

XII. Expected Changes in SEC Regulatory Policy under President Trump's Administration

The Securities and Exchange Commission (SEC) has a mandate to “protect investors, facilitate capital formation, and insure the fairness and integrity of the marketplace.”¹²⁰² The selection of Jay Clayton to replace Mary Jo White represents a significant change in philosophy, from emphasizing enforcement to increasing corporate access to capital.¹²⁰³ To facilitate this goal, the new administration is pursuing a program of deregulation, including attempts at weakening and repealing portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).¹²⁰⁴

This article will examine the impact of the new administration on the SEC, and the likely policy changes to follow. Section A briefly describes the SEC immediately prior to the start of President Trump's term. Section B then covers how the SEC will likely change under the new administration, and includes a brief introduction to Jay Clayton, the new SEC Chairman. Section C considers the relevance of the expected changes, and highlights the impact they may have on Silicon Valley start-ups and private equity.

A. The SEC Under Mary Jo White

Before being appointed to lead the SEC, Mary Jo White was an attorney at Debevoise & Plimpton LLP and a federal prosecutor in the Southern District of New York.¹²⁰⁵ President Barack Obama named White Chairwoman in 2013 in an effort to continue

¹²⁰² Nicholas Lemann, *Street Cop*, NEW YORKER (Nov. 11, 2013), <http://www.newyorker.com/magazine/2013/11/11/street-cop> [<https://pema.cc/7V5P-YSQX>].

¹²⁰³ Carmen Germaine, *Trump's Wall Street Ally Pick Signals Enforcement-Light SEC*, LAW360 (Jan. 4, 2017, 10:36 PM), <https://www-law360-com.ezproxy.bu.edu/articles/877381/trump-s-wall-street-ally-pick-signals-enforcement-light-sec> [<https://perma.cc/D3G8-EEQV>].

¹²⁰⁴ See Ben Protess & Alexandra Stevenson, *Mary Jo White to Step Down as S.E.C. Chief*, N.Y. TIMES: DEALBOOK (Nov. 14, 2016), https://www.ny-times.com/2016/11/15/business/dealbook/mary-jo-white-securities-and-exchange-commission.html?_r=0 [<https://perma.cc/Z7CD-3JLD>] (“[A]lthough Dodd-Frank will more likely be watered down than repealed, his appointments will no doubt shift the tone and priorities across financial regulatory agencies.”).

¹²⁰⁵ Lemann, *supra* note 1.

holding big banks, and the executives leading them, responsible for their roles in precipitating the financial crisis.¹²⁰⁶ As President Obama warned, “[y]ou don’t want to mess with Mary Jo.”¹²⁰⁷ In 2016 alone, the SEC brought a record 868 enforcement actions and penalized violators with more than \$4 billion in fines.¹²⁰⁸ The SEC’s emphasis on enforcement partially derived from its new authority to find executives criminally liable, in addition to its preexisting authority to fine executives without requiring them to admit any wrongdoing.¹²⁰⁹

Aside from prosecutorial actions, White dedicated a significant portion of her tenure at the SEC to implementing new policies under Dodd-Frank and the Jumpstart Our Business Startups (JOBS) Act.¹²¹⁰ Under White, the SEC promulgated more than two dozen rules as part of Dodd-Frank, covering a wide range of activities from the regulation of credit ratings agencies, to greater disclosures and transparency in securities swaps.¹²¹¹ The SEC also completed all rules under the JOBS Act, which allows greater access to capital for start-ups.¹²¹²

B. Future of the SEC

1. The Trump Administration

President Trump’s stated policy is to deregulate, and he has vowed to slash 75 percent of the preexisting regulations in the Federal Register, echoing a campaign promise to eliminate 70–80 percent of regulations.¹²¹³ President Trump believes the current regulatory

¹²⁰⁶ See Renae Merle, *Despite Travails, White Calls SEC ‘Aggressive and Successful’*, WASH. POST (May 27, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/05/27/despite-travails-white-calls-sec-aggressive-and-successful/?utm_term=.82376c35c83f [https://perma.cc/46UX-6Y3X].

¹²⁰⁷ *Id.*

¹²⁰⁸ U.S. SEC. & EXCH. COMM’N, AGENCY FIN. REP. FISCAL YEAR 2016 ii (2016).

¹²⁰⁹ See Lemann, *supra* note 1.

¹²¹⁰ Reuters, *Departing SEC Chair Mary Jo White Blasts Congress on Her Way Out the Door*, FORTUNE (Jan. 18, 2017), <http://fortune.com/2017/01/18/departing-sec-chair-mary-jo-white-blasts-congress-on-her-way-out-the-door/> [https://perma.cc/3CPL-T9AG].

¹²¹¹ U.S. SEC. & EXCH. COMM’N, *supra* note 7, at i.

