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DISCLOSURE

SEC Should Keep Focus on Enforcement, Disclosure Effectiveness, WilmerHale's Cross Says

Meredith B. Cross—a partner at Wilmer Cutler Pickering Hale & Dorr LLP in Washington and a former director of the Securities and Exchange Commission's Division of Corporation Finance—tells Bloomberg BNA's Susan Bokermann in a recent interview that SEC chair nominee Jay Clayton shouldn't ease up on enforcement. Cross also discusses likely challenges for the SEC and potential rollback of the Dodd-Frank Act under the Trump administration.

BLOOMBERG BNA: What do you think will be the top three or four issues the SEC will face in 2017?

Meredith Cross: It's very difficult to predict what [chairman nominee Jay Clayton's] priorities will be. Everybody is speculating about that. It will be important for him to establish that he will continue to be very interested in the enforcement program. There are some people who are hoping that this will be lighter touch enforcement, and I think that those people are not alone. I agree that it would be better to get away from the ''broken windows'' approach, but at the same time it's very important that the commission have some presence in all the different areas where enforcement is important.

One of the things that happens in a deregulatory environment is that a lot of fraud pops up. I think he's going to need to balance the much-needed deregulation efforts with making sure that there's a good presence across the waterfront in the different areas where there could be problems.

The commission will face a lot of talk about rolling back Dodd-Frank. That would be a very complex thing to do. Dodd-Frank has so many sections of so many complicated topics, and the idea that you just roll it back and it will relieve a great burden is not necessarily the case. I think he'll look very carefully at the things that are still on the commission's agenda to see what he will have to do about those, and a lot of it will be driven by Congress.

BBNA: Do you think there are particular rules or proposed rules that will be specifically targeted?

Cross: One rule that the corporate community would like to see at least slowed and revisited is the CEO pay ratio disclosure rule. That's a very burdensome disclosure to put together. It's now in effect, but the first disclosures don't happen until 2018.

Meredith B. Cross is a partner in Wilmer Cutler Pickering Hale & Dorr's Transactional and Securities Departments, and a member of the Corporate Practice and Strategic Response Group. Ms. Cross advises public companies and their boards on disclosure and other corporate finance securities law and corporate governance matters. She handles matters for companies with the Securities and Exchange Commission, including no-action letters, financial statement waiver requests, and disclosure and financial statement reviews by SEC Division of Corporation Finance staff.

Ms. Cross rejoined the firm in 2013, after having served as director of the Division of Corporation Finance since 2009.

BBNA: What about some of the social disclosure aspects of Dodd-Frank?

Cross: My staff and I wrote the Congo conflict minerals rule, the mine safety and the resource extraction rules. Those are interesting because they are mandated by the statute. [Clayton] could delay [the resource extraction rule] if he thought it needed to be delayed. [Republican lawmakers have since said they will revoke the SEC's resource extraction rulemaking.]

[Clayton] could ask the commission to suspend the conflict minerals rule in some way, but if I were in his shoes I would wait to see what Congress wants to do. The commission did what it was required to do, courts examined it and determined that the mandatory ''not-conflict free'' language was unconstitutional, but they upheld the rest of it. So, at this point saying, ''No, we're not going to have that rule anymore,'' without Congress coming in and saying you shouldn't have it, wouldn't be advisable in light of the statutory mandates.

The commission still hasn't done pay-for-performance, the hedging disclosure or clawbacks yet. If I had to predict, they'd likely be re-proposals, and I don't think [Clayton] will be in a hurry to do them. They were pretty detailed proposals and they got a lot of comments. I would expect he'll want to put them back out for comment and revise them in accordance with the majority of the commission once he's got one in place.

BBNA: Do you think that things will advance more slowly given the open seats on the commission?

Cross: I would think so, but it's completely speculation. [Clayton] will want to get some consensus I suspect, at least within the Republican party members on the commission, and perhaps more. Right now his consensus would be with just [acting SEC Chairman Michael Piwowar], and [Piwowar] is pretty much in the opposite position from [SEC Commissioner Kara Stein].

BBNA: Do you think that Carl Icahn's executive advisory role in the new administration will have any influence over the commission?

Cross: That's an interesting question. His advisory role is in the administration, and the SEC is not part of the administration, it's an independent agency. Even when I was there and it was all one party, the administration did not weigh in too much on what the SEC should do. They respected the independent nature of the agency. [Icahn's] views will be known, and that will balance out some of the views of the corporate community.

In terms of deregulation, I expect there will be a lot of activity on the small business side. There are things there that could be done that would not cause a lot of investor-protection concerns and may actually take away some of the impediments. So maybe they'll make it easier for them to use Rule 701 [under the 1933 Securities Act] for employee offerings before you're public, or maybe they'll further loosen some of Regulation D, on top of the prior changes to loosen up general solicitation under the JOBS Act.

The one area that I think could get a lot of attention—we used to call them the unwashed masses—the companies that are neither small business nor WKSIs [well-known, seasoned issuers]. There are a whole lot of companies in that middle group that don't get the benefit of WKSI, but they don't get the small business rules either. They are pretty small cap companies, yet they get treated like large companies. I think there will be a lot of push to help those companies.

BBNA: Do you think there will be any shift with the new commission regarding sustainability disclosures?

Cross: I wouldn't expect that they would move forward to mandate those types of disclosures. I think that will probably stay in the private sector. I think SASB [the Sustainability Accounting Standards Board] is doing good things in providing a more uniform framework so that if companies want to provide the disclosure and their investors want it, they can look to the standards that SASB has set.

[Michael Bloomberg, founder of Bloomberg BNA's parent company Bloomberg LP, chairs SASB's board.]

BBNA: Do you anticipate a particular focus for the SEC Division of Corporation Finance for 2017?

Cross: I think they'll keep working on the disclosure effectiveness project. Some fear that this project is kind of a wolf in sheep's clothing. Those people worry that streamlining will take away disclosures that companies would otherwise have to give. I think what the commission really needs to do, which they are trying to do, is look at the information that is required and determine if it's actually still useful. They need to look at how it is presented and updated. Unfortunately, it's the thing that gets set aside every time there is a problem because it's not a crisis.

One of the questions [for the new commission] will be whether there is something bigger picture that they could do. I don't know what it would be, but [Clayton] may have some ideas.

I've always wanted there to be some new, revamped version of Edgar. A system that allowed you to go look at a company page and click around and find their most recent quarterly results, who their executives are—actually find useful things in a rational way. The way [Edgar] is now, it's a dinosaur. There are a lot of issues you could focus on in fixing it, but I would focus on the presentation. You could save companies a ton of money with not having to repeat things.

I also think deregulation for smaller companies will be a priority [for the division]. Helping capital formation for smaller companies seems highly likely to be on the agenda.

BBNA: Do you think President Trump will be good or bad for the SEC going forward?

Cross: The SEC is an independent agency, and I hope it remains fiercely independent. The biggest misconception about the SEC is that it's part of the administration. It's not. If anything, it owes itself to Congress because Congress funds it. [President Trump] may have ideas, and those ideas will certainly be expressed, and they may have an impact on how the commission goes about what it does.

The political winds are what they are, but the agency, even when it's having internal debates and internal partisanship seems hopeless, it still wants to protect investors and facilitate capital formation, and everybody who goes there comes to feeling that as a religion. The real answer is that [President Trump] won't be good or bad. The agency will continue to do great things.

   ISSN 2330-6300