



SENATE BANKING COMMITTEE HEARING

OVERVIEW

For questions please contact [Graham Harper](#) or [Kwon Park](#) at (202) 547-3035.

Today, the Senate Banking Committee held a [hearing](#) to consider the nomination of Jay Clayton to be Chairman of the Securities and Exchange Commission (SEC or Commission).

Key Takeaways

- As technology continues to shape market structure, Clayton believes that the Commission should continue its review of equity market structure through the Equity Market Structure Advisory Committee (EMSAC).
- Clayton indicated that regulatory compliance costs and complexity have made companies reluctant to go public. He committed to working with the Congress, fellow Commissioners, and the SEC staff to pursue regulatory improvements to make the IPO process more appealing for companies.
- The next steps in the confirmation process will be a vote by the Senate Banking Committee followed by a vote of the full Senate (neither of which has been scheduled).

SUMMARY

Opening Statement and Testimony

[Chairman Mike Crapo \(R-ID\)](#)

- Mr. Clayton has already indicated that he will focus on capital formation. Recently, this Committee marked up several bipartisan securities bills, and we encourage Mr. Clayton to help us identify other areas which could use legislative improvement.
- The SEC must ensure that stock market rules and regulations are still appropriate, given that most of them were promulgated in a time where technology was much less advanced.
- The SEC should conduct retrospective reviews of its own regulations to ensure they are working out as intended and are still appropriate – in line with the President’s Executive Order on regulatory review. Additionally, it is important for the SEC to conduct robust cost benefit analysis (CBA).

[Ranking Member Sherrod Brown \(D-OH\)](#)

- The SEC should think about ways to improve investor protection, strengthen accounting rules and financial statements, and better enforce violations of law and bring real accountability for misconduct.
- The pay ratio rule, the disclosure of corporate political spending, the fiduciary rule, and the anti-corruption efforts around the natural resources and mining industries are important.

[Jay Clayton, Nominee for SEC Chairman](#)

- Based on all of my experiences, nationally and internationally and on Wall Street and Main Street, I firmly believe that:

1. Well-functioning capital markets are important to every American;
2. All Americans should have the opportunity to participate in, and benefit from, our capital markets on a fair basis, including being provided accurate information about what they are buying when they invest; and
3. There is zero room for bad actors in our capital markets.

· It is clear that our public capital markets are less attractive to business than in the past. As a result, investment opportunities for Main Street investors are more limited. Here, I see meaningful room for improvement and am excited to work with Congress, my fellow Commissioners, and the SEC staff to pursue those improvements, and in doing so, will always be vigilant to ensure that the Commission is steadfast in protecting investors.

Discussion

Equity Market Structure

Crapo: Should the Commission continue its review of current equity market structure – in a data-driven manner?

Clayton: Yes. Technology continues to change market structure, and the Commission should continue its ongoing analysis and review.

Warner (D-VA): Will you work with the Committee on market structure pilot programs and maintain the EMSAC?

Clayton: EMSAC is doing a good job and has identified the fact that the current market structure is complex. EMSAC should continue to examine market effectiveness and fairness.

Dodd-Frank Act

Brown: What aspects of Dodd-Frank will you attack? Has anyone on the transition team made suggestions on specific Dodd-Frank changes or possible repeal? *Clayton:* Dodd-Frank review should focus on whether existing rules are achieving their objectives. The Administration has not made any specific recommendations on Dodd-Frank. My interactions with the Administration have been quite limited since the nomination.

Schatz (D-HI): 20% of Dodd-Frank mandates remain unfinished – what is the legal basis for not finalizing rules required under the statute? *Clayton:* Statutorily mandated rulemakings should proceed.

Cortez Mastro (D-NV): Will you commit to reining in the use of forced arbitration clauses as required by Dodd-Frank?

Clayton: I will not prejudice the issue by making any commitments.

Capital Markets

Crapo: Any specific ideas to improve the IPO process? *Clayton:* Easing the onramp process and making it less costly upfront to become a public company. Rules for emerging growth companies (EGC) have made it easier for companies to go public.

Corker (R-TN), Tillis (R-NC) and Perdue (R-GA): Why are fewer companies going public than in previous years? *Clayton:* Going public during the middle-stages of a company's lifecycle is very difficult and costly. We need more companies going public during the mid-stages to encourage more people to participate in the markets and to share in its successes. We have to reduce the regulatory burdens of becoming a public company. Complex regulations create loopholes – regulations need to be practicable and less complex.

Toomey (R-PA): What is the main reason companies are reluctant to go public? Will you work with Congress to implement legislation (i.e. crowdfunding, Reg A+, etc.) as originally intended? *Clayton:* Regulatory compliance costs. Yes, I am committed to working with Congress to ensure the Commission gets the rules right.

Heitkamp (D-ND): Will you create a 10-member Capital Markets Advisory Committee if confirmed? If so, please include individuals from rural towns. Do you support the American Innovators Act to raise the number of investors that can

participate from 100 to 250? *Clayton:* Yes, I am committed to find ways to improve access to capital for small businesses.

Potential Conflicts

Crapo: Thoughts on potential conflicts with former clients? *Clayton:* To the extent recusals are warranted, I have discussed the issue with the SEC ethics and government ethics offices. If recused, I believe the other Commissioners are able to handle the matters to good effect.