¹²¹² *Id.*

¹²¹³ See Tim Devaney, *Trump Wants to Cut Regs by 75 Percent*, THE HILL (Jan. 23, 2017), <http://thehill.com/regulation/administration/315688-trump-cut-75-percent-of-regs> [https://perma.cc/2C34-P5US].

structure imposed on the financial industry harms American businesses and has slowed economic development.¹²¹⁴ To start his term, he signed a range of executive orders requiring regulators to identify two regulations that could be cut for each new regulation promulgated, ordering the Treasury Department to evaluate potential cuts to Dodd-Frank, and delaying the implementation of the Department of Labor's fiduciary rule.¹²¹⁵ In line with his deregulatory objectives, President Trump nominated Jay Clayton to lead the SEC.¹²¹⁶

2. Jay Clayton

Clayton attended the University of Pennsylvania and the University of Cambridge, earning bachelor degrees in engineering and finance, respectively, before receiving his J.D. from the University of Pennsylvania.¹²¹⁷ Following law school, Clayton held a clerkship and then joined the firm of Sullivan & Cromwell¹²¹⁸ where his practice focused on “public and private mergers and acquisitions transactions, capital markets offerings [and] regulatory and enforcement proceedings.”¹²¹⁹ Among the most notable matters Clayton handled were deals arising out of the financial crisis.¹²²⁰ Clayton advised

¹²¹⁴ See Brian Miller, *How Will the SEC Change Under Trump's Picks to Lead It?*, THE HILL: PUNDITS BLOG (Jan. 9, 2017, 1:20 PM), <http://thehill.com/blogs/pundits-blog/finance/313325-how-will-the-sec-change-under-trumps-picks-to-lead-it> [<https://perma.cc/Y8X9-FKEA>].

¹²¹⁵ Thomas K. Potter III, *Hype Surrounds Trump's Financial Regulation Orders*, LAW360 (Feb. 9, 2017, 12:52 PM), <https://www-law360-com.ezproxy.bu.edu/articles/888922/hype-surrounds-trump-s-financial-regulation-orders> [<https://perma.cc/Y7A3-UFT7>].

¹²¹⁶ Miller, *supra* note 13.

¹²¹⁷ Kara Scannell, *Wall St Lawyer with Skills Honed by Financial Crisis Heads to SEC*, FIN. TIMES (Feb. 6, 2017), <https://www.ft.com/content/11629b8c-eb13-11e6-930f-061b01e23655> [<https://perma.cc/JA35-X959>].

¹²¹⁸ Kevin Lavin, *The Incoming SEC Chairman as I Know Him*, LAW360 (Jan. 10, 2017, 2:32 PM), <https://www-law360-com.ezproxy.bu.edu/articles/878568/the-incoming-sec-chairman-as-i-know-him> [<https://perma.cc/X4H9-U9XN>].

¹²¹⁹ Lissette Rodriguez, *Everything You Need to Know About Donald Trump's SEC Chair Pick, Jay Clayton*, ABC NEWS (Jan. 4, 2017), <http://abcnews.go.com/Politics/donald-trumps-sec-chair-pick-jay-clayton/story?id=44557482> [<https://perma.cc/WVA5-QDUP>].

¹²²⁰ See Leslie Picker, *Donald Trump Nominates Wall Street Lawyer to Head S.E.C.*, N.Y. TIMES: DEALBOOK (Jan. 4, 2017), <https://www.nytimes.com>.

Barclays during its acquisition of Lehman Brothers' assets, and represented Bear Stearns when JPMorgan Chase acquired them.¹²²¹ He also advised Goldman Sachs during Berkshire Hathaway's \$5 billion investment.¹²²² Clayton's relationship with Goldman Sachs goes further the Berkshire Hathaway deal, however.¹²²³ On at least six occasions between 2007 and 2014, Clayton either advised Goldman Sachs directly or as the underwriter on deals where he represented corporate clients in their initial public offerings (IPOs).¹²²⁴ Additionally, Clayton's wife Gretchen has worked at Goldman as a private wealth advisor since 2000.¹²²⁵

Beyond his relationship with Goldman, some of Clayton's most noteworthy work has been for high profile clients that have subsequently faced SEC scrutiny.¹²²⁶ Clayton represented Alibaba, now under SEC investigation for the company's potentially misleading accounting practices, in its record-setting \$25 billion IPO.¹²²⁷ He also represented Ally Financial in its IPO and helped guide it through its national mortgage settlement with the government that arose out of the financial crisis.¹²²⁸ Och-Ziff Capital Management, which Clayton represented in the firm's \$1.2 billion IPO,¹²²⁹ was later forced to pay

com/2017/01/04/business/dealbook/donald-trump-sec-jay-clayton.html?rref=collection%2Ftimestopic%2FFinancial%20Legal%2FRegulatory&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection&_r=0 [https://perma.cc/4BKX-RTNR].

¹²²¹ *Id.*

¹²²² *Id.*

¹²²³ See Lucinda Shen, *Here's How Closely Donald Trump's Pick for SEC Chair is Tied to Goldman Sachs*, FORTUNE (Jan. 5, 2017), <http://fortune.com/2017/01/05/donald-trump-sec-jo-white-jay-clayton/> [https://perma.cc/RFP4-X48C].

