these principles. Consequently, whether a particular issuer's disclosures, or lack thereof, related to user data violate the law would depend on the facts and circumstances of a given case.

5. **SEC Rule 15c2-11, initially introduced decades ago, regulates the publication of quotations in Over-the- Counter (OTC) markets. The Rule was amended in September 2021 to require dealers to obtain and review issuer information prior to publishing quotations in an effort to "provide greater transparency to investors and other market participants." Since its introduction in [YEAR], the market has understood the Rule to only apply to equity securities, with no record of SEC communication or enforcement of application to fixed income or structured products. In fact, SEC Commissioner Peirce called out this lack of application and called for the SEC to perform "careful consideration with investors, issuers, broker-dealers, and trading platforms … through notice-and-comment rulemaking". However, following the release of the amended Rule the SEC issued a no-action letter announcing that the Rule has always applied to fixed income. In December of 2021, the SEC issued a second letter, establishing a prescriptive, phased-in compliance regime, with an updated compliance date beginning January 3, 2023, that firms must follow for fixed income securities, including securitizations. However, the SEC failed to provide a comment period for fixed income market participants – including investors, issuers, and broker-dealers – to comment on the Rule's applicably or impacts resulting in potentially severe consequences on sectors of the fixed income market including the 144A market that provides over $2 trillion* of funding for American corporations and investments for American savers, respectively. Specifically, the adoption of the amended Rule will impede a broker-dealer's ability to quote securities ultimately harming critical liquidity for investors who have overwhelming argued they already have access to necessary issuer information when making investment decisions. This reduction in market liquidity will lead to negative consequences to the valuation of securities currently held by investors including pension plans, mutual funds, and other savings account. Moreover, it will stretch beyond investors and will include everyday consumers whose loans to purchase homes, autos and other credit card goods are financed via the securitization market.**

   a. **An adoption of the amended Rule will directly impact securities issued under Rule 144A, a safe harbor from Securities Act Registration for resales of securities to qualified institutional buyers ("QIBs") that has helped boost liquidity for these securities significantly increasing liquid investment opportunities and in kind reduce the borrowing costs for a large segment of American corporations. What analysis did the SEC perform to ensure the amended Rule would not impede 144A issuance and prevent capital markets from becoming illiquid? And at a cost beyond the benefit to investor protections?**

[25] *See, e.g.*, Press Release 2020-169, Pharmaceutical Company and Former Executives Charged With Misleading Financial Disclosures (July 31, 2020), *available at* https://www.sec.gov/news/press-release/2020-169; Press Release 2020-36, SEC Charges Global Alcohol Producer with Disclosure Failures (Feb. 19, 2020), *available at* https://www.sec.gov/news/press-release/2020-36; Administrative Summary File No. 3-20107, SEC

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Charges BGC Partners with Making False and Misleading Disclosures Concerning a Key Non-GAAP Financial Measure (Sept. 30, 2020), *available at* https://www.sec.gov/enforce/33-10867-s; Administrative Summary File No. 3-19831, SEC Settles Fraud Charges with Vereit (June 23, 2020), *available at* https://www.sec.gov/enforce/33-10793-s.

The obligation on broker-dealers to comply with the applicable requirements of Rule 15c2-11 in connection with publishing or submitting quotations, in a quotation medium other than a national securities exchange, for a security as part of a Rule 144A transaction existed when Rule 144A was adopted in 1990. When the Commission adopted the 2020 Rule 15c2-11 amendments, it stated its belief that the requirement for basic, key issuer information to be current and publicly available appropriately balances the fact that some issuers do not have a reporting obligation while protecting investors through the disclosure of a relatively limited amount of information that could help them access information about such issuers before making an investment decision.[26]

b. Market participants have expressed that Rule 15c2-11 requirements cannot be fulfilled for many existing asset-backed securities (ABS) in addition to newly issued ABS given the complexity of amending contractual capital markets agreements. Has the SEC considered amending provisions of the no-action letter to limit the negative impact on structured products?

