

# Securities Regulation Daily Wrap Up, TOP STORY— Senate Banking Committee questions SEC nominees, (Mar. 15, 2016)

By [Jacquelyn Lumb](#)

During the Senate Banking Committee's consideration of the nominations of Lisa Fairfax and Hester Peirce to serve as SEC commissioners, Senator Chuck Schumer (D-NY) said he was leaning against both nominations based on their responses to his questions about corporate political spending. He cited the Supreme Court's *CitizensUnited* ruling which he said ripped a hole in the fabric of the election system, and the SEC, while not responsible, has failed to prevent that hole from being ripped any wider. Schumer asked both nominees if they believe that shareholders have a right to know about a corporation's political spending and warned that if they provided mushy answers, he may not be able to support their nominations.

**Political spending.** Fairfax, a law professor at George Washington University where she teaches corporations and securities law, noted that the 2016 omnibus appropriations bill appears to prevent rulemaking in this area, so the issue may be off the table. Peirce, with the Mercatus Center at George Mason University and a former staff attorney in the SEC's Division of Investment Management, believes that Congress made it clear that political spending disclosure was not a priority. Schumer said neither answer was acceptable. He plans to submit the question in writing to give the nominees another chance to respond.

**Retrospective reviews.** Committee Chair Richard Shelby (R-Ala) asked the nominees for their views on the importance of economic analysis and on retrospective reviews of rulemaking. Peirce replied that economic analysis is a very important tool that may help the SEC avoid unanticipated consequences in its rulemaking. She also favors retrospective reviews, and pointed to the equity market structure in particular where rules have built up over the years. Peirce said she would like to participate in that review

to see how the rules are working. Both nominees also assured Shelby that they were not asked to support any particular policy or position in return for their nominations.

Senator Dean Heller (R-Nev) asked if either nominee could point to an SEC rulemaking in which the costs outweighed the benefits. Peirce cited the conflict minerals rule, which was far outside the SEC's area of expertise. Fairfax said she would need a deeper understanding of the rules to offer a view.

**Investor protection.** Senator Jack Reed (D-RI) asked about their top objectives with respect to investor protection, listing such possibilities as cybersecurity, corporate governance, climate change, and political spending. Fairfax cited market structure issues, which she said are linked to investor protection, and the proxy apparatus, including the voting structure. Peirce cited the SEC's disclosure effectiveness review.

**Corporate governance.** Senator Mike Rounds (R-SD) asked Fairfax about her signature on the *Trinity Wall Street v. Wal-Mart Stores* brief in which the Third Circuit held that a shareholder proposal linked to Wal-Mart's sale of high capacity arms could be omitted from the company's proxy materials under the ordinary business exclusion. Fairfax said her signature did not reflect her position on the company or an industry, but about a corporate governance principle. She gave the same response to his inquiry about the *Burwell v. Hobby Lobby Stores* case—that her involvement related to the broader corporate governance matter rather than the underlying issue.

**Political contribution disclosure.** Senator Robert Menendez (D-NJ) picked up on Schumer's inquiry about the disclosure of political contributions. He said the legislation the nominees cited does not prevent the SEC from preparing or proposing a rule and once this year ends, he asked what steps they would take to set it in motion. Fairfax noted that the chair sets the agenda, but added that it would not be appropriate to prejudge the issue. Menendez advised that the SEC has received over a million comment letters urging it to pass a disclosure rule, more than any other issue in the SEC's history, and said he hopes the nominees would not ignore all of those voices.

**Dodd-Frank criticism.** Senator Elizabeth Warren (D-Mass) grilled Peirce about some of her writings that criticize the Dodd-Frank Act and asked whether someone should be

put in a position of supporting laws they believe are pointless. Peirce said the book, “Dodd-Frank: What It Does and Why It’s Flawed,” was not written in the context as a regulator, but as an academic posing suggestions on alternative approaches. She added that she has been a regulator and understands the regulator’s role in doing what Congress tells it to do, but would also suggest areas in which Congress should take another look.

Warren also noted that after the D.C. Circuit rejected the SEC’s conflict minerals rule, Peirce tweeted that even though the decision did not stop the SEC from rulemaking, it didn’t mean the SEC shouldn’t stop itself. She asked Peirce, if she is confirmed, if she will implement and enforce the SEC’s rules. Peirce said she would, but added that delays sometimes allow companies to implement rules more effectively. She said she would figure out the most effective way to implement the mandated statutes.

**FINRA.** Senator Tom Cotton (R-Ark) questioned Peirce about her view that FINRA may not be sufficiently accountable to the industry and that the PCAOB has more oversight from the SEC than FINRA. She noted that FINRA differs from its predecessor organization and that questions have been raised by its constituencies. FINRA’s oversight may need to be shored up, she said.

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