¹²²⁴ *Id.*

¹²²⁵ Benjamin Bain & Robert Schmidt, *After Ripping Wall Street, Trump Picks Insider to Lead SEC*, BLOOMBERG (Jan. 4, 2017), <https://www.bloomberg.com/politics/articles/2017-01-04/deals-lawyer-said-to-be-a-contender-to-lead-sec-under-trump> [https://perma.cc/U2VB-4NZ4].

¹²²⁶ See Picker, *supra* note 19.

¹²²⁷ *Id.*

¹²²⁸ Scannell, *supra* note 16.

¹²²⁹ Picker, *supra* note 19.

out \$400 million after being found guilty of bribing various African officials,¹²³⁰ a violation of the Foreign Corrupt Practices Act (FCPA).¹²³¹

Relatedly, Clayton chaired the Committee on International Business Transactions of the New York City Bar Association (Committee), which published an article criticizing the FCPA.¹²³² The Committee found that the Department of Justice was enforcing the FCPA more frequently than before, and that enforcement resulted from a broader interpretation of the FCPA.¹²³³ The Committee listed the drawbacks of the current U.S. enforcement policy, which included: increased compliance costs, potential reluctance to engage in international deals with greater exposure to FCPA non-compliance risks, and possible incentives for foreign firms not to register securities in the United States or to engage in corrupt practices.¹²³⁴ The article concluded by recommending a re-evaluation of the FCPA enforcement regime.¹²³⁵

Prior to his confirmation hearing, Clayton met with senators as part of the vetting process.¹²³⁶ Republicans praised his knowledge of capital formation and the financial industry.¹²³⁷ However, Democrats on the Senate Banking Committee voiced concerns about Clayton's close relationship with Wall Street institutions, and questioned the extent to which he would protect investors.¹²³⁸

¹²³⁰ *Id.*

¹²³¹ Alexandra Stevenson, *Och-Ziff African Unit Expected to Plead Guilty to Bribery*, N.Y. TIMES: DEALBOOK (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/dealbook/och-ziff-hedge-fund-unit-expected-to-plead-guilty-to-bribery.html> [<https://perma.cc/T3GN-PUWG>].

¹²³² *Jay Clayton*, SULLIVAN & CROMWELL, <https://www.sullcrom.com/lawyers/Jay-Clayton> [<https://perma.cc/ZM8Y-HFVK>].

¹²³³ COMM. ON INT'L BUS. TRANSACTIONS, N.Y.C. BAR ASS'N, *THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS 2–3* (2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> [<https://perma.cc/DA3J-YDQ3>].

¹²³⁴ *Id.* at 7, 9, 21–22.

¹²³⁵ *Id.* at 23 (“[T]he competitive landscape of the 21st century global economy warrants the reevaluation of the United States’ strategy in fighting foreign corruption . . .”).

¹²³⁶ Sarah N. Lynch, *Senate Republicans Signal Strong Support for SEC Nominee Clayton*, REUTERS (Jan. 26, 2017), <http://www.reuters.com/article/us-congress-sec-clayton-idUSKBN1592FM> [<https://perma.cc/QC7B-S6D2>].

¹²³⁷ *Id.*

¹²³⁸ *See, e.g.*, Jack Casey, *SEC Commissioner Vacancies Expected to De-*

Clayton's confirmation hearing before the Senate Banking Committee on March 23, 2017 allowed Clayton to respond to Democratic concerns, while also laying out his vision for the future of the SEC.¹²³⁹ Amid pointed questions on the many conflicts he would have and the necessity of recusing himself from a significant number of decisions, Clayton continually asserted that he would not hinder the enforcement process and that he believed there is "zero room for bad actors" in the markets.¹²⁴⁰ He made it clear that while he had worked with big banks and Wall Street firms, he would "show no favoritism" as chairman.¹²⁴¹ This did not quell concerns though, as Senator Elizabeth Warren questioned his ability to go after "the biggest names on Wall Street" since ethics rules require Clayton to recuse himself from enforcement actions against former clients,¹²⁴² or any action where a party is represented by his former firm, Sullivan & Cromwell, for two years.¹²⁴³

Aside from his own professional conflicts, there has also been potential concern over his wife's position at Goldman Sachs.¹²⁴⁴ In order to mitigate the conflict, Gretchen Clayton would have to "divest

lay Regs, Enforcement, FIN. PLANNING (Jan. 30, 2017), <https://www.financial-planning.com/news/sec-commissioner-absences-expected-to-delay-regs-enforcement> [<https://perma.cc/BS5A-4X3Z>].

¹²³⁹ See Sarah N. Lynch & Lisa Lambert, *Senate Panel Presses SEC Nominee Clayton on Conflicts*, REUTERS (Mar. 23, 2017), <http://www.reuters.com/article/us-usa-sec-clayton-idUSKBN16U0DL> [<https://perma.cc/6JNU-7KRZ>].

