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NOMINATION OF JAY CLAYTON

HEARING

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF JAY CLAYTON, OF NEW YORK, TO BE A MEMBER OF THE SECURITIES AND EXCHANGE COMMISSION

MARCH 23, 2017

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NOMINATION OF JAY CLAYTON, OF NEW YORK, TO BE A MEMBER OF THE SECURITIES AND EXCHANGE COMMISSION

THURSDAY, MARCH 23, 2017

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met at 9:33 a.m., in room SD–538, Dirksen Senate Office Building, Hon. Mike Crapo, Chairman of the Committee, presiding.

OPENING STATEMENT OF CHAIRMAN MIKE CRAPO

Chairman CRAPO. This hearing will come to order.

This morning, we will hear testimony on the nomination of Jay Clayton to be Chairman of the United States Securities and Exchange Commission.

Mr. Clayton has extensive expertise in our financial markets as a highly regarded securities lawyer. For decades he has helped companies access our capital markets, increase their ability to invest in the United States, and grow and create jobs.

One area on which Mr. Clayton has already indicated he will focus is capital formation. Capital markets drive innovation and job creation, and access is the lifeblood of our economy.

The JOBS Act helped revitalize the primary markets, and both Congress and the SEC should continue to find ways to help companies go public and allow their investors to share in their success.

Recently, this Committee marked up several bipartisan securities bills, and we encourage you, Mr. Clayton, if confirmed, to help us identify other securities areas which could use legislative improvement.

The SEC has an important three-part mission: protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. Each part of the mission is equally important and should not come at the expense of another. I raise this because the SEC's mission is critical to every U.S. citizen and retiree. Investors should be able to participate in our markets, on fair footing, so that they can pay for life events such as college and save for retirement.

We also need to help investors make sure they have material information to make informed investment decisions. I have repeatedly stressed the need for the U.S. financial system and its markets to remain the preferred destination for investors throughout the world, and the SEC has an important role to that end. I look forward to hearing more from you on how we can help companies

grow, Americans get hired, and investors share in the wealth creation by these companies.

Another important issue that the SEC is tasked with is ensuring that the stock market rules and regulations are still appropriate, given that most of them were promulgated in a time where technology was much less advanced. It is imperative that these rules serve the needs of companies and investors.

In that vein, it is important for the SEC to do retrospective reviews of its own regulations to ensure they are working out as intended and are still acceptable. This is in line with the President's own Executive orders on regulation.

Other regulators are subject to EGRPRA, the Economic Growth and Regulatory Paperwork Reduction Act, which statutorily mandates a review and an evaluation of existing regulations in order to identify which are outdated, unnecessary, or unduly burdensome.

While technically the SEC is not subject to EGRPRA, your predecessor, Chair White, indicated before this Committee that she was "very much committed to reviewing [the SEC's] rules in that fashion." A commitment like that is one that many would like to see continue.

Additionally, it is important for the SEC to have robust cost-benefit analysis. I have long stated this position, and our President recently echoed the importance of cost-benefit analysis in an Executive order.

I look forward to hearing from you, Mr. Clayton, today on these issues, as well as what you hope to prioritize when you are at the SEC.

Congratulations on your nomination, and thank you and your family for your willingness to serve.

I now turn it over to Senator Brown.

STATEMENT OF SENATOR SHERROD BROWN

Senator BROWN. Thank you, Mr. Chairman.

Congratulations, Mr. Clayton, on your nomination to be the Chair of the United States Securities and Exchange Commission. I appreciate your willingness to enter public service. All of us know some of the demands that puts on you and on your beautiful family, so thank you for your willingness to stand up and be here.

As in past SEC nominee hearings, we have discussed a number of points that are still relevant today, even if technology, as the Chairman said, has changed how the markets work. For example, how do we improve investor protection? How do we strengthen accounting rules and reliable financial statements? How do we better enforce violations of law and bring real accountability for misconduct?

Candidate Trump certainly understood that the American people are tired of the continual news of misbehavior on Wall Street with far too often minimal consequences or accountability. About a year ago, Candidate Trump went to Ottumwa, Iowa, site of a "Stand up for the Little Guy" speech by Teddy Roosevelt, and also the home of Radar, who my staff told me nobody under the age of 50 will know what I am talking about. You do? Are you over 50? You are over 50, OK.

