SEC Chairman Clayton's first speech on deregulation plans

The Securities and Exchange Commission (SEC) should consider the cost of complying with new rules as part of its cost-benefit regulatory analysis, chairman Walter J. ("Jay") Clayton said on Wednesday.

"Shareholders and customers bear these costs, which is something that should not be taken lightly, lest we lose our credibility as regulators," Clayton said in speech at the Economic Club of New York.

"Vaguely worded rules can too easily lead to subpar compliance solutions or an overinvestment in control systems. … [the SEC] needs to make sure at the time of adoption that we have a realistic vision for how rules will be implemented as well as how we and others intend to examine for compliance," Clayton added.

The event was the first public appearance by Clayton, a veteran Sullivan & Cromwell securities lawyer, since the Senate on May 9 confirmed his appointment to the post by President Donald Trump.

Clayton's remarks reflect the Trump administration's regulatory rollback agenda, but audit, compliance and legal professionals have learned hard lessons that this analysis can be much more complicated than a profit-and-loss spreadsheet. Savings by reducing oversight over a contract with a foreign governmental body can be dwarfed by the enforcement costs associated with alleged bribery.

Moreover, it is uncertain how the Department of Justice, often the SEC's partner in foreign bribery investigations, will interpret the policies offered in September 2015 by then-Deputy Associate Attorney General Sally Yates,

A Wide-Ranging Address

Clayton covered a wide range of topics in his remarks and in talking with former SEC commissioner Annette Nazareth, a Davis Polk & Wardwell law partner, and Fox Business anchor Maria Bartiromo.

A key upcoming SEC focus will be on making it easier for retail investors to participate in the growth opportunities of U.S. businesses. "Our analysis starts and ends with the long-term interests of the Main Street investor," particularly "Mr. and Mrs. 401(k)," Clayton said.

This will include working with the Department of Labor to develop common ground for a fiduciary duty covering all advice to retail investors, not just this in ERISA-type plans, as the DoL has done.

It will also include creating a *Fixed Income Market Structure Advisory Committee*, similar to the one the SEC has for equity markets, which Clayton would like to extend past its expected expiration next month. The fixed income group is especially important for current and future retirees who depend on reliable sources of income for living and potentially rising medical and personal care expenses.

“As waves of Baby Boomers retire every month and need investment options, fixed income products, which are viewed as a stable place to store hard-earned money, will attract more and more Main Street investors. Yet, many of those investors may not appreciate that fixed income products are part of markets that differ significantly from the better-known equities markets. The Commission must explore whether these markets are as efficient and resilient as we expect them to be, scrutinize our regulatory approach, and identify opportunities for improvement,” Clayton said.

The SEC will also continue working with other law enforcement and regulatory partners to identify and halt pump-and-dump and other schemes that look to separate workers and retirees from their nest eggs, Clayton added. Indeed, on the same day, the SEC charged 13 people for cold calling scams that bilked over 100 elderly victims of $10 million by high-pressure sales tactics, (see Reg-Track summary).

But these efforts alone will not help retail investors unless they can participate in the securities markets, Clayton warned, noting that for a variety of reasons, many start-ups stay private, and out of reach for non-accredited investors, for longer than they have done in the past.

Some, the so-called “unicorns,” avoid the public markets even when venture capital and other private investors pin multi-billion dollar valuations on them, and as small companies that the JOBS and FAST Acts were designed to help, continue to struggle to find adequate financing.

Saying that some of this reticence may be due to disclosure requirements, Clayton would like the SEC to develop a framework that is less burdensome on would-be issuers yet is more informative to retail investors and easier for them to apply in making decisions.

Clayton also noted the potential threats to exchanges, market participants, companies and investors posed by increasingly sophisticated cybersecurity breaches and tactics, and the need to holistically protect against them.

“Information sharing and coordination are essential for regulators to address potential cyber threats and respond to a major cyberattack, should one arise. The SEC is therefore working closely with fellow financial regulators to improve our ability to receive critical information and alerts and react to cyber threats,” he said.

Overall, Clayton broke little new ground. Instead, he sought to comfort market participants and investors worried that the change in administration will adversely affect them or cause major disruption.

“I believe in the regulatory architecture that has governed the securities markets since 1933. It is abundantly clear that wholesale changes to the Commission’s fundamental regulatory approach would not make sense,” he said.

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