
SEC Chairman Shares Upcoming SEC Rulemaking and Other Priorities at the 45th Annual Securities Regulation Institute

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Earlier this week, SEC Chairman Jay Clayton and members of the SEC Division of Corporation Finance discussed a number of topics relevant to public companies at the 45th Annual Securities Regulation Institute, which was chaired by WilmerHale Partner Meredith B. Cross. Kicking off the program, Chairman Clayton delivered opening [remarks](#) and participated in a Q&A session with Ms. Cross. Addressing issues old and new, Chairman Clayton offered an update on remaining Dodd-Frank rulemaking mandates and commented on initial coin offerings (ICOs).

Dodd-Frank Rulemaking Mandates. Regarding the outstanding rulemaking mandates under the Dodd-Frank Act, Mr. Clayton affirmed his commitment to finalizing all outstanding rules, noting that “it is the SEC’s obligation to complete the rules mandated by Congress in Dodd-Frank, and I intend to do so.” He noted, however, that the time until completion is a “multi-variable function” with two key variables being the SEC’s “mission-critical demands and the complexity of the mandates themselves.” Mr. Clayton addressed four categories of outstanding rules—the security-based swap regime, executive compensation, specialized disclosure and mandates that have been obviated in part by market developments—offering an update on the roadmap for future progress with respect to each.

With respect to the pending *executive compensation rules*, Mr. Clayton indicated that discussions are underway among the Commissioners and SEC staff regarding the best approach for finalizing these rules, which include clawbacks and new disclosure requirements regarding pay versus performance and hedging by employees, officers and directors. Noting the “already very colorful canvas” on which executive compensation rules are painted and the different views of various constituencies, Mr. Clayton noted that a “serial approach” to implementing these outstanding rules would likely best serve the SEC’s mission. The Chairman also suggested that the themes of the recently-issued pay ratio interpretive guidance, which he characterized as “true to the statutory mandate, practical, and intended to help companies reduce compliance costs,” would inform discussions of the outstanding rulemakings.

Moving beyond the executive compensation rulemakings, Chairman Clayton identified various challenges to the completion of the *specialized disclosure rules*, including divergent views on how

to approach the rules, requirements of the statutory text, the SEC's obligations under the Administrative Procedure Act, compliance requirements with the Congressional Review Act, and challengers standing poised to contest the final rules regardless of the outcome. The Chairman has asked the SEC staff to craft rules for consideration by the Commission that would balance these procedural and substantive limitations, while at the same time satisfying Congress' objectives, and thereby "bring finality to these matters."

Finally, the Chairman noted briefly that in some instances the concerns that spurred rulemaking mandates have been mitigated by market developments, including developments resulting from shareholder engagement, and such developments should inform the SEC's rulemaking priorities. Noting, as an example, that some companies have already publicly disclosed their compensation clawback policies, Mr. Clayton asserted that the SEC's rulemaking efforts should incorporate these "observable developments."

In remarks later in the program, Bill Hinman, Director of the Division of Corporation Finance, mentioned a number of other rulemaking items on the Division's agenda, including proxy plumbing and universal proxy, both of which the staff has stated recently are still "live" rulemakings. With regard to the former, Mr. Hinman mentioned in particular the importance of considering the input of participants in the proxy process.

Initial Coin Offerings. Chairman Clayton reiterated concerns he has expressed in other venues recently about ICOs generally and specifically addressed concerns about the advice being given by some securities lawyers, accountants, underwriters and dealers with respect thereto.

"The SEC is undertaking significant efforts," Mr. Clayton stated, to "educate the public that unregistered securities investments offered by unregistered promoters, with no securities lawyers or accountants on the scene, are, in a word, dangerous." Further, Mr. Clayton has "instructed the SEC staff to be on high alert for approaches to ICOs that may be contrary to the spirit of our securities laws and the professional obligations of the U.S. securities bar." In this regard, Mr. Clayton illustrated two scenarios of concern. First, are instances involving ICOs where lawyers either help structure products and offerings that possess many key features of a securities offering but instead call it an "ICO," a term the Chairman noted sounds "pretty close to an 'IPO,'" or take the position that such products are not securities. Such actions "deprive[] investors of the substantive and procedural investor protection requirements of our securities laws." In the alternative are instances where lawyers take the less definitive "it depends" position when counseling clients and ultimately assist clients with unregistered ICOs where registration under the securities laws likely would be warranted and where clients should be advised that the product offered likely is a security. Mr. Clayton also noted that the SEC is focused on "the disclosures of public companies that shift their business models to capitalize on the perceived promise of distributed ledger technology and whether the disclosures comply with the securities laws, particularly in the case of an offering."

In remarks later in the program, Mr. Hinman and Shelley Parratt, Deputy Director of the Division of Corporation Finance, also discussed ICOs and distributed ledger or "blockchain" technology, noting that these are areas of focus for the Division and that the staff is seeking to help facilitate "thoughtful, compliant" use of such products and technologies.

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