The information specified in the applicable subparagraph of Rule 15c2-11(b) is basic, key information about the subject issuer and its security. Rule 15c2-11 does not contain any provision that imposes an obligation on a market participant to amend contractual capital markets agreements in order for a broker-dealer to publish a quotation in a quotation medium other than a national securities exchange.[27]

Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule. The Commission staff no action letter to which you refer is not agency action and has no legal force or effect. Consistent with the limitations regarding all staff actions, footnote 9 of that letter states the following: "This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person."

Commission staff continues to carefully consider the concerns raised by market participants.

Publication or Submission of Quotations Without Specified Information, Release No. 34-89891 (Sept. 16, 2020), [85 FR 68124 (Oct. 27, 2020)] ("2020 Rule 15c2-11 Release"), at 85 FR 68134.

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c. At the time of its introduction, market participants did not interpret Rule 15c2-11 as applying to fixed income securities and they believe the SEC did not provide an opportunity for an adequate public comment period during the rulemaking process. These views are supported by the SEC's own Commissioner Pierce who acknowledges the Rule was focused on the OTC equity market and expressed a failure by the SEC to solicit comments on the rule's broader application. Why has the SEC not acknowledged these market concerns, and how will they be addressed to ensure they are taken into full consideration?

Since its adoption in 1971, Rule 15c2-11 has applied to "securities."[28] The term "security" is defined under section 3(a)(10) of the Exchange Act and specifically includes, among others: notes, bonds, debentures, and certificates of deposit, which are commonly known as fixed income securities.

Further, in 2019, the Commission requested public comment specifically on Rule 15c2-11's application to fixed income securities in the proposing release.29 Although commenters provided extensive responses to the Commission's request for comments, no commenters responded to these questions. Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11 after notice and comment rulemaking, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule.

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27 For example, Rule 15c2-11 does not place any obligation on an issuer to file or furnish information with the Commission. *See Publication or Submission of Quotations Without Specified Information*, Release No. 34-89891 (Sept. 16, 2020), [85 FR 68124 (Oct. 27, 2020)], at 85 FR 68142.

28 *Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, Release No. 34-9310 (Sept. 13, 1971), [36 FR 18641 (Sept. 18, 1971)].

29 *Publication or Submission of Quotations Without Specified Information*, Release No. 34-87115, (Sept. 25, 2019), [84 FR 58206 (Oct. 30, 2019)] ("2019 Rule 15c2-11 Release"), at 84 FR 58230, 58239.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator John Kennedy:

Consolidated Audit Trail

In approving the Consolidated Audit Trail (CAT) Plan in 2016, the Securities and Exchange Commission (SEC or Commission) discussed the shortcomings with the then-existing self-regulatory organization (SRO) audit trail data and the need for CAT, stating that "the purpose of the Plan, and the creation, implementation and maintenance of a comprehensive audit trail for the U.S. securities markets described therein, is to 'substantially enhance the ability of the SROs and the Commission to oversee today's securities markets and fulfill their responsibilities under the federal securities laws,'" and that as contemplated by Rule 613, "the CAT 'will allow for the prompt and accurate recording of material information about all orders in NMS securities, including the identity of customers, as these orders are generated and then routed throughout the U.S. markets until execution, cancellation, or modification.'" [https://www.sec.gov/rules/sro/nms/2016/34-79318.pdf] After significant efforts by broker-dealers and the SROs since 2016, the CAT transactional database is now operational and is currently allowing the SEC and SROs to analyze comprehensive trading data from market participants.

In 2020, the Commission issued a proposal designed to strengthen the security and protections for data in the CAT and to limit the scope of sensitive information required to be collected by the CAT. The proposal would, among other things, prohibit the bulk downloading of CAT data by the SROs by requiring them to use Secure Analytical Workspaces (SAWs) to review CAT data, subject to a strict exception process in which an SRO has the ability to seek a limited exception to download CAT transaction data in its own environment provided its security is as robust as the CAT system's security. The proposal also would strictly and clearly prohibit the use of CAT data for any commercial purpose by the SROs, such as a rule filing that has both a commercial and regulatory purpose.

Even though the CAT system is live, and starting in December 2022, it will capture personally identifiable information (PII) from all U.S. investors in the stock market, the SEC has not yet adopted the 2020 proposal. Since September 2021, the SEC has proposed more than 32 new rules, which amounts to an exceedingly fast pace of roughly 3 new rule proposals per month. However, the SEC still has not finalized the 2020 proposal designed to protect investors' PII held in the CAT. When do you plan to do so?

