

**Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021**

Questions for The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission, from Ranking Member Patrick J. Toomey:

- 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.**

Congress established the definition of a security, which includes about 20 items, like stock, bonds, and notes. One of the items is an investment contract. The Supreme Court took up the definition of an investment contract, stating that it exists when “a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” The Supreme Court has repeatedly reaffirmed this Howey Test. Thus it depends upon the particular facts and circumstances, whether any particular financial instrument, including a crypto asset, is being offered or sold as a security. The SEC’s Section 21(a) 2017 Report of Investigation on The DAO and subsequent settled enforcement orders set forth the SEC’s views on how the federal securities laws apply to particular crypto assets. Under the Commodities Exchange Act, derivatives on commodities that are not securities are subject to the CFTC’s exclusive jurisdiction.

- 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 test¹?**
 - 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-chartered 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**

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

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

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.**

The existing stablecoin market is worth nearly \$138 billion and is embedded in crypto trading and lending platforms. Though they represent only about 5 percent of all crypto assets, more than 75 percent of trading on all crypto trading platforms occurred between a stablecoin and some other token.

While I appreciate your inquiry regarding a particular hypothetical fact pattern, there are many facts that come into play when determining whether any particular financial instrument is or is not a security. As the President's Working Group report on stablecoins notes, "stablecoins, or certain parts of stablecoin arrangements, may be securities, commodities and/or derivatives." Thus, the use of stablecoins presents a number of public policy challenges with respect to protecting investors.

Stablecoins may facilitate those seeking to sidestep a host of public policy goals connected to our traditional banking and financial system, such as anti-money laundering, tax compliance, sanctions compliance, and other safeguards against illicit activity. We at the SEC will be working with our sibling regulators, including the CFTC, to deploy the full protections of the law to these products and arrangements where appropriate.

- 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 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?**

Congress created a definition of security that is intended to be broad, in order to encompass new and different types of investments that are presented to investors and that invoke the protections of the federal securities laws. The definition of security includes "investment contract" among the list of other types of securities. Whether a particular instrument is within the definition of security is based on the facts and circumstances. As it relates to investment contracts, the U.S. Supreme Court's *Howey* case and subsequent case law have found that an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.

For example, in the late 1960s and early 1970s, the Commission published releases that warned about investment contracts that were sold in the form of whisky warehouse receipts. In the whisky warehouse scenario, the promoters sold receipts to finance the aging and blending processes of Scotch whisky, where purchasers expected a return from the promoter's efforts in

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

developing and selling the Scotch. These cases highlight the fact that whether something is a security or not will depend on the economic reality of the transaction or product, not on any name or label given.

- 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.**

All issued no-action letters are publicly available on the SEC's website. A list of digital asset-related staff no-action letters can be found at the SEC's website at <https://www.sec.gov/finhub> under the "Blockchain/Distributed Ledger" section and "Regulation, Registration, and Related Matters" drop-down tab. More specifically, there have been a number of SEC staff no-action letters issued that relate to "cryptocurrencies, tokens [and] digital assets," including staff letters to [TurnKey Jet, Inc.](#), [Pocketful of Quarters, Inc.](#), [Paxos Trust Company, LLC](#), and [IMVU, Inc.](#) Staff also issued a no-action letter to the [Financial Industry Regulatory Authority \(FINRA\)](#), and the [Commission published a no-action statement](#), relating to the custody of digital asset securities by special purpose broker-dealers. There have been no such no-action letters issued since January 1, 2021.

Pending no-action inquiries with the staff are non-public and in most cases are submitted to the staff subject to claims of confidential treatment. As pending inquiries are not staff actions that are public, I am unable to provide any information about them.

- 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.**

The SEC has not issued any exemptive orders that reference cryptocurrencies, tokens, digital assets, or similar items during the period between January 1, 2021 and November 23, 2021.

Pending inquiries, including requests for exemptions from applicable provisions of the federal securities laws are, unless required to be submitted publicly, generally non-public and in most cases submitted to the staff subject to claims of confidential treatment. I am unable to provide any information about pending applications for exemptive orders that are non-public. I am aware of one pending public request, which can be found here:
https://www.sec.gov/Archives/edgar/data/1009268/000095010321008030/dp151409_406b.htm.

