



Analysis: Ten Takeaways from SEC Chair Gensler’s July 19 Appearance before the Senate Appropriations Subcommittee on Financial Services and General Government

On July 19, 2023, the Senate Appropriations Committee’s Subcommittee on Financial Services and General Government (FSGG) held a [hearing](#) to review the Fiscal Year 2024 Budget for the U.S. Securities and Exchange Commission. The only witness to [testify](#) was SEC Chair Gary Gensler.

The themes that dominated the hearing were (1) the pace of SEC rulemaking; (2) cryptocurrency policy and cryptocurrency fraud; and (3) ESG. Other topics receiving significant attention included (4) the SEC OIG’s 2022 [report](#) on SEC management; (5) recently proposed [amendments](#) to the SEC’s custody rule; (6) SEC [telework policies](#); (7) the adequacy of the SEC’s responses to Congressional inquiries; (8) the SEC’s failure to proactively detect rampant fraud at FTX. Topics that were mentioned but did not feature prominently at the hearing included (9) China; (10) proxy advisors; (11) swing pricing. Dogs that might have barked but didn’t include: (12) investment adviser examinations; (13) FINRA; (14) Reg. BI; (15) [RIA arbitration abuses](#) ; (16) SEC market structure [proposals](#); (17) [MiFiDD II](#).

Here are ten notable takeaways from the hearing:

- 1. The SEC’s budget for FY 2024 is likely to be close to \$2.4 billion.** Wednesday’s hearing came one week after the full Committee [voted](#) 29-0 to approve an FSGG appropriations bill that provides \$2.403 billion for the SEC in FY 2024. As the Committee’s top Republican observed in his opening remarks, “this is no small feat,” and it stands in striking contrast to the 34-26 Committee vote to advance the House [version](#) of the FY 2024 FSGG bill. The unanimous and bipartisan vote in the Senate Appropriations Committee is significant and suggests that a compromise acceptable to all parties has been negotiated in the Senate. Whatever the House’s position today, in the end, the House is likely to concede to the Senate agreement.
- 2. The Subcommittee repeatedly questioned and challenged the pace of SEC rulemaking.** If there was a single theme of Wednesday’s hearing it was that the SEC is trying to do too much too fast. Senator after Senator after Senator voiced this concern. The Subcommittee’s top Republican, Vice Chair Bill Hagerty (R-TN) accused the SEC of pursuing an “eyewatering number” of rulemakings “many...well beyond the SEC’s statutory mandate.” The full Committee’s Vice-Chair, Sen. Susan Collins (R-ME), promptly sought to “associate myself with some of the comments made by the vice chair on whether stakeholders are being given adequate time to respond to new rulemaking.” Sen. Joe Manchin (D-WV), noting that “both sides of the aisle, as well as businesses of all sizes, have expressed concern that SEC has provided insufficient time for public comment,” asked Gensler to “commit to adhering closer to traditional public comment periods for future rulemaking.” Sen. John Boozman (R-Ark) accused the SEC of “rushing rules,” while Chris Coons (D-DE) reminded Gensler “I joined a dozen of my colleagues in sending a letter just encouraging you to just make sure you're providing sufficient time for notice and comment on the proposed rules [and] I don't believe we got an answer,” and emphasized that need “to regulate in a wise and transparent measured way.”
- 3. Chair Gensler wants Congress to view cryptocurrency through the prism of the securities laws.** With the HFSC expected to [imminently announce](#) Congress’s first significant markup of cryptocurrency legislation, FSGG Subcommittee Chair Chris Van Hollen (D-MD) opened the

Q&A portion of the hearing by asking Gensler to “to take a few minutes to talk about the fundamental issues at stake here, and the issues of jurisdiction regarding the SEC and the CFTC...and how we deal with these [crypto] entities that people are trying to figure out whether they're fish or foul.” As in the past, Gensler took the opportunity to center policy questions pertaining to crypto in terms of securities law and judicial precedents.