The SROs have moved the date the CAT customer database goes live from July 11 to December 12, 2022. The CAT NMS Plan already contains a number of other provisions that are designed to

protect the customer and account-level information that is still required to be submitted to the CAT. For example, such customer and account information must be encrypted both at-rest and in-flight and must be protected by robust access controls. In the meantime, Commission staff is continuing to consider the issues raised by the comment letters received on the Data Security Amendment.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Bill Hagerty:

1. **The SEC has issued a new interpretation of Rule 15c2-11, indicating it would now begin enforcing the rule in debt markets for the first time in the rule's 50-year history. Although the SEC amended the rule in 2021, the focus of the proposal was related to the application of the rule to equity markets. Last year, Commissioner Peirce commented: "Nothing in the adopting release suggests that the Commission considered the application of these rules to the fixed-income markets." She also noted that the policy and economic analyses of that proposal focused on the OTC equity markets, not the fixed income markets. Since the rule has never been enforced in the fixed income markets, why did the SEC issue this new interpretation of the rule without notice and comment?**

Since its adoption in 1971 through notice and comment rulemaking, Rule 15c2-11 has applied to securities.[15] "Security" is a defined term under section 3(a)(10) of the Exchange Act and specifically includes, among others, notes, bonds, debentures, and certificates of deposits, which are commonly known as fixed income securities.

Further, in 2019, the Commission, as part of the notice and comment rulemaking that led to the adoption of amendments to Rule 15c2-11, specifically requested comment on the application or Rule 15c2-11 to fixed income securities in the proposing release.[16] Although commenters provided extensive responses to the Commission's request for comments, no commenters responded to these questions. Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11 after notice and comment rulemaking, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule.

Consistent with the limitations regarding all staff actions, footnote 9 of that letter states the following: "This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person."

2. **This new interpretation of Rule 15c2-11 conflicts with existing regulation on 144A securities by forcing private companies to make public disclosures of competitively sensitive information. Qualified Institutional Investors already have a right to obtain—upon request—specified operational and financial information about an issuer. What rationale, backed by policy and economic analysis, does the SEC have to overturn this "available upon request" approach?**

15 36 FR 18611 (Sept. 18, 1971).
16 84 FR 58230 (Oct. 30, 2019).

The 2020 Rule 15c2-11 amendments, including those requiring the publication of current and publicly available issuer information,[17] were adopted through the notice and comment rulemaking process. These amendments did not expand the scope of securities covered by the Rule. Nor did the 2020 Rule 15c2-11 amendments impose any obligation on issuers.[18] The obligation on broker-dealers to comply with the applicable requirements of Rule 15c2-11 in connection with publishing or submitting quotations, in a quotation medium other than a national securities exchange, as part of a Rule 144A transaction existed when Rule 144A was adopted in 1990. Since 1971, a broker-dealer who wishes to publish or submit a quotation, in a quotation medium other than a national securities exchange, for a security of an issuer that generally is not subject to any statute- or rule-based disclosure and reporting requirements under the federal securities laws has been required to make certain specified information available upon request to a "person"—not solely to Qualified Institutional Buyers—expressing an interest in a proposed transaction in the security with such broker-dealer.[19] The requirement to provide the requested information would prevent a broker-dealer from arranging with the issuer to have exclusive access to the issuer's information and thereby have sole access to Rule 15c2-11 information. This result would be anti-competitive and detrimental to the marketplace.[20]

17 *See* 2020 Rule 15c2-11 Release, at 85 FR 68129.

18 *See, e.g.*, 2020 Rule 15c2-11 Release, at 85 FR 68136 n.158.

19 *Compare* 17 CFR 240.15c2-11(a)(4) (1971), Rule 15c2-11(a)(4)), *with* 17 CFR 240.15c2-11(b)(5)(ii) (2021), Rule 15c2-11(b)(5)(ii) (2021).

20 1998 Rule 15c2-11 Release, at 63 FR 9669.