- 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.**

**Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021**

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

These are matters of public record, and there is a list of such actions, and the information requested on the SEC’s website at <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions>. The SEC’s complaints and orders in those actions are also a matter of public record and are available on the SEC’s homepage at the link above. The SEC’s complaints and orders in those actions are also a matter of public record and are available on the SEC’s homepage at the link above. The actions and trading suspensions filed since January 1, 2021 are listed below for convenience.

Actions

Action Name	Description	Date Filed
SEC v. Ginster	The Securities and Exchange Commission charged Ryan Ginster of Corona, California with conducting two unregistered and fraudulent securities offerings that raised over \$3.6 million in cryptocurrency from retail investors.	11/18/2021
GTV Media Group, Inc., et al.	The Securities and Exchange Commission charged New York City-based GTV Media Group Inc. and Saraca Media Group Inc., and Phoenix, Arizona-based Voice of Guo Media Inc., with conducting an illegal unregistered offering of GTV common stock. The SEC also announced charges against GTV and Saraca for conducting an illegal unregistered offering of a digital asset security referred to as either G-Coins or G-Dollars. The respondents have agreed to pay more than \$539 million to settle the SEC’s action.	9/13/2021
SEC v. Rivetz Corp., et al.	The Securities and Exchange Commission charged Rivetz Corp., Rivetz International SEZC, and Steven K. Sprague, the President of Rivetz and CEO of Rivetz International, with conducting an illegal, unregistered offering of securities through an initial coin offering.	9/8/2021
SEC v. BitConnect, et al. SEC v. Brown, et al.	The Securities and Exchange Commission filed an action against BitConnect, an online crypto lending platform, its founder Satish Kumbhani, and its top U.S. promoter and his affiliated company, alleging that they defrauded retail investors out of \$2 billion through a global fraudulent and unregistered offering of investments into a program involving digital assets. The Commission previously charged five other individuals in a related action for promoting the BitConnect offering.	9/1/2021 5/28/2021
Poloniex, LLC	The Securities and Exchange Commission filed settled charges against Poloniex, LLC, under which Poloniex agreed to pay more than \$10 million for operating an unregistered online digital asset exchange in connection with its operation of a trading platform that facilitated buying and selling of digital asset securities.	8/9/2021
Blockchain Credit Partners d/b/a DeFi Money Market, et al.	The Securities and Exchange Commission charged two Florida men and their Cayman Islands company for unregistered sales of more than \$30 million of securities using smart contracts and so-called “decentralized finance” (DeFi) technology, and for misleading investors concerning the operations and profitability of their business DeFi Money Market.	8/6/2021

**Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021**

Action Name	Description	Date Filed
SEC v. Uulala, Inc., et al.	The Securities and Exchange Commission filed settled charges against Uulala, Inc., and two of its California-based founders, Oscar Garcia and Matthew Loughran for allegedly defrauding more than a thousand investors in an unregistered offering of digital asset securities that raised more than \$9 million and against Uulala and Garcia for allegedly engaging in a second fraudulent offering of convertible notes.	8/4/2021
Blotics Ltd., f/d/b/a Coinschedule Ltd.	The Securities and Exchange Commission filed settled charges against the operator of Coinschedule.com, a once-popular website that profiled offerings of digital asset securities. The SEC's order finds that United Kingdom-based Blotics Ltd. violated the anti-touting provisions of the federal securities laws by failing to disclose the compensation it received from issuers of the digital asset securities it profiled.	7/14/2021
Loci, Inc., et al.	The Securities and Exchange Commission filed settled charges against Loci, Inc. and its CEO John Wise for making materially false and misleading statements in connection with an unregistered offer and sale of digital asset securities. According to the SEC's order, Loci provided an intellectual property search service for inventors and other users through its software platform called InnVenn. The SEC's order finds that from August 2017 through January 2018, Loci and Wise raised \$7.6 million from investors by offering and selling digital tokens called "LOCIcoin." As stated in the order, in promoting the ICO, Loci and Wise made numerous materially false statements to investors and potential investors, including false statements concerning the company's revenues, number of employees, and InnVenn's user base.	6/22/2021
SEC v. Hamid, et al. SEC v. Manor, et al.	The Securities and Exchange Commission charged three individuals for their roles in the \$30 million initial coin offering fraud that was spearheaded by convicted criminal Boaz Manor and his associate, Edith Pardo. The SEC previously charged Manor, Pardo, and their companies, CG Blockchain, Inc. and BCT Inc. SEZC in connection with the scheme in January 2020.	6/15/2021 1/17/2020
SEC v. Radjabli, et al.	The Securities and Exchange Commission filed charges against Edgar M. Radjabli of Boca Raton, Florida, and two entities he controlled for engaging in several securities frauds of escalating size. The SEC's complaint alleges that Radjabli, formerly a practicing dentist, and Apis Capital Management LLC, an unregistered investment adviser firm Radjabli owned and controlled, conducted a fraudulent offering of Apis Tokens, a digital asset representing tokenized interests in Apis Capital's main investment fund. The complaint further alleges that Radjabli and Apis Capital manipulated the securities market for Veritone Inc., a publicly-traded artificial intelligence company, by announcing in December 2018 an unsolicited cash tender offer to purchase Veritone for \$200 million, when, in truth Radjabli and Apis Capital lacked the financing or any reasonable prospect of obtaining the financing necessary to complete the deal.	6/11/2021
SEC v. LBRY, Inc.	The Securities and Exchange Commission charged LBRY, Inc., a blockchain company, with conducting an unregistered offering of digital asset securities. According to the SEC's complaint, from at least July 2016 to February 2021, LBRY, which offers a video sharing application, sold digital asset securities called "LBRY Credits" to numerous investors, including investors based in the US. LBRY allegedly received more than \$11 million in U.S. dollars, Bitcoin, and services from purchasers who participated in its offering.	3/29/2021
SEC v. Cutting	The Securities and Exchange Commission filed an emergency action and obtained a temporary restraining order and asset freeze against Shawn C. Cutting of Sandpoint, Idaho, for allegedly raising millions of dollars from hundreds of investors by falsely claiming to be a financial adviser with	3/5/2021

**Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021**

Action Name	Description	Date Filed
	securities licenses, overstating investment returns, and misappropriating money received from investors.	
SEC v. Coinseed, Inc., et al.	The Securities and Exchange Commission charged Coinseed, Inc., a company that purported to offer a mobile investment application that enabled users to invest in digital assets, and its co-founder and Chief Executive Officer, Delgerdalai Davaasambuu, in connection with Coinseed's offer and sale of digital asset securities.	2/17/2021
SEC v. Krstic, et al.	The Securities and Exchange Commission charged three individuals with defrauding hundreds of retail investors out of more than \$11 million through two fraudulent and unregistered digital asset securities offerings.	2/1/2021
Wireline, Inc.	The Securities and Exchange Commission filed a settled cease-and-desist proceeding against financial technology company Wireline, Inc. for making materially false and misleading statements in connection with an unregistered offer and sale of digital asset securities.	1/15/2021
American CryptoFed DAO LLC	The Commission instituted proceedings against American CryptoFed DAO LLC, a Wyoming-based organization concerning the registration of the company's securities.	11/10/2021
Long Blockchain Corp.	The Commission revoked registration of the securities of Long Blockchain Corp., a beverage business that had announced a shift to become a blockchain technology business which never became operational, for failure to file quarterly and annual reports.	2/22/2021

- 7) Please list all guidance materials posted to [sec.gov](https://www.sec.gov) or [investor.gov](https://www.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.**

Statements and other materials relating to digital assets are available to the public from our website homepage on the [sec.gov](https://www.sec.gov) and [investor.gov](https://www.investor.gov) websites. Click through: [SEC.gov | Strategic Hub for Innovation and Financial Technology \(FinHub\)](#); [Spotlight on Initial Coin Offerings and Digital Assets](#) | [Investor.gov](https://www.investor.gov)

Statements since January 1, 2021 include:

[Risk Alert: The Division of Examinations' Continued Focus on Digital Asset Securities.](#)

[Staff Statement on Funds Registered Under the Investment Company Act Investing in the Bitcoin Futures Market.](#)

[Funds Trading in Bitcoin Futures – Investor Bulletin.](#)

[Digital Asset and “Crypto” Investment Scams – Investor Alert.](#)

**Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021**

[President’s Working Group on Financial Markets, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency Report on Stablecoins.](#)

[Statement by Chair Gary Gensler on President’s Working Group Report on Stablecoins.](#)

- 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?**

I have stated before that I believe we need additional authorities to prevent crypto asset-related transactions, products, and platforms from falling between regulatory cracks.

Additional SEC regulatory authority over crypto trading and lending platforms and intermediaries could aid the SEC’s ability to prevent fraud and abuse and promote investor and market protection. I have asked SEC staff, working with our fellow regulators, to work along two tracks. First, I have asked them how we can work with other regulators under our current authorities to best bring investor protection to these markets. Second, I’ve asked them what gaps we might need Congress’s assistance to fill.

