



# *FedFin Client Report*

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Tuesday, October 5, 2021

## **Gensler: SEC Will Not Ban Crypto, Will Treat as Securities**

Client Report: INVESTOR19

### **Executive Summary**

As [anticipated](#), today's HFSC hearing with SEC Chair Gensler covered the full SEC agenda, although members steered clear of the SEC investigation demanded by Sen. Warren (D-MA) into recent Fed trading. Chair Gensler defended his budget request, citing for example a major increase in IPOs and saying the SEC is a "cop on the beat" ensuring investors are protected. Democrats pushed Mr. Gensler to take more action on crypto while Republicans argued crypto is not a security; Chair Gensler was consistent throughout the hearing in his belief that the law is clear on what is a security, but noted also it may be outdated in some areas and thus urged Congress to update the law if it sees appropriate. Like Fed Chair Powell ([see Client Report REFORM209](#)), Chair Gensler pledged he would not ban crypto. Partisan battles over climate disclosures also continued, and Mr. Gensler said a proposal on these should be released in the coming months. He also briefly opined on the ongoing Treasury market review, saying he is focused on market resiliency given recent instances in which the Fed had to step in.

### **Analysis**

#### ***Opening Statements***

Chairwoman Waters (D-CA) attacked the SEC under the previous Chairman's leadership, saying it provided minimal oversight, eliminated key investor protections, and took no action to standardize ESG metrics. She highlighted cryptocurrency, payment for order flow, and short-seller transparency as key issues needing to be addressed. Rep. Waters also noted that HFSC's investigation into the GameStop event earlier this year is still under way and a report on findings will be issued upon completion.

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Ranking Member McHenry (R-NC) said Chair Gensler's previous statements on digital assets have been concerning and contradictory, calling on Congress to provide clear guidelines in this arena and noting he introduced legislation to do so today. Rep. McHenry is also concerned Mr. Gensler is not abiding by the notice-and-comment rulemaking process and politicizing the Commission.

## ***Testimony***

Chair Gensler said new financial technologies are changing markets, noting more retail investors are accessing markets than at any previous time. Current Commission priorities include Treasury market resiliency, non-Treasury fixed-income markets, equity markets, and securities-based swaps, all of which would benefit from greater competition and lower costs. Highlighting the growing impact of data analytics and AI/ML, he said the SEC needs to ensure investors are protected against conflicts of interest, biases in data, and systemic risk. He specifically cited crypto as an area that currently lacks sufficient investor protection, saying the SEC is working with other regulators on potential options. Mr. Gensler also said investors want useful, consistent, and comparable disclosures not only on climate risk, but also human capital and cybersecurity.

## **Q&A**

- **Climate-Risk Disclosures:** Rep. Velázquez (D-NY) said there is strong demand for mandatory climate risk disclosures, asking if the SEC intends to propose a rule by year-end; Chair Gensler agreed there is strong demand and said the Commission intends to consider a proposal in the coming months. Reps. Barr (R-KY) and Hill (R-AR) argued any disclosure rule must ensure a sufficient materiality threshold, saying disclosures should be designed to provide investors with needed information, not "name and shame" politically unfavored industries. Noting the lack of climate expertise at the SEC, Rep. Lucas (R-OK) urged collaboration with experts at other agencies. Rep. Casten (D-IL) asked if disclosures will include details on firms' capital structures as they relate to climate risk; Chair Gensler said this was interesting and asked for additional details on Rep. Casten's thinking, but did not commit to such disclosures.
- **Crypto:** Rep. McHenry argued additional clarity on the proper regulatory regime is needed and urged Congress to provide this. Rep. Sherman (D-CA) pushed back on these comments, saying cryptocurrencies are clearly investments that demand SEC oversight. Chair Gensler said crypto firms should communicate with the SEC, register, and, if they have concerns about the framework being applied, engage in

discussion on what the correct framework is, noting his openness to revise decades-old rules that may not fit the current environment. Rep. Maloney (D-NY) agreed crypto should be regulated like securities, asking if additional authority from Congress is needed; Chair Gensler said the law is clear on what is and is not a security. Rep. Emmer (R-MN) disagreed, saying crypto is either a commodity or currency based on its use. Rep. Himes (D-CT) asked if regulating crypto exchanges is similar to regulating legacy exchanges or if an overhaul is needed; Chair Gensler does not believe a new regulator is needed, but noted it is a question for Congress. Rep. Torres (D-NY) asked if stablecoins specifically were a systemic risk; Mr. Gensler said they will be if their growth continues.

- **Payment for Order Flow:** Reps. Wagner (R-MO) and Williams (R-TX) argued PFOF should not be banned because it enables zero-commission trades and thus encourages and benefits retail traders. Rep. Lawson (D-FL) worried that a PFOF prohibition would disproportionately hurt minorities and women. Rep. Himes said that the price improvement seen with PFOF is an illusion, asking why institutional investors get better pricing than retail ones and arguing PFOF allows industry to make money closing that gap. Rep. Foster (D-IL) asked about possible disclosures to make PFOF pricing more transparent.
- **ESG Funds:** Reps. Luetkemeyer (R-MO), Barr, and Hill worried about funds advertising themselves as ESG compliant when they are not, urging the SEC to set standards on this; Chair Gensler agreed.