¹²⁴⁰ See Matt Egan, *Trump's Wall Street Cop Promises 'No Favoritism' Despite Ties to Banks*, CNN MONEY (Mar. 23, 2017), <http://money.cnn.com/2017/03/23/investing/jay-clayton-sec-confirmation-hearing/> [<https://perma.cc/JDB7-BQVU>] ("If President Trump wanted to make sure the SEC would have a hard time going after his Wall Street friends, it seems to me you would be the perfect SEC chair," Warren said. But Clayton said he doesn't think recusals or his previous history will inhibit his ability to go after companies abusing the system.").

¹²⁴¹ See *Nomination Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 115th Cong. (2017) (statement of Jay Clayton, Nominee for Chairman, U.S. Sec. & Exch. Comm'n).

¹²⁴² Egan, *supra* note 39.

¹²⁴³ Lynch & Lambert, *supra* note 38.

¹²⁴⁴ See Sarah Lynch, *Trump's SEC pick Clayton points to capital formation, not enforcement*, REUTERS (Jan. 5, 2017), <http://www.reuters.com/article/us-usa-trump-sec-idUSKBN14N1Y9> [<https://perma.cc/N38K-6X4E>].

any stock or stock options in the company.”¹²⁴⁵ Ms. Clayton also agreed to resign her position following her husband’s confirmation.¹²⁴⁶

At the confirmation hearing, Clayton connected capital formation to facilitating public faith in the markets through effective regulation.¹²⁴⁷ He highlighted that his experience working with companies to ensure compliance with SEC regulations would enable him to “pare back complex rules while maintaining key investor protections.”¹²⁴⁸ Clayton advocated for “clear and lean regulation” in order to reduce “compliance costs”¹²⁴⁹ and encourage more companies to go public.¹²⁵⁰

On April 4, 2017, the Senate Banking Committee voted to submit Clayton’s nomination to the Senate.¹²⁵¹ While three Democrats voted with all of the Republicans to advance the nomination, ranking Democrat, Senator Sherrod Brown voted against the nomination due to his belief that Clayton’s Wall Street history raises too many conflicts and that he would be “unable to vote on some of the SEC’s most important cases.”¹²⁵²

On May 2, 2017 the Senate voted to confirm Clayton’s nomination as chairman of the SEC.¹²⁵³ Just as it happened in the Senate

¹²⁴⁵ *Id.*

¹²⁴⁶ Lynch & Lambert, *supra* note 38.

¹²⁴⁷ *Nomination Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 115th Cong. (2017) (statement of Jay Clayton, Nominee for Chairman, U.S. Sec. & Exch. Comm’n).

¹²⁴⁸ Dave Michaels & Andrew Ackerman, *SEC Chairman Nominee Jay Clayton Calls for Scaling Back Regulations to Encourage IPOs*, WALL ST. J. (Mar. 23, 2017), <https://www.wsj.com/articles/sec-chairman-nominee-jay-clayton-says-past-wall-street-work-is-a-strength-1490281093> [https://perma.cc/24QX-MEJ4].

¹²⁴⁹ Lynch & Lambert, *supra* note 38.

¹²⁵⁰ See Francine McKenna, *Critics Talk Conflicts as SEC Chair Nominee Clayton Wants More IPOs*, MARKETWATCH (Mar. 23, 2017) <http://www.marketwatch.com/story/critics-talk-conflicts-as-sec-chair-nominee-clayton-wants-more-ipos-2017-03-23> [https://perma.cc/Y8CL-YGZ3].

¹²⁵¹ Patrick Temple-West, *Senate banking panel advances Trump’s SEC nominee*, POLITICO (Apr. 4, 2017), <http://www.politico.com/story/2017/04/jay-clayton-sec-senate-committee-advances-236864> [https://perma.cc/2DXR-JZM7].

¹²⁵² *Id.*

¹²⁵³ Reuters, *Wall Street Lawyer Jay Clayton Confirmed as Trump’s SEC Chair*, FORTUNE (May 3, 2017), <http://fortune.com/2017/05/03/jay-clayton-wall-street-sec/> [https://perma.cc/HH4S-TP4X].

Banking Committee; Republicans were joined by a few Democrats to confirm Clayton in a 61-37 vote.¹²⁵⁴ Supreme Court Justice Anthony Kennedy administered Clayton's swearing in on May 4, 2017 to finalize his appointment.¹²⁵⁵ Upon being sworn in, the SEC issued a statement, in which Clayton stated that he was excited to "ensure that our markets remain the safest and most vibrant markets in the world" and that the "SEC is fundamental to growing the economy, creating jobs, and providing investors and entrepreneurs with a share of the American Dream."¹²⁵⁶