- 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?**

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

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

Though I am unable to comment about any particular crypto asset or project, I find myself generally agreeing with former SEC Chairman Jay Clayton when he testified in 2018: “To the extent that digital assets like [initial coin offerings, or ICOs] are securities — and I believe every ICO I have seen is a security — we have jurisdiction, and our federal securities laws apply.” Purchasers of ICO tokens generally are buying these tokens anticipating profits, and there’s a small group of entrepreneurs and technologists standing up and nurturing the projects. I believe we have a crypto market now where many tokens may be unregistered securities, without required disclosures or market oversight.

The U.S. Supreme Court’s *Howey* case and subsequent case law have found that an “investment contract” exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.

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?

Various international jurisdictions have different legal standards and processes for consideration of new investment products, including proposed exchange-traded products that may be based on bitcoin. Our staff continues to monitor developments in other jurisdictions with respect to bitcoin-focused investment vehicles and has engaged with fellow international regulators on their approaches to potential bitcoin-based investment vehicles and ongoing monitoring of such vehicles if they exist. As fellow regulators, our staff seeks to learn from the experiences of others. However, actions in the other jurisdictions are not binding on U.S. regulators, and our staff continues to follow applicable legal standards and processes under the federal securities laws when considering bitcoin-focused investment products.

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

I welcome Congress’ interest and input on the prospect of bitcoin ETPs. As noted above, our staff continues to follow applicable legal standards and processes under the federal securities laws when considering bitcoin-focused investment products. That being said, the markets for actual bitcoin itself today are largely unregulated. This lack of regulatory oversight and

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

surveillance leads to concerns about the potential for fraud and manipulation. Congress could bring the bitcoin markets under the U.S. regulatory umbrella, which could be helpful in our consideration of bitcoin ETPs.

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.

The first of the bitcoin futures ETFs have gone effective and are operating. The Commission considers all exchange-trading products under the standards applicable to them.

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?

In the December 2020 statement, the Commission expressed certain concerns regarding the custody of crypto asset securities and the potential ramifications that would result from the loss or theft of crypto asset securities. The period in which the statement and request for comment is in effect will provide the Commission and its staff an opportunity to gain additional insight into the evolving standards and best practices with respect to custody of crypto asset securities. During this five-year period, the Commission will continue to evaluate its position on an ongoing basis and will consider comments to inform any future rulemaking or other Commission action in this area.

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).

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>

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

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

Thank you for your interest in NYSE's schedule of proxy distribution fees. I agree that these fees present important issues. An NYSE petition for Commission review of staff's disapproval of an NYSE proposal to remove the fee schedule from its rules is before the Commission. I'm looking forward to learning more about these issues and appreciate your engagement.

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.

The Investment Company Act requires certain board votes to be cast in person. The Commission has at times granted temporary industry-wide relief from this requirement in response to various national emergencies, including the COVID-19 pandemic. The Commission's exemptive authority depends on, among other things, the exemption being consistent with the purposes intended by the provisions of the Investment Company Act. The Commission could consider applications for in-person voting relief for appropriate situations beyond emergencies, as its exemptive authority permits.

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 research⁵ 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?

SEC staff are in the process of preparing the requested reports based on a review of relevant legal and regulatory requirements, academic literature, and available data. These are important

⁵ Division Q, Sec. 106.

⁶ Division Q, Sec. 107.

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

topics that require careful consideration and evaluation of a number of issues. We are working diligently to complete the reports as soon as possible.

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.

Consistent with our statutory mandates to consider efficiency, competition, and capital formation alongside investor protection, we continue to strive to eliminate unnecessary costs in our rules. One recent example is the Commission’s rule to modernize how filing fees are reported, calculated, and paid. We also released two proposed rules for public comment increasing the use of electronic filing for submissions, which we expect will expedite and ease the filing process going forward. We will continue working to eliminate unnecessary costs as we consider future rules.

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.**

Small and medium-sized companies need access to our capital markets to fund innovations and scale their operations. We are continuously looking at what is working, what barriers may be preventing the facilitation of capital formation, and how investors are faring and being protected in these markets. As noted on the Spring 2021 regulatory agenda, staff in the Division of Corporation Finance are considering recommendations to the Commission on ways to further update the Commission’s rules related to exempt offerings. In addition, our Office of the Advocate for Small Business Capital Formation has been publishing new educational content to help small businesses and their investors demystify the offering process, thereby facilitating capital formation and promoting compliance. As part of that initiative, the staff recently released

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.