“The investing public, not just here in this country, but around the globe, has taken an interest in crypto assets, so-called crypto tokens, or currencies. Generally speaking, there's some group of entrepreneurs behind those projects. What we have in America is laws that are clear: if you're raising money from the public, and the public is anticipating profits based upon the efforts of others, that comes under the securities laws. This is something that was written in the 1930s...Supreme Court Justice Thurgood Marshall wrote an opinion about 40 years ago that Congress “painted with a broad brush to protect the investing public.” And so, at the core, that's the question. How many of these 15 to 20,000 tokens have attributes that their investment contracts under the law? Investment contracts are part of the securities laws.”

4. **As a political document, the SEC OIG's October 2022 Report is nasty gift that keeps on giving.** The SEC Inspector General's 2022 [report](#) on “*SEC Management and Performance Challenges*” continues to serve as remarkably effective club for those seeking to bash the agency. First to invoke the OIG report was Ranking Member Hagerty: “Well, here are just a few issues that were raised by SEC managerial employees that came directly from the Inspector General Report...I'll run through a few of them. And these are direct quotes...” Next up was Sen. John Boozeman (R-Ark), who invoked it to buttress attacks on the SEC's regulatory analyses: “The IG report found that staff had limited time for, quote, research and analysis, end quote, meaning, their economic analysis were rushed. So, you know, we need to sort that out.” Weaponization of an unfavorable OIG report is not unprecedented in Washington, but it's worth noting the IG's are primarily tasked with preventing waste, fraud abuse – not undercutting rulemakings.
5. **The cost of crypto fraud schemes likely exceed \$9 billion annually.** Senator Richard Durbin (D-IL), pointing to “one [estimate](#) that, in 2022 alone, fraud schemes involving cryptocurrency totaled more than \$9 billion,” asked Gensler he was “surprised” by the figure. Gensler responded: “No. It could be higher, sir.” Given that the FBI's [recent estimate](#) that “the potential total loss [due to crypto fraud] has grown from \$6.9 billion in 2021 to more than \$10.2 billion in 2022.”
6. **Gensler has 5-6 more rule proposals he wants to get out the door, and “that's our full docket.”** One of the most intriguing exchanges at Wednesday's hearing came during Gensler's questioning by Sen. Joe Manchin (D-WV), who like many other Senators, generally expressed concern over the pace of the SEC's rulemaking under Gensler. “Our docket is looking to do 50 to 55 [rules]. We finalized about 19. We have about 35 proposals outstanding right now.” Returning to theme later in the hearing, Gensler told Sen. Chris Coons (D-DE) “Sir, we have 34 or 35 proposals that are already out public, but not yet adopted. And we have maybe a handful, five, six that are still being considered to be proposed, but that's our whole docket.” Given that the exchange occurred in the context of a discussion about the number of rulemakings the SEC has historically pursued “over a four-year period,” the implication was that Gensler envisions only a handful of additional rule proposals prior to the election. This comes despite the SEC having listed 18 rulemakings as being the “proposed rule” stage in its latest [regulatory agenda](#).
7. **Gensler all but apologized to Manchin for the “Scope 3” requirements in the SEC's 2022 ESG proposal.** So-called “Scope 3” climate disclosure requirements have long been the red-

headed stepchild of the SEC’s landmark 2022 Climate Disclosure Rule Proposal. As we [observed](#) the last time Gensler testified before a Senate committee, in September 2022, Scope 3 is “by far – the biggest political liability of the SEC’s climate disclosure proposal.” On Wednesday, however, the extent to which the SEC – or at least its Chairman – appear poised to run away from Scope 3 was made more explicit than ever. Under questioning from Sen. Joe Manchin, Gensler allowed: *“When we made the [ESG] proposal, we thought that this so-called Scope 3 was at a different stage of development, different stage of disclosures, fewer companies making the disclosure. We took a tiered approach at that time, but I would say this, we have heard the feedback, and it's from the agriculture community, it's from the small, medium sized enterprises. I assure you, we've heard it loud and clear. We got 15, 16,000 comments on this one.”* Still seemingly not satisfied, Manchin retorted “We can get you a lot more if you need them. I'll give you all the ones we're getting, and we'll transfer them to you.” Gensler could only nod. *“All right.”*