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Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Senator Steve Daines:

Chairman Gensler, when you last appeared before this Committee I raised concerns about the lack of oversight of Chinese trading firms. As you know, these Chinese-backed companies have access to a substantial amount of US customer information and they are growing rapidly. During that September 2021 hearing, I asked you what the SEC was doing to ensure Americans' sensitive personal and financial information is not unknowingly transferred to the Chinese government. At that time you said you would get back to us after the hearing, but it has been over a year and we have yet to receive a response to this inquiry. Please provide an update on the steps the SEC has taken (or intends to take) to address this issue.

As you are aware, the Committee on Foreign Investment in the United States ("CFIUS") plays a key gatekeeper role in helping to address these concerns. As you know, CFIUS is an interagency committee authorized to review certain transactions involving, among other things, foreign investment in the United States in order to determine the effect of such transactions on the national security of the United States. The Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") strengthens and modernizes CFIUS's ability to address national security concerns more effectively, including by broadening the authorities of the President and CFIUS to review and to take action to address any national security concerns arising from, for example, certain non-controlling investments involving foreign persons. SEC staff has and will continue to provide technical assistance to CFIUS, as needed, on issues related to foreign investment or ownership in U.S. broker-dealers.

On data protection generally, regarding other bad actors, certain SEC rules including Regulation S-P and Regulation S-ID are intended to protect against bad actors such as hackers and identity thieves. Regulation S-P requires broker-dealers, investment companies, and SEC-registered investment advisers to adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information. Regulation S-ID, which the SEC adopted jointly with the CFTC, requires that certain regulated entities subject to the SEC's enforcement authority that offer or maintain certain types of accounts must develop and implement a written identity theft prevention program designed to detect, prevent, and mitigate identity theft.

To fulfill the SEC's mandate to protect investors in U.S. capital markets, we stand ready to continue engagement regarding on-going concerns with data security.

During your recent appearance before the Senate Banking Committee, I asked you about the risk of negative unintended consequences that arises from the SEC analyzing its dozens of rule proposals independently and in isolation from each other even though many such

proposals are interrelated and could have cumulative adverse effects if implemented simultaneously. In response, you said that the SEC does "consider those cross issues" and that the SEC is "even looking now whether" to re-open the comment period for some proposals on account of overlap or interaction with other proposals.

1. **To what extent has the SEC conducted economic impact analyses of the potential cumulative and cross-sector effects of multiple rule proposals after the public comment period for such proposals has closed, and would the SEC consider making the results of such analyses publicly available?**

Please see response below in 2.

2. **The SEC under your leadership has issued 32 rule proposals over the past 11 months, most of which with the bare minimum 30 day notice and comment period. There are too many proposals, covering too broad an area, and insufficient time to comment and engage with Commission staff. During a three week period earlier this year, the SEC had 15 separate rule proposals with public comment periods that were simultaneously open. Needless to say, it would be nearly impossible for a company impacted by even a handful of those rule proposals to examine and write thoughtful comments before the close of the comment period.**
   What rule proposals is the SEC considering re-opening for public comment in light of potential interaction or cumulative effects with other subsequently released proposals?

The Commission has long considered efficiency, competition, and capital formation, in addition to investor protection and the public interest. In Commission rulemakings, the SEC conducts an economic analysis that examines the costs, benefits, and other economic effects of that particular rulemaking. The Commission's economic analysis of a proposed regulatory action compares the current state of the world, including the problem that the rule is designed to address, with the expected state of the world with the proposed regulation (or regulatory alternatives) in effect. In particular, to the extent that rules that are adopted impact market conditions through their costs, including cumulative costs, this impact is incorporated in the economic analysis (i.e. current and expected states of the world) of any new rule proposal or adoption. For more information on the costs and benefits of rules proposed or adopted by the Commission, please see the SEC's website, www.sec.gov/rules.

3. **How many full time SEC employees are working on cost-benefit analysis?**

The Division of Economic and Risk Analysis has 87 employees working on economic analyses.

4. **Has the Commission performed cost-benefit analysis on the 30 plus rulemaking proposals released this year alone?**

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5. **In December 2021, the SEC published a no action letter regarding rule 15c2-11, which regulates broker-dealers ability to publish quotations for securities. Did the SEC conduct any cost-benefit analysis prior to allowing this staff action to be published? Will the Commission commit to not allowing this staff action to go into effect until it goes through a formal rulemaking process with a notice and comment period?**

Since its adoption in 1971 through notice and comment rulemaking, Rule 15c2-11 has applied to securities.[1] "Security" is a defined term under section 3(a)(10) of the Exchange Act and specifically includes, among others, notes, bonds, debentures, and certificates of deposits, which are commonly known as fixed income securities.