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

a new interactive capital raising [navigator tool](#) on sec.gov to help small businesses and their investors navigate their options for funding small businesses.

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?

Historically, the accredited investor definition has generally used wealth and income based criteria as proxies to determine those persons whose financial sophistication may render certain protections of the Securities Act’s registration process superfluous. The Commission recently expanded the definition of accredited investor to provide additional measures for establishing an individual’s financial sophistication that are not connected to their annual income or net worth.

The Dodd-Frank Act directs the Commission to review the accredited investor definition at least every four years to determine whether the definition should be modified or adjusted. The next required review is due to be completed no later than 2023. I expect the Commission will carefully review both how effectively the wealth- and income-based criteria of the accredited investor definition – along with the effectiveness of the recently adopted amendments - are serving their intended regulatory function and what impact any changes in those thresholds would have.

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.

We will take the liquidity concerns around thinly traded securities into consideration as we continue to review U.S. market structure.

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.

The regulatory status of “finders” has been a long-standing issue in the area of broker regulation. The Commission received a wide range of comments in response to the proposed Exemptive

⁹ *Id.* at #19.

¹⁰ *Id.* at #21.

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

Order. SEC staff are considering the comments received as they continue to evaluate potential appropriate next steps to recommend to the Commission.

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.

The Private Investments Subcommittee of the AMAC issued a Final Report and Recommendations on September 27, 2021.¹² The staff from the SEC’s Division of Investment Management is reviewing the final report and its recommendations, and I look forward to their input.

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.**

We have heard from market participants who use the proxy advisory firms about the rules’ current and future possible impact on the independence, timeliness, and costs of the advice.

Last Wednesday, November 17th, the Commission voted to propose amendments to these rules. Those proposals are tailored to address the independence, timeliness, and cost concerns raised by clients of proxy advisory firms and the confusion around sources of liability. The proposals would make no change to the conflict of interest disclosure requirements of the 2020 amendments. The release further clarifies, but does not alter, the application of the antifraud provisions of our proxy rules to proxy voting advice. These proposals are now in the notice and comment process and we encourage the public to share their views with the Commission.

¹¹ *Id.* at #22.

¹² Available at [Final Recommendations and Report of the Private Investments Subcommittee \(sec.gov\)](https://www.sec.gov/section-14001/2021/09/14/20210914-sec-amac-priv-invest-subcommittee-report).

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

- 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?**

I understand that the Code currently does not require “regulated investment companies” to realize capital gains when they distribute property in response to redemption requests and that the proposed amendment would remove this exception. Accordingly, the proposed amendment may change when a shareholder of an investment company that uses in-kind redemptions would recognize capital gains. This change is more likely to affect ETF shareholders than mutual fund shareholders because many ETFs use in-kind redemptions, while mutual funds generally do not.

- 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 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?**

The Commission staff continues to review and issue no-action and similar requests, with numerous requests processed in the last few months. As part of its review, the staff considers investor protection concerns as well as the complexity and the novel nature of the issues raised by the request. The staff continues working to expeditiously review pending requests and to complete its review in a manner consistent with the Commission’s investor protection mandate.

- 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**

Committee on Banking, Housing, and Urban Affairs
Oversight of the U.S. Securities and Exchange Commission
September 14, 2021

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?

The Investment Company Act defines “Government securities” to include any security issued by the United States, or by a person controlled or supervised by and acting as an instrumentality of the U.S. Government pursuant to Congressional authorization.¹³ The Enterprises currently are in conservatorship, and FHFA, an agency of the U.S. government, is the conservator of each Enterprise.¹⁴ If and when plans for ending conservatorship are developed, SEC staff would expect to consider any questions regarding the treatment of securities issued by the Enterprises under the Act and its rules as they arise.

¹³ Investment Company Act § 2(a)(16).

¹⁴ The Enterprises are federally chartered housing finance enterprises whose purposes include providing liquidity, stability and affordability to the residential mortgage market. See FHFA, *Fannie Mae and Freddie Mac*, <https://www.fhfa.gov/about-fannie-mae-freddie-mac>. FHFA was appointed by its Director as conservator of each Enterprise on Sept 8, 2008. See FHFA, *History of Fannie Mae and Freddie Mac Conservatorships*, <https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx>.