

Selected Items from: Search Results**Securities Regulation Daily Wrap Up, TOP STORY—Senators ask Clayton about conflicts, IPOs, (Mar. 23, 2017)**

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#).

Senators queried Jay **Clayton** at his confirmation hearing to be SEC Chairman on a range of topics, including how he would deal with potential conflicts of interest, his views on enforcement, and why he thinks initial public offerings have dwindled in the U.S. In both his [prepared remarks](#) and in his testimony he said the protection of investors is a fundamental responsibility that he would pursue with "energy and purpose," warned there is "zero room for bad actors in our capital markets," and pledged "no favoritism." **Clayton** spoke most expansively about capital formation and IPOs, two areas he focused on in private practice. President Trump [announced](#) **Clayton's** nomination in January.

Not to be overshadowed by the Senate, House Financial Services Chairman Jeb Hensarling (R-Texas) issued a [joint statement](#) with Rep. Bill Huizenga (R-Mich) expressing worry that the SEC was slow to implement the Jumpstart Our Business Startups (JOBS) Act and pressing their alternative to Dodd-Frank, The Financial CHOICE Act. Although House FSC Ranking Member Maxine Waters (D-Calif) had not issued a new statement on **Clayton's** nomination as of publication, she has [previously expressed](#) concerns about **Clayton's** potential conflicts of interest.

Conflicts and enforcement. Senate Banking Committee Chairman Michael Crapo (R-Idaho) [opened](#) the questioning by asking **Clayton** about how potential conflicts arising from his prior private practice might impact him as SEC chairman. **Clayton** said he did not believe his prior legal work would impair his SEC duties. The nominee elaborated by saying that recusals would be manageable because the other commissioners could act in specific matters.

Ranking Member Sherrod Brown (D-Ohio) [followed](#) with questions about a matter involving allegations that a Trump casino violated rules about non-GAAP financial disclosures. **Clayton** reiterated his pledge of showing no favoritism. When asked by Brown about **Clayton's** contacts with the Trump transition team, **Clayton** said he had been asked his thoughts on capital markets and the prospect of public service, and that he spoke with several members of the team, including screeners, now-President Trump, Chief of Staff Reince Priebus, and the president's chief strategist, Stephen Bannon. **Clayton** agreed to provide Brown with a reconstructed list of those he spoke with about the SEC nomination.

In a second round of questions, Sen. Warren would return to questions about conflicts and enforcement. Specifically, she asked about Carl Icahn, a special adviser to Trump, who is a renowned activist investor with extensive holdings, which Warren suggested he may not have divested since taking on his advisory role in the White House. During the exchange, **Clayton** said he had met with Icahn after being nominated and that they talked about activist investing, but without discussing specific matters.

Senator Warren later asked if **Clayton** would avoid talking to Icahn if confirmed. **Clayton** said he would talk to all types of market participants, while he acknowledged that, in the context of an ongoing investigation of someone, those talks may be inappropriate. In reply to the senator's question about one of Icahn's alleged recent investments and insider trading, **Clayton** said only that insider trading cases are dependent on the facts and circumstances.

On a related point, Sen. Mark Warner (D-Va) had previously mentioned the 10-day Schedule 13D window, which can benefit activist shareholders by allowing accumulation of shares prior to the required public disclosure.

Clayton said shareholder activism is an ongoing debate, but that the purpose of Section 13 reporting should be to incentivize those who see problems with companies, but not to give an unfair advantage.

Acting SEC Chairman Michael Piwowar's widely reported effort to limit who among the SEC's staff may use the subpoena power brought questions for **Clayton** by Sen. Robert Menendez (D-NJ). Senator Menendez specifically wanted to know if **Clayton** was aware of any abuse of the power by SEC staff. **Clayton** said he had no idea if SEC staff had abused that authority. **Clayton** also said he was not consulted on the change.

As the hearing ended, Chairman Crapo and Sen. Warren engaged in a brief battle of news sources over whether Republicans or Democrats are weaker on enforcement matters. Senator Warren had earlier claimed that Republicans had a lighter touch on enforcement, but Crapo offered a different set of news reports as evidence that most enforcement decisions by the Commission are unanimous. The SEC's Office of Freedom of Information Act Services [released](#) data on enforcement matters last year. Senator Warren held to her source, which she said indicated that 48 matters during former Chair Mary Jo White's tenure could not be pursued because of conflicts.