Further, in 2019, the Commission, as part of the notice and comment rulemaking that led to the adoption of amendments to Rule 15c2-11, specifically requested comment on the application or Rule 15c2-11 to fixed income securities in the proposing release.[2] Although commenters provided extensive responses to the Commission's request for comments, no commenters responded to these questions. Following the 2020 adoption by the Commission of the amendments to Rule 15c2-11 after notice and comment rulemaking, certain market participants sought an exemption for fixed income securities. The staff issued a no-action letter, stating that the staff of the Division of Trading and Markets would not recommend enforcement action under certain conditions for quotations of certain fixed-income securities on the over-the-counter markets to allow for an orderly and good faith transition into compliance with the amended rule.

Consistent with the limitations regarding all staff actions, footnote 9 of the no-action letter states the following: "This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person."

6. **The SEC continues to impose significant regulation of crypto firms through enforcement/enforcement actions as opposed to following a formal notice and comment period. How do you square that with the concept that securities laws are clear?**

The SEC enforces existing federal securities laws, as well as the rules and regulations promulgated pursuant to those laws. Our application of those laws, rules, and regulations is governed by decades of well-developed case law.

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1 36 FR 18611 (Sept. 18, 1971).
2 84 FR 58230 (Oct. 30, 2019).

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Of the nearly 10,000 tokens in the crypto market, I believe the vast majority are securities. Offers and sales of these thousands of crypto security tokens are covered under the securities laws. Given that many crypto tokens are securities, it follows that many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity.

Without examination against and enforcement of our rules and laws, we can't instill the trust necessary for our markets to thrive. Preventing fraud, manipulation, and abuse lowers risk in the system. It protects investors and reduces the cost of capital.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

LETTER SUBMITTED BY NATIONAL ASSOCIATION OF MANUFACTURERS, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND U.S. CHAMBER OF COMMERCE

September 14, 2022

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
Washington, DC 20510

The Honorable Maxine Waters
Chairwoman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Pat Toomey
Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
Washington, DC 20510

The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Re: Unprecedented SEC Staff Interpretation to Force Private Companies Public and Raise Costs on Job Creators

Dear Chairman Brown, Chairwoman Waters, Ranking Member Toomey, and Ranking Member McHenry:

The undersigned associations write to express our strong concerns with a surprising new rule interpretation, recently issued by staff at the Securities and Exchange Commission ("SEC"), that conflicts with existing regulation, will force private companies to make public disclosures, and will directly harm businesses' ability to raise capital for job-creating projects. This change constitutes a reversal of 50 years of SEC policy and will have far-reaching implications, yet it was adopted without input from the public or any analysis of its potential impacts.

If Congress does not step in to reverse this erroneous and damaging staff interpretation before it takes effect in January 2023, private companies will be forced to publicly disclose competitively sensitive information and will face new barriers to capital formation—significantly limiting their growth potential and imposing direct consequences on their ability to create jobs here in the U.S. What is more, the new interpretation will provide no additional protection for investors, given that retail investors cannot participate in the private placements implicated by the change—and the institutional investors who can participate will face increased costs and decreased value as a result of the staff's actions.

In 2020, the SEC adopted amendments to Rule 15c2-11, which governs the quotation of securities in the over-the-counter ("OTC") market, to provide new protections for retail investors in OTC equity securities. In September 2021, however, the SEC's Division of Trading and Markets issued a no-action letter expressing the view that Rule 15c2-11, including the 2020 amendments thereto, applies to *other* types of OTC securities—including bonds and other fixed income securities.[1] Given the complete lack of analysis of fixed income securities in the 2020

[1] Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (Sept. 24, 2021). *Available at* https://www.sec.gov/files/rule-15c2-11-fixed-incomesecurities-092421.pdf.

adopting release, this new interpretation was a shock to companies, investors, and broker-dealers alike—and even to some SEC Commissioners.[2] To our knowledge, in the 50 years of the existence of Rule 15c2-11, the SEC has never attempted to enforce compliance with the rule for fixed income securities.

