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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, DC 20510–6075

September 24, 2021

The Honorable Gary Gensler, Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair Gensler:

Thank you for your testimony before the Senate Banking Committee on September 14, 2021. I write to follow up on the concerns I expressed at the hearing about the need for regulatory clarity around emerging technologies like cryptocurrencies, including stablecoins.

For investors to benefit from a fair and competitive marketplace, regulators must proactively provide rules of the road to industry. Unfortunately, the Securities and Exchange Commission (SEC) has instead adopted a strategy of regulation-by-enforcement in this area. At the hearing, you noted the SEC's success in pursuing crypto-related enforcement actions. In many of these enforcement actions, the SEC did not identify the securities involved or the rationale for their status as securities, which would have provided much-needed public regulatory clarity.[1] This approach appears related to your belief that "the probability is quite remote that . . . any given [cryptocurrency] platform has zero securities."[2] However, the SEC has a responsibility to do more than just provide probabilistic estimates.

My concerns about the SEC's lack of regulatory clarity are shared by others, including SEC commissioners. In one recent enforcement action, SEC Commissioners Hester Peirce and Elad Roisman stated they were "disappointed" by the SEC's failure to explain which digital assets were securities. They stated this omission was "symptomatic of [the SEC's] reluctance to provide additional guidance about how to determine whether a token is being sold as part of a securities offering or which tokens are securities."[3]

In an effort to obtain that additional guidance, attached are questions for the record for the recent hearing. Many of them would give industry clarity on developing promising technologies within the confines of existing laws and regulations. Please provide detailed answers so that innovators have the guidance they need to ensure domestic investment and innovation in these technologies.

Sincerely,

Pat Toomey
Ranking Member

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[1] *See, e.g.*, the SEC's enforcement actions against Poloniex, Coinschedule, ICO Rating, EtherDelta, and TokenLot.
[2] Gary Gensler, SEC Chair, Testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Sept. 14, 2021, available at https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%209-14-21.pdf.
[3] In the Mattter of Coinschedule, Statement of SEC Commissioners Hester Peirce and Elad Roisman, July 14, 2021, https://www.sec.gov/news/public-statement/peirce-roisman-coinschedule.

Questions for the Record from Ranking Member Toomey for the Hon. Gary Gensler, Chair, Securities and Exchange Commission

September 14, 2021 Hearing before the Senate Committee on Banking, Housing, and Urban Affairs

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

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

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

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

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

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

3. At the September 14, 2021 hearing, you referenced that the SEC had previously taken the position, upheld in the courts, that the acquisition interests in whiskey caskets were securities. In what ways are interests in whiskey caskets are comparable to interests in stablecoins for purposes of analyzing whether a security exists. For example, is each whiskey casket, and its contents, viewed as indistinguishable from other whiskey caskets? If not, would that analysis apply comparably to stablecoins within a particular cryptocurrency?

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

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

5. Please list all exemptive orders, arranged in chronological order, issued since January 1, 2021 through the date of your response, that reference cryptocurrencies, tokens, digital assets, and similar items. Please also provide the number of pending applications for exemptive orders that involve such items.

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

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

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

8. You recently stated in an August 5, 2021 letter to Senator Warren that the public would benefit from "additional [Congressional] authority to write rules for and attach guardrails to crypto trading and lending." Do you believe the SEC needs additional Congressional authority to properly regulate the digital asset marketplace?

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

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

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

10. I understand from your previous remarks that a Bitcoin exchange-traded fund (ETF) approval is unlikely to occur soon given your concerns around market structure and volatility. However, even with these concerns being voiced publicly over 20 companies have applied to launch a Bitcoin ETF due to the strong amount of interest cited by U.S. institutions. We have seen regulatory bodies in Canada, Germany, Switzerland and Sweden approve bitcoin ETPs, and many U.S. investors are finding ways to access these products in lieu of the absence of an SEC-approved domestic product.

