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## 6 Topics To Watch As Gensler Interviews For Top SEC Job

By **Dean Seal**

Law360 (March 1, 2021, 9:51 PM EST) -- Gary Gensler, the former Goldman Sachs executive-turned-financial regulatory hawk, will undoubtedly face questions on the recent GameStop trading frenzy, climate disclosures and other hot-button issues Tuesday when he defends his nomination to lead the U.S. Securities and Exchange Commission.

The U.S. Senate Banking Committee has scheduled a nomination hearing Tuesday morning for both Gensler, the Obama-era Commodity Futures Trading Commission chair **tapped to helm** the SEC, and Rohit Chopra, President Joe Biden's **pick to lead** the Consumer Financial Protection Bureau.

Known as a tough enforcer during his time at the CFTC, Gensler's nomination has not been considered especially controversial and is not expected to face any serious challenges to confirmation. But the hearing will give senators a chance to probe Gensler's views on a number of topics that could come to define his tenure at the nation's top securities regulator.

Here's what industry observers told Law360 they'll be looking out for at the hearing.

### GameStop

The **apparent trading war** embroiling the share price of GameStop and other "meme" stocks since January has come to dominate headlines and served as the subject of a heated U.S. House Financial Services Committee hearing **last month**. At Tuesday's hearing, senators will finally get the opportunity to address the GameStop phenomenon, even if only through questions to Gensler about the government's role in policing the stock market.

The explosive volatility seen in recent weeks, as well as the **trading restrictions** that Robinhood and other online brokerages famously imposed when that volatility hit a fever pitch in late January, has invigorated discussions around the infrastructure of the U.S. equities market, short-selling, commission-free trading and the information available to retail investors.

Jennifer Schulp of the Cato Institute told Law360 that she expects senators will ask Gensler "questions across the board on all of the issues that've been raised on GameStop," to both assess his perspective on these hot topics and do a little "policy posturing" while they're at it.

"I would expect to hear a broad-based set of questions about retail investing, payment for order flow, perhaps short-selling, and some of the underlying market structure-type questions like **settlement times**," she said.

### Climate Disclosures

Addressing climate change is one of four cornerstones of the Biden administration's policy agenda, and the SEC appears poised to play a key role.

An SEC investment advisory committee **urged the agency** last year to establish so-called environmental, social and governance, or ESG, disclosure policies, and **just last week**, acting SEC Chair Allison Herren Lee directed the Division of Corporation Finance to review the regulator's

existing 10-year-old guidance on climate-related disclosures.

Democrats are expecting Gensler to pick up **where Lee left off** and continue advancing ESG regulatory issues, and may press him Tuesday to commit to doing so, though he may receive pushback in equal measure from Republicans, who have routinely argued that ESG disclosures are **an attempt to inject politics** into securities regulation.

"Commissioner Lee has obviously taken a number of steps since becoming acting chair to lay a groundwork for the SEC to look more closely at ESG," Schulp said. "I expect Gensler to be asked a number of questions about how he sees that proceeding and what his next steps will be **in that area.**"

## Diversity

In the same vein as ESG disclosures, Gensler could field questions on the SEC's role in battling social and racial inequalities, which has also become a partisan sticking point in Washington.

Nasdaq released a proposal **in December** that would require companies to publicly disclose diversity information about their board of directors and push them to have at least "one [board member] who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ+."

In mid-February, 12 Republican members of the Senate Banking Committee **sent the SEC a letter** asking Lee to kill the proposal, arguing that diversity measures aren't material to investors and that Nasdaq has no place acting as "an arbitrator of social policy."

"It may well be that at least some of those senators will want to chat about this point," Tom Gorman, a Dorsey & Whitney LLP partner and former senior counsel for the SEC's enforcement division, told Law360.

## Cryptocurrency

Not unlike GameStop's jaw-dropping price action, the flurry of trading around Bitcoin and other cryptocurrencies has made headlines in recent months and renewed calls for regulation around the nascent space.

Gensler has written and taught on blockchain and cryptocurrencies as a professor at the MIT Sloan School of Management, and is expected to channel that expertise while leading an agency that has frequently **come under fire** for failing to provide the crypto community with **regulatory clarity**.

Gensler will mention his role at MIT in his opening remarks Tuesday, according to prereleased testimony in which he makes no direct mention of cryptocurrency, but notes that the SEC's rules need to evolve with emerging markets and technology.

Healthy Markets CEO Tyler Gellasch told Law360 that he expects Gensler could field some questions on his views about the creation of a **cryptocurrency based exchange-traded fund**, as well as the SEC's controversial **December enforcement action** against Ripple Labs Inc.

"Given the massive fluctuations and issues we've seen with cryptocurrencies, I would expect to see some questions there," Gellasch said. "Gary obviously has his own subject-matter expertise, so that might be something he's eager to jump into on his own."

## Enforcement

Gensler earned a reputation at the CFTC for taking an aggressive enforcement approach that **helped him revitalize** the once-sleepy derivatives regulator into a top financial industry watchdog.

If confirmed to lead the SEC, Gensler is **expected to overhaul** an SEC enforcement agenda that was criticized for being too light on Wall Street under **former SEC Chair Jay Clayton**.

Lawmakers will likely probe Gensler on his enforcement philosophies and priorities, experts told

Law360, with progressives angling to see if a Gensler-led SEC will take more actions against large Wall Street players, including the private equity industry, which committee Democrats have **railed against in the past**.

### **Experience in Government**

Gellasch told Law360 that the questions "that could hit [Gensler] the hardest" would be about his lengthy career as a public servant and the choices he made in those roles.

Democrats could have a critical take on Gensler's time as the assistant secretary of the U.S. Department of the Treasury under President Bill Clinton, where he pushed for the exemption of over-the-counter derivatives from regulation in 1999 and 2000.

Republicans, meanwhile, could take issue with his push in the other direction while at the CFTC from 2009 to early 2014, where he advocated banning proprietary trading by big Wall Street firms like Goldman Sachs and took a particularly tough stance in negotiations over a new regime for policing the over-the-counter derivatives market at the center of the 2007-08 financial crisis.

But while some of those moves may be worth interrogating to some lawmakers, Gensler's time in each position has been generally lauded. Under the Clinton administration, he helped write the Sarbanes-Oxley Act in the wake of the Enron and WorldCom scandals, and under the Obama administration, he implemented all new regulations for the \$400 trillion swaps market.

Gellasch says he doesn't anticipate that Gensler will encounter much partisan flak for the work he did in recent decades, and that given his reputation in Washington as a reasonable regulator who's willing to compromise, lawmakers' questioning will instead focus on the work he plans to do in the four years to come.

"You don't get nominated several times decades apart for important jobs by being bad at navigating DC and politics," Gellasch said. "He's extraordinarily adept at navigating difficult issues and challenging people. I think we'll likely see that on display [Tuesday]."

--Additional reporting by Al Barbarino, Elise Hansen and Jon Hill. Editing by Breda Lund.