IPO markets. In what may have been **Clayton**'s signature issue, the SEC nominee dramatically explained why there are so few U.S. IPOs in reply to a question from Sen. Bob Corker (R-Tenn). Using a hand gesture approximating the "hockey stick" pattern of economic growth following a typical recession, but in this context being used to illustrate a company's growth pattern, **Clayton** said many companies historically sought to go public at a lower point on the growth chart than is possible today.

Clayton said the costs and other burdens of going public prevent many companies from doing so earlier in their growth cycles. **Clayton** also said "robust" private capital markets contributed to companies deciding to stay private longer and then going public only after they have reached greater maturity.

In earlier questioning from Chairman Crapo, **Clayton** had explained that an easier IPO on-ramp, but not eased regulatory standards, already had made a difference in the marketplace. **Clayton**, a transaction lawyer whose practice emphasizes capital formation, said often times the first question a person will ask about a company is whether it is an emerging growth company under the JOBS Act because EGC status makes an IPO easier.

Individual accountability. Senators also asked **Clayton** more generally about his views on enforcement, although much of the questioning about enforcement was tinged by suggestions of **Clayton**, if confirmed, having to pilot the SEC in the context of an Administration that has many potential conflicts of interest.

Senator Heidi Heitkamp (D-ND) asked about clarifying the mental state required to hold company executives criminally responsible. **Clayton** said that was a question for the courts and Congress, but he would vigorously enforce the law as it is. In reply to a related question from Sen. Catherine Cortez Masto (D-Nev), **Clayton** said that while companies should be held accountable, individual accountability can be a more effective deterrent.

Dodd-Frank and regulatory approach. The big question for securities practitioners since the November election has been whether the Trump Administration and the Republican-led Congress would follow through on their plans to repeal and replace the Dodd-Frank Act. Senator Brown asked **Clayton** about the Trump Administration's related executive order mandating a review of financial system rules. **Clayton** said he had "no specific plans for attack" on Dodd-Frank, but he also said the reform law should be examined to see if it has achieved its objectives.

On another front, Sen. Richard Shelby (R-Ala), the immediate former Banking Committee chairman, wanted to know how **Clayton** views the role of cost-benefit analysis in rulemaking. According to **Clayton**, economic analysis is "very important" both qualitatively and quantitatively. **Clayton** elaborated by noting that one can look back decades and see the "profound" effects of some regulations.

In reply to a question posed by Sen. Corker, **Clayton** spoke briefly about partisanship and his approach to voting at the Commission. The senator had asked why the SEC seems so partisan lately. **Clayton** first said that his goal as chairman would be "consensus" because he values unanimous votes on important matters. But **Clayton** also "speculate[d]" that partisanship "is strong in Washington," while noting that the SEC's mission is not a partisan mission.

On a related matter, Sen. Mike Rounds had asked **Clayton** if he is a Republican. **Clayton** explained that he is an Independent. Many will recall that former Chairs White and Mary Schapiro described themselves as Independents.

When asked by Sen. Brian Schatz (D-Hawaii) what legal basis Acting Chairman Piwowar had for not pursuing Congressionally-mandated rules, **Clayton** said that rulemaking required under statute should go forward.

Clayton also explained that generally he prefers less complexity and more clarity in regulations, at least to the extent practicable.

Acting Chairman Piwowar also had [requested](#) renewed [public comment](#) on the Commission's pay ratio rule. Senator Menendez [characterized](#) Piwowar's action as obstructing implementation of a Congressional mandate and asked **Clayton** if he agreed with that action. **Clayton** replied that it was Piwowar's decision to make and he did not know what prompted the acting chairman to seek more public comment. **Clayton** said he could not say what he would do if confirmed to be chairman since he has not had an opportunity for interaction with SEC staff on the rule.

With respect to cybersecurity, Sen. Warner wondered if the SEC should take a "fresh look" at cyber issues in light of the Yahoo! Inc. disclosures. **Clayton** declined to speak about any specific case, but he did suggest that there is a question of whether this type of disclosure is where it should be. During a follow-up exchange with Sen. Jack Reed (D-RI), who has previously introduced legislation to require company boards to disclose their cybersecurity expertise, **Clayton** further suggested current cyber disclosures may not be enough, but that materiality is the touchstone.

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