Candidate Trump promised the people of Ottumwa that he, quote, knew Wall Street, that he knew the people on Wall Street, and that he would not let Wall Street get away with murder. That was Candidate Trump. I bet the audience at that speech would be surprised to learn that the President has picked Goldman Sachs alumni to run the National Economic Council, to occupy the top two jobs at Treasury, and that he has turned to Goldman Sachs outside counsel to run the SEC.

As Candidate Trump knew, as Americans sacrifice and save for retirement, college bills, or a downpayment on a home, they are more skeptical and less trusting of the market. Whether it is another flash crash, a $1 billion Ponzi scheme, a $1 trillion financial crisis, people worry about trusting the market with their hard-earned savings. That is what you walk into, Mr. Clayton. Americans worry that the financial system is rigged against them. At a time when we are actually debating whether retirement advisers should put their clients' interests first—think of that; we debate here whether retirement advisers should put their clients' interests first—it is hard not to see why people feel that way.

If ordinary fears were not enough, in recent years we have learned and witnessed the significant financial risks of hacking and cyber crime as well as climate change. It seems as the list of concerns grows longer, the insistence—the insistence—for removing protections against fraud and abuse grows louder and more sweeping as amnesia, collective amnesia, swept across this body. I hope we do not spend the next 2 hours discussing issues that you agree are important, only to see those issues ignored if you are confirmed.

You spent your career protecting some of the biggest names on Wall Street, and those relationships pose a host of conflicts for this position. I am concerned you may need to recuse yourself too often at a time when we need a strong, independent SEC Chair on the front line of enforcement, not watching from the sidelines. Your record representing banks and bankers and hedge funds and executives speaks for itself. But those people are already well represented among the President's friends, supporters, advisers, and far too many people in all three branches of Government.

I want to hear today what you will do to represent glass workers in Lancaster, Ohio, auto workers in Warren Ohio, steel workers in Canton, Ohio. In some cases, private equity or a hedge fund took control of their company and hastily shipped factory jobs overseas. The people who still have jobs continue to scrape by as incomes are stagnant, as their paychecks and benefits have grown smaller over the years because management cared more about pleasing Wall Street and padding their profits and their bottom lines than doing right by working people.

Meanwhile, executive pay keeps going up and up and up. Workers nearing retirement have had their pension and health care benefits slashed. That is why the pay ratio rule, the disclosure of corporate political spending, the fiduciary rule, the anticorruption efforts around natural resources and mining industries—I could go on and on and on and on about the special interest influence in this body and in the Administration. That is why all of those rules are so important.

There is a lot of ground to cover. If I do not get through all my questions here—and I know colleagues will do the same—I will submit them separately for the record.

Mr. Chairman, thank you, and, Mr. Clayton, thank you again for your willingness to serve.

Chairman CRAPO. Thank you very much, Senator Brown.

Mr. Clayton, will you now please rise and raise your right hand? Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CLAYTON. I do.

Chairman CRAPO. Thank you. And one more question. Do you agree to appear and testify before any duly constituted committee of the Senate?

Mr. CLAYTON. I do.

Chairman CRAPO. Thank you. You may take your seat.

Your written statement will be made a part of the record in its entirety. Again, I give you my congratulations on your nomination. And before you begin your statement to the Committee, you may, if you choose, introduce the members of your family. I see you have a beautiful family here with you.

Mr. CLAYTON. Great. I will do that. Thank you, Senator. I will start at this end: My father, Walter Clayton; my mother, Kathi Clayton; my wife, Gretchen; my daughters Haley and Jasper; my son, Wyatt; my youngest brother, Andrew; and his wife, Michelle, are all here for me today.

Chairman CRAPO. Well, thank you. You are very fortunate to have such a beautiful family and have them here with you.

Mr. Clayton, you may proceed.

STATEMENT OF JAY CLAYTON, OF NEW YORK, TO BE A MEMBER OF THE SECURITIES AND EXCHANGE COMMISSION

Mr. CLAYTON. Thank you very much, Senator.

Chairman Crapo, Ranking Member Brown, and Members of the Committee, I am honored to appear before you today as President Trump's nominee to chair the Securities and Exchange Commission. I want to thank you and your staff for the time you have spent with me. I have enjoyed, and learned from, our meetings.

