

Ranking Member Pat Toomey (R-Pa.)
Opening Statement
Full Committee Hearing: Oversight of the U.S. Securities and Exchange
Commission
September 14, 2021 at 10:00 AM

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

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

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

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

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

Similarly, I worried that you'd favor the paternalistic push by some on the Left to restrict investor freedom under the guise of protection, while actually harming retail investors. Such harm may result from your apparent

opposition to payment for order flow, which helped allow brokers to offer commission-free trading.

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

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

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

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

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

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

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

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

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

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

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