Assessing Gary Gensler's Legacy At The SEC

By **Daniel Hawke, Jane Norberg and Christian Schultz** (January 28, 2025)

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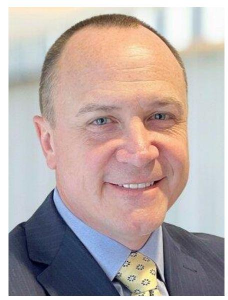

Christian Schultz

Shortly before Inauguration Day, Gary Gensler delivered a speech in which he reflected on his tenure as chair of the U.S. Securities and Exchange Commission, and characterized it as one that promoted "common-sense rules of the road" in the securities markets.[1]

Analogizing federal securities regulations to rules that govern driving and football, and likening the SEC to traffic cops or refs calling penalties, Gensler made the case that robust regulation of the capital markets is essential to inspiring investor confidence and maintaining markets that are efficient, resilient and have integrity.

Without a sensible regulatory framework, he asserted, there would be chaos, inequity and mistrust, which would inhibit capital formation and deter investors from efficiently and effectively deploying their capital. And because markets and technology constantly change, rules must be updated, and new rules must be proposed to ensure that the rules of the road remain clear and effective for all market participants.

Gensler articulated this perspective as a defense to criticism that the commission under his leadership has overregulated on certain issues and underregulated — or overenforced — on others.

For example, detractors argue that Gensler's tenure was marked by social activism and regulatory overreach on mandating corporate environmental, social and governance issues to advance a climate and diversity, equity, and inclusion agenda — rules that were eventually stayed pending legal challenges.

Similarly, they would assert that the commission's use of its enforcement power to address off-channel communications with eye-popping penalties was enforcement overkill that might better and more efficiently have been addressed through less punitive means.

And they would contend that at a time when reputable market participants were calling for reasonable regulation of the still-nascent cryptocurrency and digital asset markets, the commission declined to promulgate any new rules but instead used its enforcement power to drive the fledgling industry into compliance with existing securities laws that are not an exact fit for the conduct at issue. Coupled with the commission's aggressive enforcement posture, they would argue, the dearth of reasonable rulemaking deterred market participants from entering the market and deprived the markets of a resilient regulatory framework in which to develop and operate.

Against the backdrop of these overarching debates and critiques, the following sections delve more deeply into how, under Gensler's leadership, the SEC pursued an aggressive regulatory agenda and tackled a range of regulatory priorities — some of which were lauded for their transparency and investor protection elements, while others were severely criticized as heavy-handed, overbearing or incomplete.

By examining the rulemaking and enforcement efforts that defined Gensler's tenure, we can better assess whether he is correct that his commission promoted "common-sense rules of the road" or, as others would assert, if it was dominated by progressive regulatory priorities.

Key Shifts Under Gensler's Leadership

The SEC under Gensler was noteworthy for its speedy and aggressive rulemaking, and an equally hard-line enforcement agenda.

According to a report by the Committee on Capital Markets Regulation, from the beginning of his tenure on April 21, 2021, to Oct. 15, 2024, Gensler oversaw the issuance of 49 proposed and final substantive rules, most of which were not statutorily mandated — meaning, required by Congress — outpacing those issued during Chair Jay Clayton's and Chair Mary Jo White's tenures.[2]

During that same period, the SEC filed 2,700 enforcement actions,[3] many of which involved novel or unprecedented theories of liability in areas such as crypto and digital assets, ESG, cybersecurity, and artificial intelligence.

Major Regulatory Accomplishments

Despite ongoing controversy, the SEC under Gensler took steps widely recognized as significant for market integrity and investor protection, and the SEC noted some of these as Gensler's major accomplishments in his departure announcement.

Treasury Markets

In December 2023, the commission adopted measures to reduce risk and cost in the U.S. Treasury markets, promoting central clearing of Treasury securities. And it narrowed the exemption allowing certain broker-dealers to avoid registering with a national securities association.

Market Structure

The SEC revised Regulation NMS in March 2024 to allow stocks to be traded with narrower spreads and lower trading fees, passed a rule shortening the settlement cycle to one day in February 2023, and introduced rules in March 2024 to enhance broker execution quality reporting.

Form PF

In May 2023, the commission amended Form PF to require that large hedge fund and private equity advisers file current reports of certain events. Jointly with the U.S. Commodity Futures Trading Commission, the SEC in February 2023 improved the quality of data collected from private funds, reflecting Gensler's commitment to closer oversight of sophisticated market participants.