8. **Gensler Pulled Sen. Van Hollen Under the Bus.** Ranking Member Haggerty used most of his time during the second round of Q&A to follow a line of questioning that featured prominently in the HFSC’s [recent hearings](#) on “Oversight of the SEC,” pressing Gensler “regarding any use by you or your direct reports or personnel there at the SEC, using their own personal either off channel or off platform methods to communicate or conduct SEC business, using personal phones.” Upon reaching the culmination of his argument, and his allotted time, the Ranking Republican pointedly asked Gensler: “Have you yourself been involved in using your personal device or off-platform devices for SEC business?” The SEC Chairman’s response? *“I think Senator Van Hollen still might call me on my cell phone. I've known him for 23 years.”* [Indeed.](#)
9. **Sen. Boozeman likes Gensler; hates proposed amendments to the SEC custody rule.** Sen. Boozeman (R-Ark) used his time during the Q&A portion of hearing to position himself as Congress’s most prominent critic of the SEC’s recently proposed amendments to the custody rule for RIAs. Despite projecting genuine respect for Gensler (“I want to compliment you. It's always been good to get on the phone or come to your office, even if we might have differences of policy”), Boozeman ripped into the [proposed](#) custody rule. (“It undermines CFTC customer protection rules, conflicts with global margin treatment, went up in the derivatives and Treasury markets and adds complexity to institutional investment advisors and qualified custodians. Even worse, both CFTC and Treasury staff said the SEC did not coordinate with other agencies, which is unacceptable. The impacts on the derivatives, commodities, and Treasury markets could cause systemic harm.) and urged Gensler “to withdraw the proposal or completely rework it.”
10. **Senate Appropriations Vice-Chair Susan Collins was quintessentially Susan Collins.** Wednesday’s hearing was gaveled-in with three Senators present. Two Senators had to be there: Van Hollen (Chair) and Hagerty (Ranking Republican). The third Senator was a more conspicuous presence. As Vice Chair of the *full* Senate Appropriations Committee – i.e., its top Republican member – Sen. Susan Collins (R-ME) is an *ex officio* member of all SAC subcommittees. Yet it is unusual to see such pro-forma authority actually invoked for the purpose of participating in a routine subcommittee hearing. Yet not only was Collins in attendance – she’d arrived early. She had a question to ask; a point to make. What was it?

After establishing herself as reasonable (“I understand that there are some jobs that can be done effectively, fully remote,” and “I’m quick to concede that there are some jobs that can be done remotely”), Collins got to the point: *“Why did the SEC agree to a policy that's going to result in*

employees actually coming to work only four days a month? This does not strike me as a good deal for the taxpayers or for the consumers that you're charged with protecting.”

After allowing Gensler to respond, Collins continued to flip the script. *“When you're serving the public, when you're helping to protect consumers, when you're dealing with large financial firms, you need people to be at work. I'm just concerned, as we have seen at the IRS and the Social Security Administration, that what happens is consumers get the short stick...so I want to express directly to you my deep concern and disappointment about that agreement.”*

By positioning herself as the advocate of consumers and questioning the impact of the new policy on the agency’s ability to serve consumers and protect investors, Collins was asking exactly the kind of questions U.S. Senators are supposed to ask. And by choosing to use her time to focus on an issue that resonates many small businesses, [municipalities](#), [financial advisers](#), blue collar workers, and presumably voters in Maine – where the average annual income is about \$83K, as compared the average \$215K paid to SEC employees - she was also practicing smart and disciplined politics, while deftly sidestepping the political hedgehog of ESG.

Reasonable individuals may disagree about what is “reasonable” in the context of telework policies, but it’s hard to dispute that Collins is an effective Senator and shrewd politician.

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