3. Enforcement Policy

Enforcing securities laws is one of the SEC's most prominent functions and helps "protect investors . . . and insure the fairness and integrity of the marketplace."¹²⁵⁷ Clayton lacks the prosecutorial background of his predecessor, and as a result, there likely will be less of an emphasis on enforcement under his leadership.¹²⁵⁸ First, Clayton's role in authoring a paper criticizing the FCPA likely indicates de-emphasizing enforcement of the FCPA.¹²⁵⁹ Second, the "broken windows" approach to enforcement, where smaller infractions are policed in an effort to deter larger offenses, will likely be scaled back.¹²⁶⁰ For example, the SEC will likely curtail the number of actions against

¹²⁵⁴ *Id.*

¹²⁵⁵ Dave Michaels, *Jay Clayton Sworn In to Lead the SEC*, WALL ST. J. (May 4, 2017), <https://www.wsj.com/articles/jay-clayton-sworn-in-to-lead-sec-1493931947> [<https://perma.cc/VA6H-UDZF>].

¹²⁵⁶ Press Release, U.S. Sec. & Exch. Comm'n, *Jay Clayton Sworn in as Chairman of SEC* (May 4, 2017), <https://www.sec.gov/news/press-release/2017-94> [<https://perma.cc/UJ7N-H69W>].

¹²⁵⁷ Lemann, *supra* note 1.

¹²⁵⁸ Germaine, *supra* note 2; Dave Michaels, *Trump's Man for the SEC: Time to Ease Regulation*, WALL ST. J. (Feb. 19, 2017), <https://www.wsj.com/articles/trumps-man-for-the-sec-time-to-ease-regulation-1487505602> [<https://perma.cc/L2KC-RRFE>]; Miller, *supra* note 13 ("After eight years of the . . . (SEC) being led by former enforcement regulators and criminal prosecutors, we can expect to see some changes [A]s the first chairman in years to have no experience working in the government, he will not bring a prosecutor's mindset to his new role."); Scannell, *supra* note 16.

¹²⁵⁹ See Germaine, *supra* note 2.

¹²⁶⁰ Alex Padalka, *Trump's SEC Unlikely to Boost Enforcement*, FIN. ADVISOR IQ (Feb. 9, 2017), <http://financialadvisoriq.com/c/1562753/179903> [<https://perma.cc/SAG3-B4RY>].

improper trading protocols and record keeping.¹²⁶¹ Third, acting SEC Chair, Michael Piwowar, limited some of the enforcement division's delegated authority to issue subpoenas and launch new investigations, requiring the direct approval of the SEC's director of enforcement.¹²⁶²

Another change could come in the form of different penalties for offenders and enforcement procedures.¹²⁶³ Under White, the SEC sought massive penalties from firms, including a "\$415 million enforcement action against Merrill Lynch" and a "\$267 million [action] against J.P. Morgan in 2016."¹²⁶⁴ Under Clayton, the SEC could increase efforts to punish the individuals responsible, instead of shareholders.¹²⁶⁵ Clayton's confirmation hearing testimony supports this line of thought, as he indicated his belief that bad behavior is better deterred by punishing individual executives rather than the companies that they work for.¹²⁶⁶ Procedurally, the SEC may move away from using the internal administrative court, given Republican's proposal to allow respondents to choose their forum, and recent legal challenges to the administrative forum.¹²⁶⁷

¹²⁶¹ See Associated Press, *Q&A: Duke University Expert Cox on SEC Future Under Trump*, IRON MOUNTAIN DAILY NEWS (Feb. 13, 2017), <http://www.ironmountaindailynews.com/opinion/columns/2017/02/qa-duke-university-expert-cox-on-sec-future-under-trump/> [<https://perma.cc/3SFZ-TLQB>].

¹²⁶² Carmen Germaine, *Acting SEC Chair Curbs Enforcement Staff's Power*, LAW360 (Feb. 16, 2017, 6:44 PM), <https://www-law360-com.ezproxy.bu.edu/articles/892929/acting-sec-chair-curbs-enforcement-staff-s-power> [<https://perma.cc/7993-VSDV>].

¹²⁶³ See William McLucas & Harry Weiss, Wilmer Cutler Pickering Hale & Dorr, *A New Administration: Change and Continuity in Securities Regulation*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Dec. 19, 2016), <https://corpgov.law.harvard.edu/2016/12/19/a-new-administration-change-and-continuity-in-securities-regulation/> [<https://perma.cc/X2GK-Z3HJ>].

¹²⁶⁴ Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), <https://www.sec.gov/news/pressrelease/2016-212.html> [<https://perma.cc/SD6P-A3DD>].

¹²⁶⁵ See McLucas & Weiss, *supra* note 62 ("Republican opponents of extracting such large financial penalties against corporations assert that such penalties punish shareholders who, in many cases, already have been victimized by the company's fraud. Instead, there could be an even greater focus on holding individuals within these enterprises accountable . . .").

¹²⁶⁶ Lynch & Lambert, *supra* note 38.

