



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trump's Wall Street Ally Pick Signals Enforcement-Light SEC

By **Carmen Germaine**

Law360, New York (January 4, 2017, 10:36 PM EST) -- President-elect Donald Trump's selection of Sullivan & Cromwell LLP partner Jay Clayton to chair the U.S. Securities and Exchange Commission signals a major shift for the Wall Street watchdog, as experts say the M&A attorney is likely to turn the agency's focus from enforcement both domestically and internationally to cutting the rules companies find most irksome.

Clayton, who focuses his practice on mergers and acquisitions and capital markets offerings, is the latest Trump pick with ties to the New York financial services industry. If confirmed, he'll be the first SEC chair with no government experience since David Sturtevant Ruder left his post as dean of Northwestern School of Law to head the agency in 1977.

Coupled with Clayton's deep experience with transactional work — unusual for an SEC chair — experts said corporate America is eager to see how the Sullivan & Cromwell attorney could bring a different perspective to the agency that shifts focus from departing SEC Chair Mary Jo White's "broken windows" style of enforcement to shedding regulatory burdens.

"Unlike Mary Jo White, who was a former prosecutor out of the Southern District of New York, I think his nomination sends somewhat of a signal that the Trump administration is looking for more of a capital raising, deal-making friendly head of the SEC and perhaps less of an enforcement focus," said David Chase, a partner at the Law Firm of David R. Chase PA and a former SEC prosecutor.

Clayton has worked on some corporate governance and regulatory matters, including representing Italian oil and gas company Eni SpA in a Foreign Corrupt Practices Act investigation conducted by the SEC and the U.S. Department of Justice, but focuses his practice on M&A transactions and capital markets financing. He's represented clients including Goldman Sachs and Barclays Capital, and led the team representing the underwriters on Alibaba Group Holding Ltd.'s historic initial public offering, which was the largest-ever IPO.

Former SEC Division of Corporate Finance Director Meredith B. Cross said that, despite his lack of public enforcement work, Clayton's M&A and capital markets work means he's already deeply familiar with the ways public companies most typically interact with the SEC. That experience sets him apart from previous SEC chairs in a way that has companies looking forward to his tenure, she said.

"When I've been talking to my clients today, they're just excited to hear that the chairman will be somebody who has done this kind of work and understands the impact on

companies from working on matters. That part is new," said Cross, now a partner at WilmerHale. "That is not a negative against prior chairmen, it's just different."

But experts also noted that Trump's selection of a transactional corporate lawyer suggests the agency will move away from the more aggressive enforcement work it did under White, who was the first woman appointed as U.S. attorney for Manhattan.

Jacob S. Frenkel, chair of the government investigations and securities enforcement practice at Dickinson Wright PLLC and a former SEC prosecutor, argued that the agency in recent years has moved away from protecting investors and fostering capital formation. Clayton's nomination could be a way to correct the SEC's "misplaced obsession and focus on enforcement," Frenkel said.

"Nothing in the agency's legislative history establishes the SEC as a law enforcement agency," Frenkel said. "So the selection of a deal and governance-centric, sophisticated capital markets lawyer is refreshing to restore the focus to the agency's fundamental missions."

As far as what enforcement programs could be on the chopping block in the next months and years, experts said there's one big hint — Clayton served as chair of the drafting committee for a 2011 paper titled "The FCPA and Its Impact on International Business Transactions — Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?"

The paper, published by the New York City Bar Association, argued that the U.S. is pursuing a "virtually stand-alone" approach to fighting foreign corruption that places companies subject to the FCPA at a disadvantage to foreign competitors that don't have securities on U.S. exchanges.

The FCPA raises costs for companies seeking to transact with foreign businesses by increasing the expense of due diligence, and discourages companies from transacting with foreign counterparts that haven't been subject to FCPA scrutiny, the paper argued.

The article also suggested that the FCPA could even "exacerbate the problem of overseas corruption" by discouraging U.S.-regulated firms from entering jurisdictions with significant corruption risks and potentially allowing less transparent companies "to dominate those jurisdictions."

Of course the article, written by a committee over five years ago, doesn't necessarily reflect Clayton's exact views. Experts noted that it was written during a period of intense lobbying before the DOJ and SEC issued their FCPA guide.

In fact, Harvard Law School Professor Matthew C. Stephenson noted, Clayton won't even be the first agency pick connected with FCPA criticism — current DOJ Fraud Section Chief Andrew Weissman helped pen a very similar treatise on behalf of the U.S. Chamber Institute for Legal Reform in 2010.

Stephenson said he's still disturbed by the idea of "putting someone who basically called for a substantial weakening of the FCPA in charge of FCPA enforcement," but said Weissman's appointment hasn't led to a dramatic change in policy.