Our capital markets have far-reaching and profound effects for every American. Making sure our markets are fair, open, orderly, and efficient—and ensuring that investors are protected—is the fundamental responsibility of the SEC. If confirmed, I will take up this responsibility with energy and purpose. I pledge to work with my fellow Commissioners, the SEC staff, this Committee, and the many others who support and defend our capital markets.

The importance of Government service was instilled in me from a young age. Six weeks after I was born, my father shipped out to Vietnam as a second lieutenant, and my mother, 20 at the time, and I moved to her childhood home in Lykens, Pennsylvania. We lived with her parents and her four younger brothers.

Lucky for me, my grandfather, Pat Kerwin, the eighth and last child of coal miners, a small-town lawyer and perpetual public servant, both in title and action, took a strong interest in me. We were great friends for 20 years. Remarkably, for as far back as I

can remember, he took me to township meetings, real estate closings, and estate sales. These experiences, much more Main Street than Wall Street, made a deep and lasting impression on me.

When I entered the ninth grade, we moved as a family for the last time to Delaware County, Pennsylvania. I met new friends, mostly through sports. One of those friends, who has long been my best friend, is my wife, Gretchen. We met 36 years ago and have been married for 25 years. I want to specifically thank Gretchen for her encouragement, love, and support. As Chair of the SEC, I will be mindful of my responsibility to my children and their generation.

During the course of my 20-plus-year career as a transactional lawyer, it has been my privilege to work with leaders in the public and private sector, including on landmark transactions, such as the world's largest IPO, as well as important transactions during the dark days of the financial crisis. From my 5 years living and working in Europe—where I worked on matters involving the laws and markets of no fewer than a dozen countries, including France, Sweden, Turkey, Switzerland, Italy, England, Greece, and Germany—I learned that the world's capital markets are very interconnected and, more broadly, that America is, indeed, the greatest country.

My work has included counseling a number of small businesses and individuals. During my college and postgraduate years, my mother and father operated a small warehousing and logistics business. I worked with them on various projects, including lease negotiations, inventory system design, and establishing a 401(k) plan for employees. There were ups and downs, and I learned firsthand the many challenges that small and medium-sized businesses face as well as their importance to our economy.

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

One, well-functioning capital markets are important to every American;

Two, 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

Three, there is zero room for bad actors in our capital markets.

I am 100 percent committed to rooting out any fraud and shady practices in our financial system. I recognize that bad actors undermine the hard-earned confidence that is essential to the efficient operation of our capital markets. I pledge to you and to the American people that I will show no favoritism to anyone.

One last comment: For over 70 years, the U.S. capital markets have been the envy of the world. Our markets have allowed our businesses to grow and create jobs. Our markets have provided a broad cross-section of America with the opportunity to invest in that growth, including through pension funds and retirement assets. In recent years, our markets have faced growing competition from abroad. U.S. listings by non-U.S. companies have slowed dramatically. More significantly, it is clear that our public capital markets are less attractive to business than in the past. As a result of these developments, investment opportunities for Main Street in-

vestors are more limited. Here I see meaningful room for improvement.

I am excited to work with you, my fellow Commissioners, and the SEC staff to pursue those improvements, and in doing so, I will always be vigilant to ensure that the Commission is steadfast in protecting investors.

Thank you for this opportunity. I look forward to receiving your advice and answering your questions.

Chairman CRAPO. Thank you for your statement, Mr. Clayton.

And before I begin my questions, I would just like to remind the Members of the Committee that we will be working on a 5-minute timeframe for each segment, and I encourage Members to honor that so that all of our colleagues can have an opportunity to get their questioning in.

And as Senators are prone to do, you may get a question right at the end of the 5 minutes, Mr. Clayton. If that happens, I will allow you to answer the question, but I encourage you to be brief in those answers.

First, you are a highly regarded attorney who has received recognition for your expertise in the securities field. Some have raised concerns that your success and your former clients will create conflicts for you. Frankly, could you quickly provide us your thoughts on this issue?

Mr. CLAYTON. Yes, Senator, and I will try to be brief. I have been fortunate to have a diverse experience as a transactional lawyer and a securities lawyer dealing with a number of participants in our capital markets, both nationally and internationally, in a number of different settings—securities offerings, private capital raisings, mergers and acquisitions, regulatory matters, et cetera. I believe that that is a strength. I also believe that the types of matters I have worked on, which involved problem solving, is a strength.

