Ranking Member Pat Toomey (R-Pa.)
Opening Statement
Full Committee Hearing
September 15, 2022 at 10:00 AM

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% 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 crypto markets. 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 crypto market participants? The Chairman insists in his written testimony that "the vast majority" of crypto tokens 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 crypto market?

As I've said, crypto tokens 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 crypto markets, 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.