

Public Statement

Statement of Chairman Jay Clayton at Open Meeting



Chairman Jay Clayton

Dec. 18, 2019

Good morning. This is an open meeting of the U.S. Securities and Exchange Commission, under the Government in the Sunshine Act.

Today, we have six items on the agenda. As I've remarked in the past, we must efficiently allocate the Commission's limited resources to a combination of statutory mandates and the needs of the day. The diverse array of items on today's agenda illustrates this point – we are considering actions that represent the Commission's continued efforts to complete the remaining, complex mandates of the Dodd-Frank Act, as well as a proposal that reflects our continued efforts to update and modernize our rules to reflect substantial changes in our markets, domestically and internationally, and advances in technology. In addition, the Commission will exercise its important oversight role with respect to the Public Company Accounting Oversight Board ("PCAOB") in considering whether to approve the PCAOB's 2020 budget and related accounting support fee.

Standing up the Title VII Regime

The first three items on today's agenda represent an important milestone in standing up the Dodd-Frank Title VII regime. Title VII of the Dodd-Frank Act frames the SEC's regulatory authority over security-based swaps and certain key participants in that market. More specifically, Title VII directed the Commission to establish a number of rules governing security-based swaps.

Today, the Commission will consider cross-border rule amendments. Adoption of these amendments would (1) trigger the implementation period for compliance with the Title VII security-based swap regime generally, including previously adopted reporting and recordkeeping requirements and capital and margin requirements, and (2) establish a compliance date by which security-based swap entities must register with the Commission. The Commission will also consider related guidance and an order, as well as rules regarding risk mitigation techniques for uncleared security-based swaps.

These items generally are designed to respond to statutory, jurisdictional and a host of pragmatic issues that market participants, including foreign governments and regulatory authorities, have raised regarding the cross-border application of the Commission's security-based swap rules. The actions we are considering today are also intended to increase coherence across the Title VII regime, including to better harmonize the Commission's approach with that of the CFTC in order to increase effectiveness and reduce complexity and costs.

I want to pause for a moment and recognize the enormity of this task — developing a new, effective regime for the regulation of security-based swaps that (1) is true to the requirements of Title VII, (2) works well with U.S. and international laws and regulations that regulate the same and related securities and other positions, and (3) respects and accommodates a web of other U.S. and non-U.S. requirements from different regulators, including data privacy.

Today's actions are the result of our staff's careful and thoughtful approach to these issues, and I am proud to support the staff's efforts in this area, including the work of our Office of International Affairs, led by Raquel Fox. The Office of International Affairs and the Division of Trading and Markets understand the complexities in implementing our Title VII regime in a manner that is consistent with a vast array of international requirements, and they continue to engage our regulatory counterparts in the United States and across the world in constructive efforts to improve regulation globally. I note here that the CFTC is considering related action today.

I would like to thank Commissioner Peirce for her leadership in advancing the Title VII regime. In light of Commissioner Peirce's substantial efforts on the Title VII items that we will consider today, I will turn it over to Commissioner Peirce to provide her opening remarks.^[1] I'll then ask Brett Redfearn, our Director of the Division of Trading and Markets, and S.P. Kothari, our Chief Economist and Director of the Division of Economic and Risk Analysis, for the staff's presentation of the first three recommendations on our agenda. Following the staff's presentations, I'll ask Commissioner Jackson, Commissioner Roisman and Commissioner Lee for any remarks.

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Implementing the Statutory Mandate to Adopt Resource Extraction Disclosure Rules

We will now consider the fourth item on today's agenda -- a proposal from the Division of Corporation Finance to implement the mandate in Section 1504 of the Dodd-Frank Act.

Section 1504 added Section 13(q) to the Securities Exchange Act of 1934 to require disclosure of certain resource extraction payments. The Commission has expended substantial resources on two prior efforts to implement Section 1504. The Commission first adopted rules to implement this mandate in 2012. The 2012 rules were vacated by the U.S. District Court for the District of Columbia.^[2] The Commission then adopted new rules in 2016. The 2016 rules were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act, or the CRA.^[3]

Although the joint resolution vacated the 2016 rules, the statutory mandate under Section 13(q) remains in effect. As a result, the Commission is statutorily obligated to issue a rule to implement Section 1504. However, under the CRA, the Commission may not reissue the same rule that was vacated in "substantially the same form" or issue a new rule that is "substantially the same" as the disapproved rule.

