

# Likely Policy Priorities of the Gensler SEC

April 14, 2021

Gary Gensler was confirmed today in a 53-45 vote as Chair of the Securities and Exchange Commission (“SEC”).

Before his confirmation, Chair Gensler testified before the Senate Committee on Banking, Housing and Urban Affairs (“Banking Committee”) on Tuesday, March 2, 2021. Several key themes emerged in Chair Gensler’s testimony that signaled some of his likely policy priorities and directions for future initiatives at the agency.

Chair Gensler’s opening statement<sup>1</sup> and responses to questions provided perspective on three major policy themes: (1) the SEC’s potential role in using its disclosure, examination and enforcement authority to advance environmental, social and governance (“ESG”) and political spending priorities of the Democratic Party and Biden Administration; (2) market structure reforms, particularly in the equity markets in the wake of the WallStreetBets-related market volatility (though market structure reform more broadly will be a priority); and (3) digital asset and financial technology, and in particular, the regulation of cryptocurrency and new technologies.

**The SEC, Social Policy and “Materiality”.** In recent years, debates over the role of the SEC and its authority over corporate disclosure requirements to advance social policy goals have grown in prominence. Even prior to the confirmation hearing, the SEC signaled a shift in focus to addressing climate and ESG issues under Acting Chair Allison Herren Lee. Acting Chair Lee created the new role of Senior Policy Advisory for Climate and ESG, issued a “Statement on the Review of Climate-Related Disclosure” directing the Division of Corporation Finance to enhance focus on climate-related disclosures in public company filings,<sup>2</sup> and announced an Enforcement task force focused on climate

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<sup>1</sup> Gary Gensler, Opening Statement, Senate Committee on Banking, Housing and Urban Affairs, see [here](#).

<sup>2</sup> SEC, Statement on the Review of Climate-Related Disclosure, see [here](#).

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and ESG issues.<sup>3</sup> Most recently, Acting Chair Lee issued a statement seeking public input into disclosure requirements relating to climate change.<sup>4</sup>

As expected, Chair Gensler's testimony included general statements on the value of diversity, environmental protection and information about political spending without committing to particular policy outcomes. In the course of the hearing, however, Chair Gensler had some interesting things to say about his interpretation of the "materiality" of such information.

In an early set of questions focused on public company disclosure related to political spending and ESG topics, Senator Pat Toomey, the ranking Republican on the Committee, probed Chair Gensler on whether he would apply the historical "materiality" standard to disclosure requirements. In response, Chair Gensler signaled an approach to "materiality" that takes into account empirical information about concerns of the investing public as a measure of what a reasonable investor would consider material in making investment and voting decisions. Chair Gensler acknowledged that information that affects a financially insignificant portion of a company's revenue would often not be considered "material," and asserted that he would ground his decision-making in the Supreme Court's materiality standard and economic analysis. However, he also emphasized that he may ultimately be guided by the investor community, noting for example, that on the issue of political spending and ESG information, he would consider the level of investor support for disclosures evidenced in the 2020 proxy voting season.

In responding to questions from Chairman Sherrod Brown and Senator Elizabeth Warren, Chair Gensler also referred to investor interest in climate risks and ventured that clear guidance and mandatory disclosures could be "pro-issuer." When asked about mandatory disclosure on workforce diversity, Chair Gensler signaled that he would consider the issue, framing it as part of the evolving approach to disclosures around "human capital" as an important part of the value proposition for many companies. The bottom line appears to be that Chair Gensler seems ready to take a broader approach to materiality than past Chairs, which likely signals an increased openness to ESG and other types of required disclosures.

**Market Structure.** In response to heightened public attention in late January to heavy trading in GameStop and other stocks popularized in social media forums, senators on the Banking Committee posed several questions about equity market structure, including the practice of providing payment for order flow ("PFOF"). In response, Chair Gensler raised five considerations on which he intends to focus: (1) ensuring best

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<sup>3</sup> SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues, *see* [here](#).

<sup>4</sup> SEC, Public Input Welcomed on Climate Change Disclosures, *available* [here](#).

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execution “in the face of” PFOF; (2) understanding investor protection consequences of app-based order taking and information platforms with features that some perceive as encouraging frequent trading; (3) removing barriers to maintaining continuous access to markets; (4) understanding whether market consolidation is impeding competition; and (5) updating back office infrastructure to lower risks and costs.

While these themes were expected and Chair Gensler did not commit to particular actions, his focus on the impact of market consolidation on retail order flow suggests that he may take a broad approach to market structure that may expand beyond PFOF, electronic sales practices and reducing the settlement cycle for equities from trade date, plus two business days. Given his own knowledge of the markets, Chair Gensler can be expected to review and potentially take action on a range of market structure issues.

**Digital Assets and Financial Technology.** During the committee hearing, Chair Gensler received multiple questions about the SEC’s responsibility to oversee innovative technologies. Chair Gensler sounded several themes, noting that while technology can be a positive “catalyst for change” critical for financial inclusion, the SEC must be mindful of agency jurisdiction, indicating both that he would respect SEC limits on regulating non-security assets and play a leading role in developing regulation for digital assets that fall within the SEC’s jurisdictional bounds.

Overall, Chair Gensler emphasized that regulation must remain technology-neutral and the importance of providing regulatory clarity through guidance and no-action letters while maintaining an ultimate goal of protecting investors. Chair Gensler is very knowledgeable about digital assets from his work at MIT over the last few years and there is no doubt he will want to make his mark in that space, perhaps even working together with Commissioner Hester Peirce who had been extremely focused on crypto-related issues.

**Additional Topics.** Senators also raised questions regarding the nominee’s views on various enforcement topics, use of binding arbitration agreements, competition among credit rating agencies, private equity, the desirability of a financial transaction tax, and other issues, including use of 10b5-1 plans and disclosures of trading by corporate insiders. Overall, Chair Gensler evidenced his interest and willingness to review current regulations and practices.

**Implications for Examination and Enforcement.** Consistent with the main themes articulated by Democratic Senators and the nominee himself, we expect Chair Gensler to drive an aggressive regulatory, examination, and enforcement platform that focuses on climate and ESG; financial institutions; market structure; and appropriate regulation of other digital assets and technologies. The SEC will also likely focus on enforcement

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of Regulation Best Interest as it conducts another round of examinations of that new regulation, which will likely yield enforcement referrals.

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Please do not hesitate to contact us with any questions.

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