As far as the extent of my practice and whether the recusals that would be required and the potential conflicts will impair my ability to act as Chair of the Securities and Exchange Commission, I do not believe they will do so. I have discussed this at length with the SEC Ethics Office, with the Office of Government Ethics. This is not a new issue. There is a protocol in place for dealing with those matters. Most importantly, I believe that if I am recused, that my fellow Commissioners will be able to handle the matters ably and to good effect.

Chairman CRAPO. Thank you very much. And I agree with your observation. It seems a little surprising to me that a person's success in a field in which we are asking them to now lead an agency could be a criticism. So I appreciate your commitment to assure that conflicts will not arise and that you will fairly and impartially administer the agency.

Mr. Clayton, in your opening statement, you discussed the dearth of initial public offerings and the need to keep our capital markets robust, serving as engines for our economy. Can you please let us know any particular thoughts on how the SEC can aid in this process?

Mr. CLAYTON. Yes, I very much—I am looking at this from the outside. I very much look forward to discussing this with my fellow

Commissioners and with the SEC staff. But I will note that easing the on ramp to the public capital market process—and when I say "easing the on ramp," I do not mean easing the important regulations that public companies face. I mean making it less costly up front to become a public company has had an effect on the market.

When I go to meetings where a company is considering whether to go public or not, one of the first questions that is asked is: Is this an emerging growth company? Because that has made it easier for companies to become registered public companies in this country.

Chairman CRAPO. Thank you.

The equity markets have seen a lot of change in the past few decades, including in terms of companies and products listed as well as the technology behind it and the investors participating in it. Your predecessor as well as the current Acting Chairman and other former Commissioners have stated that there is a need to review the current equity market structure, and such a review should be disciplined and conducted in a data-driven manner.

What are your thoughts on continuing the SEC's review of market structure? And what steps does the SEC still need to do?

Mr. CLAYTON. Senator, I think it is very apparent that technology continues to change our markets, and that is something that will continue unabated. The markets respond, technology responds. I believe that we need to engage in a virtually constant assessment of whether our markets are operating efficiently and for all investors.

As far as the specifics of the market structure analysis that the Commission has going on now, I do believe that they should continue. I have become, thanks to some of the questioning from you and your staff, more familiar with that, and I do believe that we should continue examining market structure going forward.

Chairman CRAPO. Well, thank you. I would just let you know at the conclusion of my 5 minutes that this is a very important issue to us, and we look forward to receiving the input from the SEC from its analysis and deliberations. So I encourage you to pursue that very aggressively.

Mr. CLAYTON. Thank you.

Chairman CRAPO. I will yield back 15 seconds out of my 5 minutes. Senator Brown.

Senator BROWN. I will take it. Thank you.

Chairman CRAPO. You will take it.

[Laughter.]

Senator BROWN. Thank you, Mr. Chairman.

Given this Administration's unprecedented business in commercial entanglements and demonstrated lack of transparency, lack of interest in transparency, we must focus on the potential conflicts of interest that this creates for people like you, for the Administration's nominees. In the case of the SEC, this is not hypothetical. In 2002, President Trump's casino business settled an SEC enforcement action over the use of non-GAAP financial data. Before the case settled, he sent a letter to the entire Commission asking for leniency. Following the settlement, he sent a thank you note to then Chair Harvey Pitt for personally talking to him and "being fair."

Mr. Chairman, I want to submit those documents for the record.

Chairman CRAPO. Without objection.

Senator BROWN. My question is this: In an Administration replete with billionaires, many of whom, as we learned in confirmation hearings, had multiple conflicts of interest and ethical lapses, how will you ensure the SEC's independence in matters that affect his personal business, the President's, and other Administration officials' businesses?

Mr. CLAYTON. Senator, as I said in my opening statement and I will repeat, if I am lucky enough to be confirmed, I am committed to showing no favoritism to anyone in this position.

Senator BROWN. OK. What members of the Trump administration or its transition team did you communicate with prior to being selected by the President as his nominee?