¹²⁶⁷ Germaine, *supra* note 2 ("Republican lawmakers have proposed allowing respondents to choose their forum [and] [t]he Tenth Circuit also ruled in late December that the in-house judges are serving unconstitutionally."). See

While the overall number of enforcement actions may decline, a high level of enforcement should remain, regardless of the change in leadership.¹²⁶⁸ Enforcement is of interest to both political parties and it is key to maintaining the integrity of the markets.¹²⁶⁹ Furthermore, the SEC's enforcement personnel are "largely self-executing" and will continue to pursue individual cases.¹²⁷⁰

4. Changes in Policy Approach

Foremost among the potential policy changes Clayton will have to address is the treatment of Dodd-Frank.¹²⁷¹ President Trump's view that Dodd-Frank is a "very negative force," indicates the likely trajectory of the administration.¹²⁷² Shortly after taking office, President Trump signed an executive order directing the Secretary of the Treasury to make recommendations on changes to the legislation.¹²⁷³ While Clayton and the SEC may seek to undo portions of Dodd-Frank, because Congress mandated the rulemaking, the amount the SEC can repeal is limited without a further mandate from Congress.¹²⁷⁴ When pressed on the issue of "attack[ing]" Dodd-Frank during his confirmation hearing, Clayton focused on trying to minimize the adverse "unintended consequences" that the regulation has caused, such as increasing compliance expenses.¹²⁷⁵ Rather than

generally Jonathan Assia, Dev. Art., *Can the SEC Hold onto its Home Court Advantage? An Analysis of the SEC's Administrative Court*, 36 REV. BANKING & FIN. L. (2017).

¹²⁶⁸ Christine Simmons, *Ceresney, Back at Debevoise, Predicts Strong SEC Under Trump*, AM. LAW. (Jan. 24, 2017), <http://www.americanlawyer.com/id=1202777511281/-Ceresney-Back-at-Debevoise-Predicts-Strong-SEC-Under-Trump-?slreturn=20170115180305> [<https://perma.cc/8E32-SPQL>].

¹²⁶⁹ *Id.*

¹²⁷⁰ Miller, *supra* note 13.

¹²⁷¹ See Richard Summerfield, *Future of Dodd-Frank*, FINANCIER WORLDWIDE, Feb. 2017, <https://www.financierworldwide.com/future-of-dodd-frank/#.WI-IUH2QrJcw> [<https://perma.cc/S4XD-ASW7>].

¹²⁷² *Id.*

¹²⁷³ Gregory Korte & David Jackson, *Trump to Dismantle Dodd-Frank Wall Street Rules Through Executive Orders*, USA TODAY (last updated Feb. 8, 2017), <http://www.usatoday.com/story/news/politics/2017/02/03/through-executive-orders-trump-takes-aim-financial-regulations/97431284/> [<https://perma.cc/QPA2-ZS58>].

¹²⁷⁴ Miller, *supra* note 13.

¹²⁷⁵ Egan, *supra* note 39.

repealing rules promulgated under Dodd-Frank, Clayton will mostly likely move away from enforcing certain rules.¹²⁷⁶ However, in response to questioning from the Senate Banking Committee, Clayton conceded “Dodd-Frank rules already in force should be enforced,” which may indicate a less dramatic policy shift in this area for now.¹²⁷⁷

Despite Clayton’s measured remarks, an updated version of the Financial CHOICE Act, which aims to repeal significant sections of Dodd-Frank, was released on April 19, 2017.¹²⁷⁸ The updated legislation will garner much support from the present administration.¹²⁷⁹ Among the proposed changes are significant modifications to the SEC’s enforcement division, including limiting access to the SEC’s administrative court and requiring greater levels of procedure in establishing theories of liability that could be used to challenge violations.¹²⁸⁰

Aside from the CHOICE Act, there are further efforts to repeal elements of Dodd-Frank coming from the SEC, including “provisions to eliminate the conflict minerals and pay-ratio disclosures[,]”¹²⁸¹ which mandated companies to list materials potentially sourced from conflict areas and disclosure of the pay ratios of executives compared with median employee salaries, respectively.¹²⁸² SEC Commissioner Piwowar recently directed further consideration of these rules by both the SEC and the public.

In accepting the nomination, Clayton said he would “encourage[] American companies to do what they do best: create jobs.”¹²⁸³ To accomplish this, it appears Clayton will focus on capital

¹²⁷⁶ See Germaine, *supra* note 2 (“[A]ctually taking them off the agency’s books will require congressional action.”).

¹²⁷⁷ McKenna, *supra* note 49.

¹²⁷⁸ Peter J. Henning, *A Whack at Dodd-Frank Could Hamstring the S.E.C.*, N.Y. TIMES: DEALBOOK (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/business/dealbook/a-whack-at-dodd-frank-could-hamstring-the-sec.html?ref=dealbook> [<https://perma.cc/2LU6-EZEL>].

¹²⁷⁹ *Id.* (reporting the updated bill “may result in Congress curtailing enforcement of securities laws”).

