

Gensler's Legacy: An Energetic Agenda Cut Short by Courts

The Securities and Exchange Commission chair will be known most for his expansive rulemaking agenda in policy areas such as ESG, market structure and technologies like artificial intelligence and cryptocurrency.

By **David Isenberg** | December 18, 2024

Securities and Exchange Commission Chair **Gary Gensler** will be known most for the ambition of his regulatory agenda, as well as the roadblocks he faced, his critics and supporters both say.

The SEC chair's tenure "has been one of the most productive" in history, a spokesperson for the SEC said on behalf of Gensler.

Rule changes under Gensler include the move to next-day settlement, money market fund reforms, updates to Treasury market rules, amendments to the Names Rule and cybersecurity disclosures for corporate issuers, the spokesperson noted.



Securities and Exchange Commission Chair Gary Gensler

Gensler's time at the SEC aligned with his track record when he was chair of the **Commodity Futures Trading Commission**, said **David Portilla**, a partner at **Davis Polk** and a former senior policy advisor to the **Financial Stability Oversight Council**.

"He pushes a lot through the agency, and he gets a lot of things done," Portilla said.

"He was big on rulemaking," said Rep. **Maxine Waters**, (D-Calif.) and the ranking member of the House Financial Services Committee.

"I'm a fan of Gensler's," she said. "I think that he was very smart, very competent, and he really did do the kind of job that is required of the SEC, even though he didn't have all the resources he needed to do everything that he wanted to do."

Several ambitious rulemaking items were never finalized, or were tossed out by the courts, noted **Paul Cellupica**, general counsel for the **Investment**

Company Institute and a former deputy director of the SEC's Division of Investment Management.

Proposals such as requiring swing pricing for open-end funds, amendments to the custody rule and new predictive data analytics requirements for brokers and advisors, were never finalized, Cellupica noted.

Other rules faced legal challenges and lost in the courts, because they were "overly burdensome, not thought through, and ultimately not in the interests of markets and investors," he said.

Those losses included the private-fund advisors rule, amendments to the definition of "dealer" and the share repurchase rule.

"The SEC's history in the courts is excellent, except in those circumstances when it overreaches in the eyes of the industry or the public," said **Amy Greer**, a partner at **K&L Gates** and a former chief litigation counsel at the SEC's Philadelphia office. "The courts tend to make the agency pay for that."

When regulators have long agenda lists, "you get some things done and not other things," Portilla said.

"Also, the agency had to contend with legal challenges, and that is just an effect of the rulemaking process at this point," he said.

Legal challenges were accompanied by "strong and vigorous pushback from industry," as well as some pushback from lawmakers from both parties, Cellupica noted.

The SEC finalized close to 45 of its 55 projects on Gensler's long-term agenda, and 35 have been or are on their way toward implementation, the chair noted this month at an **American Bar Association** event.

"Nobody bats 1.000," he said.

Smart, Agenda-Driven

Both opponents and supporters of Gensler's agenda noted his intelligence.

"Gary Gensler has been one of the most sophisticated, energetic, expert chairs of the agency," said **William Birdthistle**, former director of the Division of Investment Management under Gensler and now a professor at the **University of Chicago Law School**.

"He definitely is a smart person," Cellupica said.

Gensler both worked hard and had a spirit of public service, a combination that is difficult to find, Birdthistle said.

But to critics, Gensler's spirit of public service was more of a closed-minded agenda.

Gensler's spirit affected morale at the SEC, because staffers felt they didn't have a voice in policy decisions, Cellupica said.

"He just has not been interested in ideas from industry on how to promote innovation and encourage capital formation," Cellupica said. "I think he was fairly explicit about this."

In many of Gensler's rules, there was no recognition that the SEC cost issuers a lot of money on compliance, Greer said.

This attitude was clear in the several reforms to the proxy resolution process, she said.

Gensler's regulatory agenda lacked the incrementalism, study and industry buy-in that typically is the hallmark of agency rulemaking, Greer said.

