Speech

Opening Remarks at the Securities Regulation Institute

Chairman Jay Clayton

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Thank you for that warm welcome.[1] I am delighted to join you today by videoconference. I know Meredith [Cross] has prepared questions. I look forward to answering those, as well as questions from this distinguished audience. When I was teaching at UPenn law school, the best classes were the ones where students asked difficult, but informed, questions. With Meredith and this audience, I know that I am in for a treat.

Before we get to the question and answer session, I want to take a few moments to highlight two issues: (1) my expectations for market professionals, particularly when dealing with new products or new forms of old products, and (2) the SEC's approach to remaining Dodd-Frank rulemaking mandates. I believe you and investors should know my perspective on these topics, and how that perspective is being influenced by a variety of factors.

Expectations for Professionals

My first message is simple and a bit stern. Market professionals, especially gatekeepers, need to act responsibly and hold themselves to high standards. To be blunt, from what I have seen recently, particularly in the initial coin offering ("ICO") space, they can do better.

Our securities laws – and 80 plus years of practice – assume that securities lawyers, accountants, underwriters, and dealers will act responsibly. It is expected that they will bring expertise, judgment, and a healthy dose of skepticism to their work. Said another way, even when the issue presented is narrow, market professionals are relied upon to bring knowledge of the broad legal framework, accounting rules, and the markets to bear.

Legal advice (or in the cases I will cite, the lack thereof) surrounding ICOs helps illustrate this point. Let me posit a few scenarios. First, and most disturbing to me, there are ICOs where the lawyers involved appear to be, on the one hand, assisting promoters in structuring offerings of products that have many of the key features of a securities offering, but call it an "ICO," which sounds pretty close to an "IPO." On the other hand, those lawyers claim the products are not securities, and the promoters proceed without compliance with the securities laws, which deprives investors of the substantive and procedural investor protection requirements of our securities laws.

Second are ICOs where the lawyers appear to have taken a step back from the key issues – including whether the "coin" is a security and whether the offering qualifies for an exemption from registration – even in circumstances where registration would likely be warranted. These lawyers appear to provide the "it depends" equivocal advice, rather than counseling their clients that the product they are promoting likely is a security. Their clients then proceed with the ICO without complying with the securities laws because those clients are willing to take the risk.

With respect to these two scenarios, I have 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.

I recognize that in some ICOs there is no market professional involved. The SEC is undertaking significant efforts 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.

Before I move on to the next topic I want to raise one more narrow, distributed ledger or "blockchain"-related legal issue by means of a hypothetical. I doubt anyone in this audience thinks it would be acceptable for a public company with no meaningful track record in pursuing the commercialization of distributed ledger or blockchain technology to (1) start to dabble in blockchain activities, (2) change its name to something like "Blockchain-R-Us," and (3) immediately offer securities, without providing adequate disclosure to Main Street investors about those changes and the risks involved. The SEC is looking closely at 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.

Perspective on Remaining Dodd-Frank Mandates

I will now turn to another topic, which has been around for a while and, experience proves, is not easy: finishing rulemaking mandates under the Dodd-Frank Act ("Dodd-Frank"). As many in this room know, including those who devoted substantial time to Dodd-Frank rules while they served at the SEC, if crafting these rules was straightforward, they would be done.

Since arriving at the Commission, I have been working with my fellow Commissioners and the SEC's able and dedicated staff to pursue an agenda that is true to the agency's mission as viewed through the lens of long-term Main Street investors. In the area of rulemaking, this means efficiently allocating the Commission's limited resources to a combination of statutory mandates and the needs of the day (such as the broad dissatisfaction with the current regulatory approach to retail investment advice, which is commonly referred to as the "fiduciary rule"). In other words, how quickly we can complete the remaining Dodd-Frank rules is a multi-variable function and two of the key variables – there are many – are mission-critical demands and the complexity of the mandates themselves.

With that as context, I will try to shed further light on how I believe we should proceed on the remaining Dodd-Frank rules. These rules for the most part fall into four categories, each of which has characteristics that inform how I believe we should approach that category and the specific rules in it.

The first category is the remaining rules to stand-up the security-based swap regime. The SEC has finalized many, but not all, of the Title VII rules that Congress directed it to establish. As we seek to complete the Title VII rules, I believe that final implementation should be done holistically – as a coherent package. The rules are substantially interrelated and this approach should allow for more efficient implementation and internal consistency. I should also note that, in some instances – in part because of statutory variances and differences in products and markets – the SEC's final and proposed rules governing security-based swaps have differed, in some cases significantly, from the rules governing swaps that the Commodity Futures Trading Commission ("CFTC") adopted pursuant to its own Title VII mandates. We are seeking to harmonize our ultimate securities-based swap rules with the CFTC, where appropriate, to increase effectiveness as well as reduce complexity and costs. This requires deliberate and constructive engagement with our CFTC brethren, which I am pleased to report is well underway.

The second category is executive compensation rules for both public companies and SEC-regulated entities. Those rules are challenging for various reasons, including that we are writing on an already very colorful canvas and different constituencies see the rules as serving different, and sometimes inconsistent, goals. Here, as a result of the complexity and scope of the existing executive compensation disclosure regime, as well as the nature of the mandates, I believe a serial approach is likely to be most efficient and best serve the SEC's mission. I am pleased that we recently issued interpretive guidance to help companies comply with the new pay ratio rules. This guidance was true to the statutory mandate, practical, and intended to help companies reduce compliance costs. With those same themes in mind, I am discussing with my fellow Commissioners and the staff how best to address the remaining mandatory executive compensation rules.

The third category is specialized disclosure rules, such as resource extraction disclosure. I do not need to tell you there are many strong and divergent views on how these rules should be approached. I also will remind you that, beyond the statutory text, they pose additional challenges, including how the SEC can meet its obligations under the Administrative Procedure Act and, as various court cases demonstrate, still survive legal challenge. In the case of resource extraction, we also must comply with the parameters of the Congressional Review Act. In short, the task is difficult and it is clear some stand poised to challenge our work, whatever its outcome. Yet that does not relieve us of our responsibility. With that perspective, I have asked the staff to craft rules for consideration by the Commission that meet the objectives of Congress, take into account this array of procedural and substantive constraints, and bring finality to these matters.

The last category, which in some instances overlaps with the others, is mandates for which market developments – including developments resulting from shareholder engagement – have, at least in part, mitigated some of the concerns that motivated the statutory requirements. For example, several companies already have made public their policies regarding compensation clawbacks. Some of these policies go beyond what would be required under Dodd-Frank. We have seen a few companies attempt to claw back compensation from their executives under these policies. Our rulemaking priorities, as well as the rules themselves, should reflect these observable developments.

All that said, it is the SEC's obligation to complete the rules mandated by Congress in Dodd-Frank, and I intend to do so. By necessity, as we – me, my fellow Commissioners, and the staff – develop and finalize the rules we will have to be flexible in timing, in sequence, and in content, because there are many factors beyond our control that can dictate how to apply the agency's limited resources.

Conclusion

In closing, I cannot overstate the importance of the role of those who provide legal advice and other professional services in our markets. Securities lawyers and other market professionals play a fundamental role in protecting American investors, and the thorough provision of your services is essential to the operation of fair, orderly, and efficient U.S. markets. And with respect to outstanding Dodd-Frank rulemakings, let me assure you that the SEC is actively looking for ways to navigate the clear challenges presented and satisfy the statutory mandates.

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[1] My words are my own and do not necessarily reflect the views of my fellow Commissioners or the SEC staff.