¹²⁸⁰ *Id.*

¹²⁸¹ Tom Zanki, *Acting SEC Chair Signals Shift To Ease Disclosure Rules*, LAW360 (Feb. 14, 2017, 9:40 PM), <https://www-law360-com.ezproxy.bu.edu/articles/891945/acting-sec-chair-signals-shift-to-ease-disclosure-rules> [<https://perma.cc/7JFG-XME8>].

¹²⁸² *Id.*

¹²⁸³ Roger Yu, *Honed by Wall Street: What Makes Trump SEC Chair Pick Jay*

formation instead of pursuing greater regulations and continuing to implement Dodd-Frank.¹²⁸⁴ Capital formation is the process by which private companies gain access to public markets for capital, such as through Initial Public Offerings.¹²⁸⁵ This shift in focus reflects the pursuit of deregulation aimed at increasing small companies' access to equity markets.¹²⁸⁶ Clayton commented on this goal at his confirmation hearing, explaining that the burden on companies going public was too significant and that it needed to be reduced to revive the diminished U.S. IPO market.¹²⁸⁷ Clayton has also already begun reaching out to potential candidates to join his staff, including William Hinman, a prominent deal lawyer connected to Wall Street and Silicon Valley, and Steven Peiken, who worked at Sullivan & Cromwell with Clayton.¹²⁸⁸ These picks lend further evidence to the "commission's likely pivot toward a deregulatory agenda."¹²⁸⁹

As part of this general policy, Clayton will likely pursue an agenda of corporate finance reform, including streamlining disclosure requirements,¹²⁹⁰ and promulgating new rules on accounting and compliance requirements and initial public filings.¹²⁹¹ Among the associated changes, it is likely that certain protective rulemakings that

Clayton Tick, USA TODAY (last updated Jan. 5, 2017, 1:47 PM), <http://www.usatoday.com/story/money/2017/01/04/donald-trumps-sec-chair-nominee-comes-deep-wall-street-ties/96162306/> [<https://perma.cc/53S5-X5CG>].

¹²⁸⁴ *See id.*

¹²⁸⁵ *See* Sarah N. Lynch, *US SEC's Stein Cautions on Capital Formation Rules*, REUTERS (Feb. 25, 2017), <http://www.reuters.com/article/usa-sec-capitalformation-idUSL1N1G91IS> [<https://perma.cc/G6QA-D9LG>].

¹²⁸⁶ *See* JD Alois, *Jay Clayton to Join SEC During Unprecedented Need to "Cut the Red Tape,"* CROWDFUND INSIDER (Jan. 4, 2017, 4:43 PM), <https://www.crowdfundinsider.com/2017/01/94340-jay-clayton-join-sec-unprecedented-need-cut-red-tape/> [<https://perma.cc/8R92-YWLJ>] (observing that some analysts feel the "unprecedented decline in IPOs and public company listings, [which has deprived] entrepreneurs of the best method to raise capital" could be remedied if Clayton "cut the red tape").

¹²⁸⁷ Michaels & Ackerman, *supra* note 47.

¹²⁸⁸ Dave Michaels, *Trump Pick for SEC Chairmen Assembling Top Agency Staff*, WALL ST. J. (Apr. 25, 2017), <https://www.wsj.com/articles/trump-pick-for-sec-chairman-assembling-top-agency-staff-1493132329> [<https://perma.cc/YEK6-ZZ5B>].

¹²⁸⁹ *Id.*

¹²⁹⁰ Germaine, *supra* note 2.

¹²⁹¹ Lynch, *supra* note 84.

are currently incomplete will remain unfinished, including proposed regulations relating to fiduciary rules for stockbrokers, conflicted investments of banks, and increased regulation of exchange-traded funds.¹²⁹²

C. Relevance

The new administration represents a paradigm shift in the way the markets are regulated.¹²⁹³ Dodd-Frank reshaped the landscape of financial regulation and shifted the focus of the SEC, and that legislation will now likely face a significant transformation.¹²⁹⁴ Day-to-day operations of financial firms could change depending on the level of deregulation related to topics including best price trade execution and accounting rules.¹²⁹⁵

Silicon Valley tech start-ups and investors alike are warmly welcoming Clayton's appointment.¹²⁹⁶ Given the apparent focus on capital formation, it appears likely that Clayton, in contrast to White, largely will leave Silicon Valley alone.¹²⁹⁷ Beyond simply removing the regulatory focus on start-ups, there is an expectation that pre-existing regulations might be altered to facilitate even greater investment potential,¹²⁹⁸ by, among other changes, broadening qualified investor

¹²⁹² Editorial, *Will Jay Clayton Protect Investors?*, N.Y. TIMES (Jan. 7, 2017), <https://www.nytimes.com/2017/01/07/opinion/sunday/will-jay-clayton-protect-investors.html> [<https://perma.cc/DAZ2-JSH4>].

¹²⁹³ See Renae Merle, *SEC Chair White Concerned About Trump Administration's Plans to Roll Back Financial Reform*, WASH. POST: WONKBLOG (Jan. 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/17/sec-chair-white-concerned-about-trump-administrations-plans-to-roll-back-financial-reform/?utm_term=.d04eac989469 [<https://perma.cc/L4T9-EB9B>] (“White’s departure is just the beginning of a sweeping transformation of the way Wall Street is regulated during the Trump administration.”).