Many private companies issue fixed income securities in the form of corporate bonds offered under Rule 144A, which companies have used for private placements since 1990. Applying the 2020 amendments to fixed income securities will require these *private* issuers to make detailed financial data *publicly available* before broker-dealers can freely quote their securities. This new requirement will take effect on January 4, 2023.[3]

Rule 144A was created by the SEC more than 30 years ago specifically to provide companies with a means to raise capital outside of public, registered offerings. Retail investors—which Rule 15c2-11's disclosure requirements were designed to protect—are prohibited from participating in these private placements. Only qualified institutional buyers ("QIBs"), such as mutual funds and pension plans, can purchase Rule 144A securities, and these sophisticated institutions already have a mechanism to access issuer financial information. Rule 144A requires that securityholders and prospective purchasers be given the right to obtain, upon request, specified operational and financial information about the issuer. When it promulgated Rule 144A, the SEC determined after considering public comments that this "available upon request" approach appropriately balanced investor protection and capital formation.[4] Yet the SEC staff has now effectively overturned this balance without public notice-and-comment or any analysis of the potential impacts of such a dramatic policy change.

If the SEC persists in enforcing this novel interpretation, private companies will be forced to go beyond what is required by Rule 144A and instead make public their confidential and competitive information for their debt to be freely quoted on the secondary market. This requirement will impose significant costs on these businesses by exposing sensitive information to competitors and undermining their right as non-public companies to avoid public scrutiny of their financial data. Private companies that choose to protect this confidential information, on the other hand, will experience substantially decreased liquidity given that broker-dealers will not be able to freely quote their securities. This will directly increase the costs of raising capital through Rule 144A and reduce the capital available to private companies, ultimately impacting their ability to create jobs, grow their business, and invest for the future.

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[2] *Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities*. Commissioner Hester M. Peirce (Sept. 24, 2021). *Available at* https://www.sec.gov/news/public-statement/peirce-nal-rule-15c2-11-2021-09-24. ("Nothing in the adopting release suggests that the Commission considered the application of these rules to the fixed-income markets. [...] Consequently, nobody seems to have contemplated that this rule would affect the fixed-income markets in a way different from the pre-amendment version of the rule...")

[3] Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (Dec. 16, 2021). *Available at* https://www.sec.gov/files/fixed-income-rule-15c2-11-nalfinra-121621.pdf.

[4] *Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145*, 55 Fed. Reg. 17933 (Apr. 30, 1990). Release Nos. 33-6862, 34-27928, IC-17452; *available at* https://archives.federalregister.gov/issue_slice/1990/4/30/17932-17949.pdf#page=2.

Importantly, the SEC intends for the effects of this new staff interpretation to be retroactive, which will impair investments in private company bonds made by institutional investors, even if those investments were made years ago. Investors in Rule 144A bonds face the challenge of trying to determine which issuers will comply with this new staff interpretation, which will not, and whether they need to sell their investments—which will further depress prices. This new staff interpretation has no benefit for investors, which is why they have opposed this significant policy change from the SEC.

Congress enacted the Administrative Procedure Act to require agencies to follow appropriate deliberative processes when developing significant regulatory requirements. Critically, agencies are required to provide opportunities for the public to review and submit feedback on proposed changes before they are adopted. They are also required to conduct a fulsome analysis of the potential impacts of their rule proposals. The SEC bypassed these important safeguards in applying the 2020 amendments to Rule 15c2-11 to Rule 144A securities, and the SEC has given no indication that it plans to reverse the staff's interpretation before it becomes effective early next year.

Given the impending harms discussed above, we respectfully encourage Congress to step in before the new interpretation takes effect in January 2023. It is critical that Congress act by year's end to protect American businesses and safeguard capital formation by preventing the SEC from imposing public disclosure obligations on privately held Rule 144A issuers.

Sincerely,

National Association of Manufacturers

Securities Industry and Financial Markets Association

U.S. Chamber of Commerce

cc: Members of the Senate Committee on Banking, Housing, and Urban Affairs
Members of the House Committee on Financial Services