Brown: How will you ensure the SEC's independence in matters impacting the personal businesses of Administration officials? Which Trump Administration officials did you communicate with prior to your nomination? *Clayton:* If confirmed, I am committed to showing no favoritism to anyone. Prior to nomination, I met with several members of the transition team and interviewed with President Trump, Reince Priebus, and Steve Bannon.

Van Hollen (D-MD): Goldman Sachs recently settled for \$5 billion on charges related to selling shady mortgage-backed securities – did you represent Goldman in any of these transactions? *Clayton:* No, mortgage-backed securities were not part of my practice.

Warren (D-MA): How effective will the SEC be if the Chairman is recused from nearly every enforcement case, and a deadlock occurs (with the other Commissioners voting along party lines)? *Clayton:* The Commission has almost always voted unanimously to pursue enforcement matters. My recusal does not mean there will always be a deadlock within the Commission. (Note: Senator Warren also questioned Carl Ichan's role as an advisor to the President as it poses potential conflicts and could trigger a violation of insider trading laws)

Schatz (D-HI): Will you consider a return to Sullivan & Cromwell after your tenure? *Clayton:* I have severed all ties to the firm and divested in all financial assets required by law. I am not precluding a return to the firm because that would set a bad precedent, but I am committed to this job if confirmed.

Cortez Mastro (D-NV): Once an enforcement case concludes, should the public be aware if a Commissioner is recused and what triggered the recusal? *Clayton:* The Commission currently has a policy for disclosure of recusals. As for the reason that triggered the recusal, I will look into whether any particular reason can be disclosed.

Enforcement

Heitkamp (D-ND): Should executives acting recklessly (but not intentionally or knowingly) be held criminally liable for activity causing significant harm to the financial system? *Clayton:* This is a question for the courts and the legislature – if this is the mens rea standard mandated by law, I will vigorously enforce the law. I believe that individual prosecution has a significant impact on behavior, specifically with regard to white collar crime.

Cortez Mastro (D-NV): Should executives be held strictly liable for corporate wrongdoing under a recklessness standard? *Clayton:* Companies should be held accountable if they make illicit gains and those profits should be disgorged; however, regulators should keep in mind that shareholders do bear these costs. Imposing strict liability without mens rea is a big step to take.

Kennedy (R-LA) and Heller (R-NV): When investors lose cash or become victims to financial fraud, what do you envision will afford these victims fair treatment should they turn to SIPC for help? *Clayton:* SIPC has denied coverage in particular instances of fraud. I will work on ways to assist victims of financial fraud. Regulators should utilize technology more efficiently to better monitor individual financial advisors and brokers.

Rounds (R-SD): We should not assume a firm or individual is guilty because of a yes or no vote on whether to pursue an enforcement case. *Clayton:* I have zero tolerance for bad actors and believe individual accountability is extremely important in setting the tone for the industry. I am an independent but do not agree with Senator Warren that Republicans are more lax on enforcement.

Menendez (D-NJ): Acting Chair Piwowar has taken steps to revoke delegated subpoena authority by restricting it to the Enforcement Division Director - do you think the SEC staff abused its delegated subpoena authority? *Clayton:* My experience in defense work is very limited, and I do not have a view due to limited inside knowledge on the issue.

Reed (D-RI): Are you open to increasing the civil monetary penalty threshold? *Clayton:* I am willing to study this issue.

Brown: How would you advise a client who is subject to the Foreign Corrupt Practices Act (FCPA), trying to engage in business with a country well-known for corruption? *Clayton:* To think long and hard about whether that client wants exposure to similar oversight and enforcement of other OECD countries.

Commission Actions and Resources

Shelby (R-AL): Is there a need for comprehensive CBA prior to any rulemaking? *Clayton:* Yes, economic impacts are very important, not only quantitatively but also qualitatively. Rigorously examining a rule's impacts and its far reaching costs are a very important aspect of the Commission's work.

Menendez (D-NJ): Acting Chair Piwowar unilaterally reopened the comment period for the CEO pay-ratio rule – do you agree with his actions? *Clayton:* As Acting Chair that was his decision – I am unaware of his interactions with staff and what motivated him.

Reed (D-RI): How will you cope with an inadequate budget? *Clayton:* In many instances, CEOs face this problem and act accordingly.

Heller (R-NV): Will you commit to working with state regulators on particular issues impacting their industries and states? *Clayton:* Yes.

Corporate Disclosures and Governance

Van Hollen (D-MD): Thoughts on political spending disclosure? *Clayton:* The touchstone to mandated disclosure is "materiality." A number of companies are voluntarily making political disclosures, and shareholders may access this information through resolution or the proxy process. If confirmed, I will think about a federal mandate to require political spending disclosure.

Heller (R-NV): Will you commit to looking at making necessary disclosure changes (Industry Guide Seven) to keep the U.S. mining industry competitive? *Clayton:* Yes.

Reed (D-RI): Should companies exposed to climate risk be required to disclose it? *Clayton:* The SEC issued guidance in this area – public companies should be mindful of that guidance when crafting their disclosure statements.

Donnelly (D-IN): Thoughts on stock buy-backs? *Clayton:* There are certain instances when stock buy-backs are appropriate and others where they are not.

Warner (D-VA) and Reed (D-RI): Should companies be required to disclose whether a cybersecurity expert is a member of their board (citing legislation that was introduced requiring this type of disclosure)? *Clayton:* The materiality standard should apply when considering this mandate.