Money Market Funds

The commission in July 2023 reformed rules governing money market funds, increasing minimum liquidity requirements, eliminating money market funds' ability to temporarily suspend redemptions, requiring certain money market funds to implement a liquidity fee framework, and updating certain reporting requirements.

Corporate Governance

The commission adopted corporate governance-related rules aimed at promoting trust in the capital markets, including more stringent rules in 2022 governing Rule 10b5-1 trading plans. These rules address when corporate insiders can sell their shares, when executives must return compensation based on misstated financial statements, and the disclosure of the relationship between executive compensation and performance.

In 2021, the commission also extended proxy voting rights by allowing shareholders to choose among board candidates in contested elections, along with mandating swifter disclosure by those seeking to influence corporate control.

Transparency and Disclosure

The commission adopted rules promoting enhanced transparency and disclosure. Companies must now disclose material cybersecurity incidents and ESG risks, including climate-related risks and data breaches that endanger client personal information. These requirements apply not only to public companies, but also to those contemplating public offerings via special-purpose acquisition companies.

The commission also adopted rules in May 2024 requiring certain broker-dealers and investment advisers to disclose data breaches that put their clients' personal information at risk.

Auditing

The commission and the Public Company Accounting Oversight Board in 2022 successfully negotiated with Chinese authorities to allow the PCAOB to inspect and investigate audit firms in China and Hong Kong that audit China-related companies listed in the U.S.

With the commission's oversight and approval, the PCAOB updated 18 interim accounting and auditing oversight standards.[4]

Exams and Enforcement

Gensler underscored the role of the SEC's Divisions of Enforcement and Examinations as "steadfast cops on the beat" under his leadership. He put an exclamation point on his impact on enforcement as reflected by the SEC's self-acclaimed record of 118 enforcement actions in the first quarter of 2025, which ran from October through December 2024.[5]

On Gensler's watch, the commission filed more than 2,700 enforcement actions that resulted in penalties and disgorgement of roughly $21 billion, with distributions of more than $2.7 billion to harmed investors. The Division of Examinations separately recovered more than $250 million for harmed investors.[6]

Whistleblower Protections

The SEC awarded approximately $1.5 billion to whistleblowers after receiving more than 145,000 tips, complaints, and referrals[7] — of which 21,000 came from just two people in the past two fiscal years alone.[8]

Compared to the SEC under Clayton, which filed just three enforcement actions based on actions taken to impede reporting during his tenure, Gensler's SEC conducted enforcement sweeps in this area and filed 20 actions for impeding whistleblowers from reporting information to the SEC, many times through confidentiality provisions.[9]

Digital Assets

The SEC under Gensler was unapologetic about its concern over digital assets as suitable investments for retail investors.

According to the chair in a Nov. 14 speech, "This is a field in which over the years there has been significant investor harm. Further, aside from speculative investing and possible use for illicit activities, the vast majority of crypto assets have yet to prove out sustainable use cases."

Critiques and Challenges

Gensler's critics would argue that his legacy is not one of commonsense regulation, but of one of social activism, regulatory overreach and judicial setback.

On his watch, the commission proposed and adopted a wide range of new rules, many with overt social objectives and implications, including mandating ESG disclosures, strengthening board diversity requirements, increasing transparency around executive compensation and enhancing shareholder proxy voting rights. The commission also sought to engage in stricter oversight of emerging industries and markets such as AI, digital assets and SPACs.

Critics of Gensler's tenure say that the commission has no legal authority to require disclosures about how an issuer is performing on certain climate or social benchmarks, even if some investors would find that information useful or important to their investment decisions.[10] It could be said more broadly that Gensler led a commission that, through its climate disclosure rulemaking, indirectly regulated industries that it has no authority to regulate directly and, through its inaction in the crypto space, failed to regulate industries over which it has asserted jurisdiction.

For example, despite aggressively pursuing enforcement actions against crypto intermediaries, Gensler's commission did not propose any comprehensive regulatory framework or rules for the crypto industry, preferring instead to use its enforcement power to highlight abuses in the industry. Not only has this fed into perceptions of "regulation by enforcement," but it also sets the U.S. apart from other jurisdictions such as Europe, which has introduced crypto regulation.

More broadly, the commission's enforcement program continued to pursue a cover-the-waterfront agenda characterized by enforcement sweeps, task forces and enormous penalties. For example, Gensler's commission extracted billions of dollars in penalties for recordkeeping violations by broker-dealers and investment advisers who failed to preserve off-channel communications.

