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Skadden Discusses How Trump's Focus on Deregulation Could Shape SEC Priorities in 2017

By *Brian V. Breheny, Colleen P. Mahoney and Lily S. Huang* March 2, 2017

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In his statement announcing the appointment of Jay Clayton to run the Securities and Exchange Commission (SEC), President Donald Trump said that “we need to undo many regulations which have stifled investment in American businesses, and restore oversight of the financial industry in a way that does not harm American workers.” Taken together, President Trump’s emphasis on deregulation, his statement in connection with Clayton’s appointment and Clayton’s professional experiences indicate a clear intention to shift the SEC’s agenda in terms of both regulation and enforcement priorities.

Leadership changes throughout the SEC will position the agency to implement these changes this year. In addition to selecting Clayton to replace Mary Jo White, who stepped down as SEC chair on January 20, 2017, President Trump is expected to nominate two additional commissioners whose seats were left vacant in 2016. Assuming confirmation, Clayton also will have a number of division directors and other key SEC leadership positions to fill.

Regulation Reform

The Dodd-Frank Act most likely will not survive 2017 intact. Many of the act’s provisions have been the subject of debate and calls for repeal since their inception. In the fall of 2016, the House Financial Services Committee approved the Financial CHOICE Act, which provides a potential road map for the future of Dodd-Frank, specifically, and financial regulation, in general. (See “[The Trump Impact: Key Issues in Financial Services Reform for 2017.](#)”) The Financial CHOICE Act proposes significant changes to Dodd-Frank, including repeal of the Volcker Rule, the Department of Labor’s fiduciary duty rule and the CEO pay ratio rule. (See “[Trump’s Proposed Changes to Tax, Dodd-Frank, DOL Could Impact Executive Compensation.](#)”)

If Congress does not repeal certain provisions of the Dodd-Frank Act outright, it may look to the SEC to revise those provisions, giving Clayton a say in how those rules are finalized. Clayton will inherit a number of other rulemaking matters that have been on the SEC’s agenda, including efforts resulting from congressional mandates to ease capital formation rules in the Jumpstart Our Business Startups Act (JOBS Act) and Fixing America’s Surface Transportation Act (FAST Act).

Among the matters that could be high on Clayton’s agenda is the drive to modernize and simplify SEC disclosure requirements. The SEC and its staff have long pursued the idea of a comprehensive re-evaluation of the mandated disclosure requirements for U.S. public companies. If the SEC decides to move forward with this undertaking, companies can expect to see significant changes to information they are required to disclose regarding their businesses and financial results. A number of redundant, overlapping and outdated SEC rules also likely would be eliminated. Such disclosure changes would not be universally welcomed; critics see these initiatives as anti-disclosure and seeking to curtail information available to investors. However, Clayton likely would see these initiatives as in line with the new administration’s general push toward less regulation.

Two rulemaking matters on which former Chair White focused in 2016 — universal proxy cards and board diversity disclosures — are less likely to remain on the SEC’s agenda this year. In October 2016, the SEC proposed amendments to its proxy rules that would require the use of universal proxy cards in contested board of director elections. If adopted, the proposed changes would allow shareholders to choose from among all board candidates regardless of who nominated them, rather than voting for a particular slate of candidates as is the current practice. These proposals received a fairly negative reaction from a number of key market participants, including the U.S. Chamber of Commerce. Considering that Republican Michael S. Piwowar, who was named acting chairman of the SEC on January 23, 2017, voted against the proposal, it is unlikely that the SEC will move to finalize these rules. Likewise, former Chair White’s drive to amend the SEC’s rules to increase the required disclosures regarding the diversity of board members and nominees likely will end with her departure.

Enforcement Priorities

During the Obama administration, a key focus of the SEC's enforcement efforts was high-profile matters against major financial institutions stemming from the 2008 financial crisis. In part, there was a perception that these aggressive cases were in response to the public outcry that the SEC's enforcement laxity contributed to the financial crisis. These cases were often pursued using the SEC's administrative proceeding process. Many market participants questioned the fairness and impartiality of the SEC's use of that process in pursuing these cases and whether the basis for the focus on financial institutions was the underlying facts or a desire to punish them.

Under new leadership, the SEC may return its enforcement attention to traditional securities violations such as insider trading, and accounting and financial fraud. It also may focus its enforcement efforts on individual violators as opposed to high-profile companies. The use of the SEC's administrative proceeding process, which has attracted strong criticism, will likely change. Finally, the SEC staff's process for considering and granting waivers to the automatic disqualification provisions of a number of the SEC rules that are triggered by certain enforcement matters, such as the WKSII status and the Regulation D "bad actor" provisions, may revert to the traditional approach followed prior to the recent highly public and unprecedented commission debate on these matters.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's client update, "Trump's Focus on Deregulation Could Shape SEC Priorities in 2017," dated January 30, 2017, and available [here](#).

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