The CRA does not define the phrase "substantially the same" and there is no case law to provide us with additional guidance on how much the rule needs to change in order to satisfy the "[not] substantially the same form" and "not substantially the same" requirements.^[4] It does, however, appear clear that, here, the Commission must issue a new rule.^[5]

In this regard, when preparing recommendations for the Commission on fulfilling the Section 13(q) mandate, among various other matters discussed in the proposing release we vote on today, the staff considered the concerns expressed by members of Congress who voted to disapprove the 2016 rules pursuant to the CRA. These comments were primarily focused on the high costs of compliance and the potential for competitive harm associated with the 2016 rules. Simply put, based on the reasons why Congress vacated the rule, in this case simply using the same text as the revised rule and revising the justifications or the economic analysis would likely fall short of the CRA's requirements.

I believe today's recommendations are true to the requirements that Section 1504 places on the Commission and, thanks to the staff's good work, would effectively implement the statute's objective of promoting transparency of resource extraction payments to governments in a manner that responds to Congressional concerns about compliance burdens and potential competitive harms. That said, I welcome comments on whether the proposed approach can be improved.

Before I turn the proceedings over to Bill Hinman, Director of the Division of Corporation Finance, and his staff to discuss the recommendations, I would like to thank the staff for their hard and careful work on this proposal. Specifically, I would like to thank:

- From the Division of Corporation Finance: Bill Hinman, Barry Summer, Betsy Murphy, Elliot Staffin and John Hodgkin;
- From the Office of General Counsel: Bob Stebbins, Bryant Morris, Brooks Shirey, and Connor Raso;
- From the Division of Economic and Risk Analysis: S.P. Kothari, Vlad Ivanov and Walter Hamscher; and
- From the Office of the Chief Accountant: Jonathan Duersch.

Now I will turn it over to Bill and S.P. for the staff's recommendation. Following the staff's presentations, I'll ask Commissioner Jackson, Commissioner Peirce, Commissioner Roisman and Commissioner Lee for any remarks.

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Modernizing the Accredited Investor Definition

The fifth item on today's agenda is a recommendation from the Division of Corporation Finance to propose amendments to the definition of "accredited investor."

The accredited investor definition is a cornerstone of Regulation D and a significant segment of our private placement market. It also plays an important role in other state and federal securities law contexts.

Under our Regulation D regime, there are individual accredited investors and institutional accredited investors. The current key tests for individual "accredited investor" status are only financial — we have an income test and a wealth test. These tests have been in place, with a few modifications, for decades. They serve to exclude many individuals from our private markets who clearly have the financial sophistication to participate in those markets. The proposed amendments would maintain the current financial tests and add new non-financial categories of individuals that have the demonstrated financial sophistication and other attributes that would indicate that they should not be excluded from this now very large and important market, including persons with Series 7, 65 or 82 licenses.

The proposed amendments also would add additional tests for institutional accredited investor status, including expressly permitting tribal governments to participate in our private capital markets as investors.

The proposed amendments benefit from years of engagement by the Commission and staff, including the Commission's concept release on harmonization of securities offering exemptions that we issued in June, the staff's comprehensive review of the definition in 2015, as well as prior Commission proposals, recommendations of our advisory committees and small business forums, and public comment.

Today's proposals are an important step in our ongoing efforts to assess the private offering framework as a whole, including ways to increase opportunity for more of our Main Street investors to participate in the private capital markets. I expect more to come in this space in the coming months, including examining whether appropriately structured funds can facilitate greater Main Street investor access to

private investments, particularly as a component of an investment portfolio that is analogous to the portfolio of a well-managed pension fund.

I believe it is important to focus on solutions that provide access to investment opportunities on substantially the same terms as those that would be available to institutional investors with protections—including alignment of interest between individuals and institutions, and transparency—that are akin to the protections in our public market. This alignment of interest is extremely important to me and I ask that commenters please recognize that I and many of my colleagues are skeptical of approaches that do not have either (1) demonstrated financial sophistication of the individual investor or (2) clear, ongoing alignment of interest with the sponsor.

I want to commend the staff for their work on today's proposal. Before I turn it over to Bill Hinman, for the staff's presentation of the recommendation, I would like to acknowledge members of the staff that contributed to this effort:

- From the Division of Corporation Finance: Bill Hinman, Betsy Murphy, Jennifer Zepralka, Charles Kwon, Charlie Guidry and Michael Seaman.
- From the Division of Economic and Risk Analysis: S.P. Kothari, Hari Phatak, Vlad Ivanov, Matt Wynter and Andrew Glickman.
- From the Office of the General Counsel: Bob Stebbins, Bryant Morris, and Connor Raso.
- From the Division of Investment Management: Dalia Blass, Sarah ten Siethoff, Melissa Gainor, Jenny Songer, Larry Pace, Benjamin Tecmire, Melissa Harke, Mark Uyeda and Matt Cook.