Related Content

December 9, 2024

Trump's SEC Nominee May Take Defensive Approach to Rules

December 13, 2024

Top ICI PAC Recipient to Chair House Financial Services Committee

December 6, 2024

The SEC 'Could Use a Few More Economists': Gensler

Gensler's agenda items on issues such as private funds were prophylactic to prevent widespread fraud or a systemic meltdown, said **James Cox**, a professor at the **Duke University School of Law**.

Other regulations, such as the cybersecurity rule for corporate issuers, were overly intrusive, Greer said.

And some rule proposals, such as the SEC's proposed best execution standard, seemed to lack a purpose or weren't thought through, she said, so the agency never finalized it.

"You just had a sense that he had a list, and he wanted to get through that list, and he was going to do that no matter what," Greer said.

ESG

Both supporters and opponents of Gensler's agenda named his March climate risk disclosure rule for public companies as one of the defining features of his legacy. The final rule has been challenged in court, briefs have been exchanged and the litigation remains uncertain in the new administration, as oral arguments haven't yet been set.

Gensler expanded the agency's remit to shine a light on "long-neglected areas," such as climate change, said **Bart Naylor**, financial policy advocate at **Public Citizen**.

The final rule scaled back from the proposal the scope of the climate-related disclosures required, including cutting altogether value-chain greenhouse gas emissions disclosures, known as Scope 3 emissions.

Once Republicans began to more aggressively attack environmental, social and governance investing, Gensler should have stuck to his guns and included the Scope 3 emissions in the final rule, Waters said.

Gensler "could have done a little better on climate," she said.

But Greer said he should have been more incremental on climate.

Many global companies will be subject to international climate disclosures, and the United States shouldn't be a "secondary regulator," but Scope 3 shouldn't have been proposed, she said.

If the climate disclosure rule doesn't survive the court challenge, or is formally rescinded by the next SEC chair, "that's obviously a very big blow to Gensler's legacy," said **Jill Fisch**, a professor at the **University of Pennsylvania Carey Law School**.

The agency also left untouched on its regulatory agenda any proposal to require demographic disclosures for corporations, registrants or boards.

The U.S. Supreme Court "pulled the rug out from under" Gensler and Congress to act on diversity and inclusion with its June 2023 court cases overturning affirmative action by government entities, Waters said.

Enforcement, Crypto

Gensler's legacy will also be defined by its "eye-catching" and "glamorous" enforcement numbers, Cox said.

The Enforcement Division under Gensler initiated a Wall Street-wide sweep into off-channel communications, fined companies for cybersecurity breaches and enforced against false statements related to artificial intelligence, ESG and special purpose acquisition companies.

"[T]he agency's enforcement actions have held wrongdoers accountable and returned billions to harmed investors," an SEC spokesperson said.

But some of Gensler's dissenting commissioners challenged these enforcement priorities, Greer noted.

Commissioners **Hester Peirce**, **Elad Roisman** and **Mark Uyeda** often questioned whether the conduct being enforced against was even unlawful at all, Greer said.

"Is the standard reasonable conduct or perfect conduct? And that's a question that's asked over and over again," Greer said.

Gensler's enforcement agenda also included taming the "wild west" of crypto, Naylor said.

"He insisted that crypto is a security and he started to evaluate crypto companies based on their actions," Waters said.

Paul Atkins, President-elect **Donald Trump**'s selection to replace Gensler as chair, is a co-founder of the Token Alliance, a subsidiary of the **Chamber of Digital Commerce**, a lobbying firm for the cryptocurrency industry.

A lot of Gensler's legacy depends on how much Atkins undoes, Fisch said.

Ignites is a copyrighted publication. Ignites has agreed to make available its content for the sole use of the employees of the subscriber company. Accordingly, it is a violation of the copyright law for anyone to duplicate the content of Ignites for the use of any person, other than the employees of the subscriber company.