

## [Securities Regulation Daily Wrap Up, TOP STORY—Senate Banking Committee mostly lobs softballs to SEC nominees, \(Oct. 24, 2017\)](#)

Securities Regulation Daily Wrap Up

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If the Senate Banking Committee hearing on their nomination is any indication, Hester Peirce and Robert Jackson face few obstacles to confirmation as SEC commissioners. No committee members questioned the nominees' competence, and much of the questioning involved noncontroversial topics such as the need to improve cybersecurity. Jackson often returned to the theme of prioritizing Dodd-Frank rulemaking, while Peirce, an SEC alumna, tempered some responses by cautioning that she cannot say how she will act until she can see the agency from the inside again.

Jackson's work as a Columbia University law professor and director of the school's program on corporate law and policy [focuses](#) on corporate governance the use of advanced data techniques to improve market transparency. Peirce, whom President Obama also nominated to an SEC commissioner post, worked for eight years at the SEC before joining the staff of the Senate Banking Committee. She said she wants to return to the Commission because she believes in the importance of individuals, institutions, and innovation.

If both nominees are confirmed, it will restore a five-member commission and maintain a balance among political parties with one Independent (Clayton), two Democrats (Stein and Jackson), and two Republicans (Piwowar and Peirce). Under Exchange Act Section 4(a), no more than three commissioners may be from the same political party, and "members of different political parties shall be appointed alternately as nearly as may be practicable."

**Priorities.** Chairman Michael Crapo (R-Idaho) started the [hearing](#) by asking each nominee what areas the SEC should prioritize in the next year. Peirce said that in addition to the rulemaking agenda prepared by Chairman Clayton, she would prioritize the oversight of firms through the OCC; equity and fixed-income market structure; and cybersecurity. Jackson named cybersecurity, outstanding Dodd-Frank rules, and enforcement (particularly insider trading). Without mentioning any specific incidents by name, he said that "recent events" have caused investors to wonder if the SEC is really acting as the cop on the beat.

In one of the hearing's few tense moments, Elizabeth Warren (D-Mass) asked each nominee if they would "make it a top priority" to get the Dodd-Frank rules back on the agenda and completed as soon as possible. Jackson unequivocally said yes, while Peirce observed that the chairman sets the agenda and that unanticipated events sometimes take precedence. Warren clarified that the rules are not optional and asked again if Peirce believes the agency is obligated to complete the mandates before other discretionary projects. Peirce said she could not answer. Concluding her time, Warren said that regardless of political party, "If you believe in the American constitutional system you should demand that the SEC stop this lawless behavior."

**Nominees' previous statements.** In only two cases did committee members question statements made by the nominees in private practice. Richard Shelby (R-Ala) brought up a brief that Jackson filed in Metlife's case against the Financial Stability Oversight Council, which had named the insurer a systemically important financial institution. He asked the nominee to explain what he meant when he argued that using a cost-benefit analysis to designate institutions as systemically important "reveals a lack of understanding of basic principles of financial regulation." Jackson said that they were not taking the position that cost-benefit analysis is not important, and he said he agrees that it is critical. The argument in the Metlife case was that we should know the limits of what we can know about the costs and benefits in any particular case.

Catherine Cortez Masto (D-Nev) questioned Peirce about her previous criticism of the CFPB's rule limiting arbitration clauses. Both the Equifax data breach and the Wells Fargo fake accounts scandal demonstrate that

consumers cannot simply vote with their feet, Cortez Masto said. These companies attempted to force affected individuals to arbitrate claims even where there was no contractual relationship as to the breached data or bogus accounts. Peirce agreed that the rule could be examined but maintained that arbitration, generally, can be more beneficial to class-action litigation.

**Enforcement.** Several senators focused their questioning on enforcement, and specifically individual accountability. In response to a question from Chairman Crapo, Peirce acknowledged that if the SEC is not enforcing rules, no one will take them seriously. She said she is glad that Clayton is focused on retail fraud. Jackson said that enforcement is critical to maintaining investor confidence. He especially wants to know the degree to which technology is being used to improve efficiencies in enforcement in order to make the best use of the resources Congress allocates.

Cortez Masto brought up the uncertain future of the Yates memo and asked if the nominees will redouble efforts to hold individuals accountable even if the DOJ backs away from this effort. Both nominees committed to doing so, with Peirce emphasizing that the SEC is an independent agency.

**FINRA oversight.** Mike Rounds (R-SD) asked the nominees for their views on transparency at FINRA. Both Peirce and Jackson said they were encouraged by the leadership of Robert Cook, who has reached out to constituents to get their concerns. But Peirce added that the SEC also needs to oversee that process to make sure that FINRA is hearing those concerns and is improving transparency. She worries that there is a culture of not speaking up even when fraud is observed. Jackson agreed that SEC oversight is important, particularly in regard to FINRA's collection of data on broker fraud. There are many repeat offenders in this space, and FINRA may not be passing enough of that information on to investors.

**Revisiting rules and guidance.** The timeliness of certain SEC guidance and approaches also came up at several points in the hearing. On a question from Sen. Shelby about duplicative regulations, Peirce observed that the SEC has been around for a long time and that it is important to look back at how rules are working individually and how they are working together. On cybersecurity specifically, she said that the SEC should think about whether it needs additional guidance. Jackson concurred, cautioning that the risks today differ from the risks of just a few years ago. When Jack Reed (D-RI) asked if it would help to have direction from Congress, Jackson said that this is always helpful but that updating the rules is critical to the SEC's mission and they can and should get it done with or without legislation.

Finally, Brian Schatz (D-Haw) said that since the barriers to stock buybacks have been removed, companies are choosing to pass excess cash on to shareholders rather than reinvest in their workforce, capital improvements, or research and development. Will the nominees consider rescinding Rule 10b-18, the 1982 regulation that provided a safe harbor for stock repurchases? Jackson said he was "absolutely" willing to reconsider the rule. Peirce also said the rule could be reexamined, because it has been on the books for a while.

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