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

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

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

12. In December 2020, the SEC put out a statement and request for comment regarding the custody of digital asset securities by special purpose broker-dealers (SPBDs). The statement requires the SPBD to limit its business to "dealing in, effecting transactions in, maintaining custody of, and/or operating an ATS [alternative trading system] for digital asset securities."[4] Several submitted comments have noted that requiring a broker-dealer to bifurcate its operations to be able to deal separately with digital asset securities is unnecessary and could lead to additional operational risk for the broker-dealer, among other challenges. Is the SEC considering revisions to its statement to remove the requirement to bifurcate a broker-dealer's operations for the purposes of acting as a custodian of digital asset securities?

13. Recent press articles have discussed high fees being charged to public companies in connection with distribution of proxy materials. Historically, these have been set according to a fee schedule adopted by the New York Stock Exchange (NYSE). Earlier this year, the SEC rejected a proposed rule change by NYSE to cease setting a fee schedule.

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

    b. Some service providers who fulfill brokers' obligations to distribute proxy materials impose an additional "suppression fee," which results in the service provider receiving a higher fee for electronic distributions than for paper mailings. Please

[3] https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03
[4] https://www.sec.gov/rules/policy/2020/34-90788.pdf

explain whether charging higher fees for electronic distributions is in the best interests of investors.

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

15. The Consolidated Appropriations Act, 2021, Public Law No. 116-260, instructed the SEC to deliver two reports about small issuers by June 2021 – one on analyst research[5] and one about the effects of the 10% limitation on investments by investment companies.[6] These reports are now overdue. What is the estimated timeframe for delivery of these reports?

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

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

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

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

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

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[5] Division Q, Sec. 106.
[6] Division Q, Sec. 107.
[7] Gary Gensler's March 5, 2021 response to Senator Toomey's question for the record, #14, for Senate Banking Committee's March 2, 2021 hearing, "Nominations of The Honorable Gary Gensler and The Honorable Rohit Chopra," available at https://www.banking.senate.gov/imo/media/doc/Gensler%20Resp%20to%20QFRs%203-2-21.pdf.
[8] *Id.* at #18.

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

20. In your responses to a question for the record from your confirmation hearing, you stated that you would "review… the SEC's proposed Exemptive Order issued last year that would exempt certain 'finders' from broker registration requirements" and determine if further action is appropriate.[10] Please provide an update on your review of the proposed Exemptive Order.

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

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

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

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

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

24. My office has received concerns that career SEC staff are waiting for direction from the SEC Chair's office before proceeding on no-action letters and similar requests involving technical interpretations of the federal securities laws and SEC rules. In some cases, the requestors had been working with the SEC staff for a significant period of time. For example, my office is aware of one request for no-action relief involving the application of Sections 13 and 16 of

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[9] *Id.* at #19.
[10] *Id.* at #21.
[11] *Id.* at #22.

the Securities Exchange Act of 1934 to authorized participants in connection with non-fully transparent active exchange-traded funds that have been already approved by the SEC. What steps are you taking to ensure that career SEC staff can resolve pending requests on such technical issues?

25. 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). These resolution plans are intended to, among other things, "foster[] market discipline by making clear that no extraordinary government support will be available to indemnify investors against losses or fund the resolution of an Enterprise." *Id.* at 23,580. Specifically, "[i]n developing a resolution plan, each Enterprise shall: . . . [n]ot assume the provision or continuation of extraordinary support by the United States to the Enterprise to prevent either its becoming in danger of default or in default (including, in particular, support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as supervisor, conservator, or receiver of the Enterprise, including the Senior Preferred Stock Purchase Agreements entered into by FHFA and the U.S. Department of the Treasury on September 7, 2008 and any amendments thereto)." 12 C.F.R. 1242.5(b)(2). Related to this, Treasury's Housing Reform Plan released in September 2019 recommended that "[a] credible resolution framework can ensure that shareholders and unsecured creditors bear losses, thereby protecting taxpayers against bailouts, enhancing market discipline, and mitigating moral hazard and systemic risk." In light of FHFA's policy that, notwithstanding the Senior Preferred Stock Purchase Agreements, unsecured creditors of each Enterprise should be at risk of loss upon an insolvency event affecting the Enterprise, why should SEC regulations governing money market mutual funds, registration requirements, or other market activity continue to treat securities issued by the Enterprises in a manner similar to securities issued by the U.S. Treasury?