

# NATIONAL REVIEW

## The SEC's "Daddy" Issues

The chairman has adopted an exceedingly paternalistic agenda at the SEC, taking the agency far beyond its ambit.

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There were few surprises in Gary Gensler's first appearance before the Senate Committee on Banking, Housing, and Urban Affairs as Securities and Exchange Commission chairman last week. Anyone who has been following the SEC's agenda over the past five months could have scripted his testimony, right down to the folksy metaphors. We heard, once again, that Gensler is a "Rom Com" guy, when he compared the dangers of artificial intelligence in trading apps to Netflix's recommendation algorithm. We also heard numerous references to his father, who was a hard-working small-business owner. But the biggest takeaway from Gensler's wide-ranging testimony was his commitment to the ambitious and aggressive agenda that he has set for the SEC.

In opening remarks, Senator Pat Toomey (R., Pa.) highlighted a number of areas in which Gensler's agenda pushes the agency beyond its authority, restricts investor freedom, and hampers innovation. But a frank line of questioning from Senator John Kennedy (R., La.) about corporate disclosures on environmental and social issues more succinctly captured the crux of the debate:

Senator Kennedy: As to the people and the companies that you regulate as chairman of the SEC, do you consider yourself to be their daddy?

SEC Chairman Gensler: No. No. (laughs)

Senator Kennedy: Then why do you act like it?

Despite Gensler's insistence that he is "operating" within the "narrow set of chalk lines" available to the SEC, his proposed reforms seek to transcend those boundaries. Indeed, throughout his testimony, Gensler pointed time and again to so-called investor protection as the justification for stepping in to limit investor options.

For example, Gensler spoke about potential reforms to protect retail investors, including regulating trading-app design, banning payment-for-order flow — which supports zero-commission trading — and decreasing off-exchange trading. He is skeptical of the digital technology that has brought the markets to a broader audience, suggesting that adding more regulation to an already highly regulated environment may be warranted. He also claimed that retail investors are being harmed by a lack of competition for their orders and seemed to suggest that a return to the days *before* competition would create conditions that benefit retail investors, including decreased trading commissions and narrowed spreads. Gensler would do well to remember his own metaphor — that markets are like a sweater in which everything is knitted together — when considering the consequences, both intended and unintended, of any regulatory changes.

Gensler's public-company-disclosure agenda, the subject of Senator Kennedy's question, shows the same paternalistic thinking that is animating his desire to solve public-policy problems far beyond the securities realm. Gensler advocated a myriad of new disclosure obligations on companies falling under the ESG — or environmental, social, and governance — rubric, saying that the SEC will require what "investors want." Putting aside the questions of whether the SEC has the authority to do so and whether advocates of more disclosure know what investors want, these disclosure obligations risk burdening companies and their shareholders with high regulatory costs for potentially little gain. (It also is worth noting that much of the ESG discussion centered on human-capital disclosures, rather than climate change, perhaps suggesting that the Democratic senators on the committee view enactment of climate-change disclosures by the SEC as a done deal.)

Finally, Gensler's views on crypto regulation fit the same mold. Again, relying on "investor protection," Gensler asserted broad authority for the SEC to regulate digital assets, claiming that almost all crypto assets are securities. In contrast to retail investing, where he seems to think that technology has so altered the field that new regulation is required, Gensler sees little need for new authority, regulation, or guidance in order for the SEC to shoehorn crypto assets into a securities-regulation framework that long predates the technology at hand. Indeed, he testified that Congress's legislative role could be limited to helping with coordination among the financial-regulation agencies and filling some gaps on technical issues. What the senators' questions and Gensler's testimony showed, however, is that determining whether a digital asset qualifies as a security is far from clear. This lack of clarity, coupled with the SEC's insistence on

bringing these assets within an ill-fitting securities-regulation framework, risks hampering innovation at the expense of so-called investor protection.

It's one thing for Gensler to pepper his testimony with references to his father — a man who, by all accounts, seems to be worthy of the chairman's admiration. It's another, though, for him to embrace an exceedingly paternalistic agenda at the SEC. The agency's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation is a complicated one. Its role need not be further complicated by shouldering the decisions best left to individual investors.

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