¹²⁹⁴ *Id.*

¹²⁹⁵ Reuters, *Here Are 5 SEC Policy Areas Likely to Change Post-Trump*, FORTUNE (Nov. 16, 2016), <http://fortune.com/2016/11/16/donald-trump-sec-policy/> [<https://perma.cc/4T4Z-EUMH>].

¹²⁹⁶ See Connie Loizos, *Why Silicon Valley is High-Fiving Over Trump's SEC Pick*, TECHCRUNCH (Jan. 26, 2016), <https://techcrunch.com/2017/01/26/why-silicon-valley-is-high-fiving-over-trumps-sec-pick/> [<https://perma.cc/HGF7-77BL>].

¹²⁹⁷ *Id.*

¹²⁹⁸ *Id.*

exceptions and increasing the permissible crowdfunding investment limits.¹²⁹⁹

Another industry that should benefit from Clayton's appointment is private equity.¹³⁰⁰ Under White and Director of Enforcement Andrew Ceresney, the SEC focused on pursuing misconduct in the industry and making private equity more transparent.¹³⁰¹ Yet because Clayton is expected to deemphasize enforcement to some degree, it is possible that "the SEC's crusade against the private equity industry" may be coming to a close.¹³⁰² David Rubenstein, Co-CEO of Carlyle Group, noticed unprecedented excitement among industry professionals about the potential for favorable regulation and deregulation.¹³⁰³ Some of this enthusiasm comes from the administration's hostility to Dodd-Frank, which requires private equity advisors to register with the SEC.¹³⁰⁴ Removing these registration requirements would reduce compliance costs for private equity firms and could also facilitate more IPOs.¹³⁰⁵

¹²⁹⁹ *Id.*

¹³⁰⁰ See Benjamin Horney, *Why Trump's SEC Pick is Good for the PE Industry*, LAW360 (Jan. 6, 2017, 3:49 PM), <https://www-law360-com.ezproxy.bu.edu/articles/877775/why-trump-s-sec-pick-is-good-news-for-the-pe-industry> [<https://perma.cc/M8X4-6TLJ>] ("Trump's pick has the industry hopeful that a dramatic shift in the way private equity is policed could be on the horizon.").

¹³⁰¹ Joshua M. Newville & Sigal P. Mandelker, *SEC Enforcement's Increased Emphasis on Private Equity*, NAT'L L. REV. (May 22, 2016), <http://www.natlawreview.com/article/sec-enforcement-s-increased-focus-private-equity> [<https://perma.cc/6SLX-H5EQ>].

¹³⁰² Horney, *supra* note 99.

¹³⁰³ See Melissa Mittelman & Sarah Syed, *Rubenstein Sees 'Bullish' Private Equity as Trump Takes Office*, BLOOMBERG (last updated Mar. 2, 2017, 6:23 AM), <https://www.bloomberg.com/news/articles/2017-03-01/rubenstein-sees-bullish-private-equity-as-trump-takes-office> [<https://perma.cc/QG2Z-G77J>] ("I've been coming to this for 20 years and I haven't seen anything quite as bullish, . . . 'There's an atmosphere that private equity is welcome into the financial community, and that regulations and deregulations coming out of Washington . . . will be favorable.'").

¹³⁰⁴ See Joshua Milgrim et al., *President Trump: The Outlook for Private Equity*, DECHERT (last visited Mar. 1, 2017), <https://info.dechert.com/27/7847/landing-pages/president-trump--the-outlook-for-private-equity.asp?sid=fd8742d3-d238-441a-b714-4e8b069bdc79> [<https://perma.cc/SXQ3-TVEH>].

¹³⁰⁵ *Id.*

D. Conclusion

The appointment of Jay Clayton to lead the SEC is seen as a signal that the SEC will concentrate more on capital formation, and than enforcement and regulations.¹³⁰⁶ Clayton's testimony at his confirmation hearing supported this outlook, emphasizing a revitalization of the IPO market and a reduction of regulatory burdens on companies.¹³⁰⁷ Clayton emphasized "growing the economy" and working with "investors and entrepreneurs."¹³⁰⁸ President Trump has pledged to deregulate,¹³⁰⁹ and now it is up to Clayton and the SEC to implement his vision.

Geoffrey Gardner¹³¹⁰

¹³⁰⁶ See Picker, *supra* note 19.

¹³⁰⁷ Michaels & Ackerman, *supra* note 47.

¹³⁰⁸ Press Release, U.S. Sec. & Exch. Comm'n, Jay Clayton Sworn in as Chairman of SEC (May 4, 2017), <https://www.sec.gov/news/press-release/2017-94> [<https://perma.cc/UJ7N-H69W>].

¹³⁰⁹ See Devaney *supra* note 12.

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