Despite being promoted as a hallmark of Gensler's legacy, rulemaking during Gensler's tenure has been mired in litigation.

In June 2024, the U.S. Court of Appeals for the Fifth Circuit vacated the commission's rules enhancing the regulation of private fund advisers on the basis that the commission lacked the requisite statutory authority to adopt such rules.

Plaintiffs have launched similar challenges against the climate-related disclosure rules[11] which were consolidated in the U.S. Court of Appeal for the Eighth Circuit in March 2024 and are currently pending in Iowa v. SEC.

American Securities Association v. SEC, a lawsuit challenging the rule requiring a consolidated audit trail to monitor and analyze trading activity,[12] is also undergoing review in the U.S. Court of Appeal for the Eleventh Circuit. It is unlikely the commission under President Donald Trump will continue to defend the climate-related disclosure rules, and it is an open question whether it will do so for the CAT rule.

Lasting Impact on the Agency

Gensler left behind a different commission from the one he inherited from Clayton at the end of the first Trump administration, and one whose aggressive agenda has been somewhat stymied by legal and staffing hurdles. According to a 2022 report by the SEC's Office of the Inspector General, overall attrition at the commission reached a 10-year high in 2022 that was nearly double the attrition rate in the last year of Clayton's tenure, with more than 20% attrition among senior officers and 8% among attorneys.[13]

In fiscal year 2024, the commission brought only 583 enforcement actions, a 26% decline compared to fiscal year 2023.[14] Gensler looked to redefine this perception when the SEC announced 118 enforcement actions in the first quarter of 2025,[15] with a flurry of activity in the days leading up to his departure.

Whatever side of the debate one takes, there is a case to be made that Gensler's tenure is best defined by a track record of commonsense regulation in some areas, social activism in other areas and increasing judicial skepticism about the commission's authority to regulate or fulfill its enforcement, administrative law, and adjudicatory functions.

There is no doubt that investor protection advocates found a staunch ally in a nonlawyer, professorial chair, steeped in Washington fiscal and regulatory policy, who was eager to make his mark as an aggressive enforcer of the securities laws and as a regulator seeking to advance progressive policy objectives.

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[1] https://www.sec.gov/newsroom/speeches-statements/gensler-sec-011425.

[2] Comm. on Cap. Mkts. Regul., Rapid Pace of SEC Rulemakings Continues & Litigation Ramps up to Historic Highs 1 (2024), https://capmktsreg.org/wp-content/uploads/2024/10/CCMR-Pace-of-SEC-Rulemaking-Unprecedented-Litigation-10-30-24-FINAL.pdf.

[3] Press Release, SEC, SEC Gensler to Depart Agency on January 20 (Nov. 21, 2024), https://www.sec.gov/newsroom/press-releases/2024-182.

[4] Id.

[5] Press Release, SEC, SEC Announces Record Enforcement Actions Brought in First Quarter of Fiscal Year 2025 (Jan. 17, 2025), https://www.sec.gov/newsroom/press-releases/2025-26.

[6] Press Release, SEC, SEC Gensler to Depart Agency on January 20 (Nov. 21, 2024), https://www.sec.gov/newsroom/press-releases/2024-182.

[7] Id.

[8] See SEC Office of the Whistleblower, Annual Report to Congress for Fiscal Year 2024 11, 11 n.32 (2024), https://www.sec.gov/files/fy24-annual-whistleblower-report.pdf.

[9] See Whistleblower Protections, SEC, https://www.sec.gov/enforcement-litigation/whistleblower-program/whistleblower-protections (last updated Jan. 17, 2025).

[10] See, e.g., Letter from Kevin Cramer, et al., U.S. Sens., to Gary Gensler, Chair, SEC (April 5, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131192-301362.pdf.

[11] Petitioners' Joint Opening Brief, Chamber of Com. of the U.S. v. SEC, No. 24-1628 (8th Cir. June 14, 2024).

[12] Opening Brief of Petitioners, Am. Sec. Ass'n v. SEC, No 23-13396 (11th Cir. Feb. 8, 2024).

[13] See Office of Inspector General, The Inspector General's Statement on the SEC's Management and Performance Challenges 22 (2022), https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf.

[14] Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2024 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

[15] Press Release, SEC, SEC Announces Record Enforcement Actions Brought in First Quarter of Fiscal Year 2025 (Jan. 17, 2025), https://www.sec.gov/newsroom/press-releases/2025-26.