Now I will turn it over to Bill and S.P. for the staff's recommendation. Following the staff's presentations, I'll ask Commissioner Jackson, Commissioner Peirce, Commissioner Roisman and Commissioner Lee for any remarks.

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Consideration of the PCAOB Budget

The final item on today's agenda is the staff's recommendation to approve the proposed 2020 budget and accounting support fee for the PCAOB.

The Commission oversees the PCAOB and is responsible for approving the PCAOB's annual budget and accounting support fee. Chairman Duhnke, other Board members DesPartes and Jurata and staff of the PCAOB are here today as we consider these matters. Commissioner Lee is not participating in consideration of this item.

Continued coordination efforts between the PCAOB and the Commission are essential. In the past year, the PCAOB continued to execute transformation initiatives seeking to align its operations and programs with the objectives outlined in its strategic plan.

I would like to thank the PCAOB for the continued engagement in transformation initiatives across the organization to evaluate current programs and implement change where warranted. I appreciate the changes made to date; they are important to our shared goal of improving audit quality. I acknowledge change takes time, but it is important the Board continues to focus on effectively and efficiently executing on its transformation initiatives in order to provide responsive oversight. I am pleased that you have made selections for the leadership positions at the top of the office and division levels. This is critical to fully execute the transformation initiatives.

I would also like to thank Chairman Duhnke, Board members Jay Brown, James Kaiser, Duane DesParte and Rebekah Goshorn Jurata, and the PCAOB staff for all you do to enhance audit quality through your vital work.

As I have often said, high-quality, reliable financial statements are the bedrock of our capital markets. The PCAOB plays a critical role in promoting audit quality that underpins the credibility of financial statements. I remain committed to supporting the work you perform on a daily basis in furtherance of the public interest.

Lastly, I want to thank the following staff at the SEC, who all worked constructively on the review of the PCAOB's 2020 budget and accounting support fee:

- From the Office of the Chief Accountant: Sagar Teotia, Marc Panucci, Giles Cohen, Ryan Wolfe, Godfrey Murangi, Matt Hodder, Peggy Kim, and Mark Jacoby;
- From the Office of Financial Management: Caryn Kauffman, Rick Taylor, Nikki Puccio, and Crystal Willis;
- From the Office of the General Counsel: Bryant Morris and Omid Harraf; and
- From the Office of Information Technology: Charles Riddle and Bobby Sharma.

I will now turn to Sagar Teotia, the SEC's Chief Accountant, for his remarks, to be followed by remarks from CFO Caryn Kauffman, and Chairman Duhnke.

[1] I would like to commend the SEC's teams for their extensive work on these actions. In particular, I want to thank (1) *from the Division of Trading and Markets*, Brett Redfearn, Lizzie Baird, Mark Wolfe, Carol McGee, Andrew Bernstein, Laura Compton, Katia Imus, Emily Westerberg Russell, Joanne Rutkowski, Devin Ryan, Bonnie Gauch, Joseph Levinson, Edward Schellhorn, Michael Gaw, Justin Pica and Ajay Sutaria; (2) *from the Division of Economic and Risk Analysis*, S.P. Kothari, Chyhe Becker, Narahari Phatak, Lauren Moore, Y.C. Loon, Burt Porter, Claire O'Sullivan, Diana Knyazeva, Sai Rao and Anne Yang; (3) *from the Office of Compliance Inspections and Examinations*, Pete Driscoll, Dan Kahl, Jennifer McCarthy, Christine Sibille, and Carrie O'Brien; (4) *from the Office of the General Counsel*, Bob Stebbins, Meridith Mitchell, Lori Price, Robert Teply, Donna Chambers, William Miller, and Maureen Johansen; (5) *from the Office of International Affairs*, Raquel Fox, Katherine Martin, Jonathan Balcom, Kathleen Hutchinson, Natasha Kaden and Stephen Benham; and (6) *from the Office of the Chief Accountant*, Giles Cohen.

[2] *API v. SEC*, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013).

[3] H..J. Res. 41, 115th Cong. (2017) (enacted).

[4] See, e.g., Adam M. Finkel and Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 Administrative Law Review 707 (2011).

[5] Under the CRA, the only way an agency may reissue the same rule that had earlier been disapproved is if a new law is enacted authorizing the agency to do so. See 5 U.S.C. 801(b)(2).