Shearman & Sterling LLP partner Philip Urofsky noted that Clayton will be in a different position as head of a regulatory agency than as a lawyer in private practice writing a paper to serve the interests of his clients.

"It's not ultimately clear that this will translate directly into new policies at the SEC," Urofsky said.

But if Clayton's views on the FCPA do echo those of the 2011 paper, he may find himself in good company with the incoming president. Trump called the law "horrible" in 2012, and said that it harmed American business interests.

Stephenson said that, given Trump's statements on the FCPA and anti-corruption laws in general and the kind of sentiment voiced in the paper that the act hurts American companies, there are legitimate concerns that the act could become a tool for retaliating against foreign companies.

Even more worrisome, Stephenson said, it's possible that the FCPA could be used to aggressively target companies viewed as adverse to the Trump administration, while letting other companies pass under the radar.

"That I think is not at all a ridiculous concern to have," Stephenson said. "Certainly we see that pattern in other countries, and there's evidence that even in the U.S. there can be, and has been, partisan enforcement of the anti-corruption laws."

But Urofsky said that many of the concerns voiced in the paper have already been alleviated, especially as foreign regulators in recent years have stepped up efforts to enforce their own anti-corruption laws.

And even if Clayton does still want to rein in FCPA enforcement, Urofsky said, he may not be able to just walk away from clear statements from SEC staff regarding what constitutes a failure of internal controls under the act.

"You can't completely do an about-face on that, so it's not like we're going to see an abrupt U-turn on enforcement policies," Urofsky said. "But we may see a downgrading of the priority of these cases at the SEC."

Apart from the FCPA, experts said that Clayton will likely pull back on enforcement in other areas as well. Experts said he will probably ease up on the "broken windows" style of policing and focus more on cases involving investor harm.

Chase suggested Clayton may also reduce the SEC's dependence on its administrative forum. The agency significantly increased the use of its in-house court after the Dodd-Frank Act was passed, but critics have argued the administrative judges are biased in favor of the agency and Republican lawmakers have proposed allowing respondents to choose their forum. The Tenth Circuit also ruled in late December that the in-house judges are serving unconstitutionally because they are hired rather than appointed by the president or the commission.

"My sense would be, particularly with a Republican president and Congress, you may see an effort to roll that back a little bit," Chase said.

But experts said that, apart from modest rollbacks, Clayton is unlikely to gut the enforcement program — in part because, as Cross noted, no SEC head wants to take the risk of missing a major investor fraud.

Instead, experts expect Clayton to simply shift the agency's focus to matters of corporate finance reform. The release announcing his nomination hinted as much, saying Clayton would "unleash the job-creating power of our economy" by encouraging investment.

In a statement on the nomination, Trump said Clayton would "ensure our financial institutions can thrive and create jobs while playing by the rules at the same time," and again pledged to "undo many regulations which have stifled investment in American businesses."

Cross said that Clayton will be well-equipped to hit the ground running on disclosure and other corporate finance issues if confirmed, considering his background in capital markets offerings.

"There's a lot of talk about making it less expensive to raise capital, and I think since he is intimately familiar with the capital raising rules, he will have a good perspective on where you can reduce burdens without threatening investor protection," Cross said.

One initiative Clayton will likely continue is the SEC's efforts to modernize its disclosure requirements. Continuing that process could prove thorny — White attracted heated criticism for the disclosure modernization plans from Sen. Elizabeth Warren, D-Mass., who claimed the SEC chair had an "anti-disclosure agenda" — but Republican lawmakers have been supportive of efforts to streamline the requirements.

Clayton will also no doubt take a second look at the rulemaking ushered in by Dodd-Frank, which is a favorite target of Trump. Many Dodd-Frank-mandated rules, including requirements that companies disclose whether certain "conflict minerals" contained in their products originated in the Democratic Republic of the Congo or neighboring countries and outline how their CEO's pay compares to the median pay for other employees, have attracted criticism from Republican lawmakers.

Frenkel said that, while no investor favors any form of slave labor or conflict like that associated with minerals mined in the Congo, the conflict minerals rule and similar disclosure requirements are politically driven and frustrate capital formation without increasing investor protection, and said rethinking those types of rules will encourage a "welcoming and forgiving capital market system."

"It's these types of disclosures that are unnecessarily burdensome to well-run micro, small and midcap companies," Frenkel said.

But Cross said that Clayton won't be able to do away with those requirements on day one. He may be able to step back enforcement of some Dodd-Frank-mandated rules, with uncertain results, but she said actually taking them off the agency's books will require congressional action.

In the meantime, Cross said, everyone in the financial industry will be waiting to see how a transactional attorney will approach the SEC's top post.

"It's interesting to have somebody as chair where that's been his lifeblood," Cross said.

--Editing by Philip Shea and Mark Lebetkin.