Mr. CLAYTON. Members of the current Trump administration or transition team. I was asked by the transition team—how I got introduced to this process, Senator, was I was asked by the transition team for my thoughts on the capital markets and things that could be done to improve capital formation. I met with several members of the transition team to do that. I did not think that I would be sitting here today when I met with them. The possibility of me going into public service was raised. I then met with members of the transition team who screened candidates, and then I met with now President Trump, Mr. Priebus, and Mr. Bannon to be interviewed for the job, and was later nominated.

Senator BROWN. Would you reconstruct, not right now but submit to the Committee, the names of people that you can reconstruct and look at your notes that you met with in the first round, if you would possibly do that?

Mr. CLAYTON. Yes.

Senator BROWN. Do you know if anyone you spoke with has businesses regulated by the SEC?

Mr. CLAYTON. I do not, but I would expect they do.

Senator BROWN. Would you submit that to us also?

Mr. CLAYTON. Yes. To the extent I can, yes.

Senator BROWN. OK. Thank you.

The President signed an Executive order directing the review of financial regulations and stated that he planned "to do a big number on Dodd-Frank." Gary Cohn, former president of Goldman Sachs and now National Economic Council Director, declared, "We are going to attack all aspects of Dodd-Frank." What aspects of Dodd-Frank will you be attacking?

Mr. CLAYTON. I do not have any specific plans for attack, Senator. I do believe that Dodd-Frank should be looked at, in particular, rules that have been in place as to whether they are achieving their objectives effectively. But I have no specific plans for attacking a particular provision of Dodd-Frank, Senator.

Senator BROWN. Has anyone whom you met with talked to you, anyone from the transition or the Administration you have talked to made suggestions and questioned—did they question the efficacy and the fairness of Dodd-Frank and suggested to you that it needs reform or change or repeal?

Mr. CLAYTON. As a general matter, the question of whether Dodd-Frank has been effective is a question that is on the minds

of people in the Administration based on my interaction with them, yes. Have I had specific discussions with them about a particular aspect of it? No. My interaction with the Administration since I was nominated has been quite limited.

Senator BROWN. Do you see your job to help the Administration, as they said they want to, deregulate Wall Street? Or do you see your job following the law and to finish writing the rules mandated by Congress?

Mr. CLAYTON. Senator, I see my mission as very much the tripart mission of the SEC: investor protection, capital formation, and efficient markets.

Senator BROWN. OK.

Mr. CLAYTON. Thank you.

Senator BROWN. Thanks.

Chairman CRAPO. Thank you.

Senator Shelby.

Senator SHELBY. Thank you. Welcome, Mr. Clayton.

I believe that the nominee before us today represents what we once valued in this country: an individual who rises from modest means to the pinnacle of his profession and then answers the call of public service—a good dead that I can assure you will not go unpunished here.

Instead of applauding such achievement, some will seek to minimize your accomplishments and impugn your motivation or ability to serve. I wished it were not true.

Following the crash of the U.S. housing market in 2007, the near collapse of the worldwide financial system, we had a unique opportunity here to closely study the causes of the crisis and develop a rational and targeted legislative response. Regrettably, that did not happen.

As an attorney, you act as an adviser, advocate, and negotiator. We should all realize this. In so doing, you represent the clients' best interests consistent with their own ethical obligations and yours.

I believe attorneys should never be judged by the parties that they represent but, rather, by the quality of the representation that they provide. In this particular nominee, I believe we are fortunate to have one of our Nation's very best legal practitioners. He understands corporate structure, capital markets, and capital formation, as well as the statutory and regulatory requirements that govern those disciplines.

The mission, as I understand it from many years on the Committee, 31 years here, of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation that is absolutely necessary to promote and sustain economic growth in this country. I believe your background, your education, and experience make you particularly well qualified and suited to be Chairman of the Securities and Exchange Commission, and I look forward to supporting your nomination.

Having said that, I have one question. I have long advocated here the need for comprehensive cost-benefit analysis for all agency rulemakings, not just the SEC. If the benefit of a rule or regulation

cannot be shown to outweigh its cost, I believe it should not be brought forth.

Would you share your views, if you have thought about this—and I am sure you have—on the role of cost-benefit analysis in the rulemaking process which you will be confronted with?

Mr. CLAYTON. Thank you. Thank you for your comments, and, yes, I will. I do believe that the economic impact of rules and regulations that are promulgated—I am going to focus specifically on the Securities and Exchange Commission—is very important, not only quantitatively but qualitatively. I think that we are often looking back after a decade or two decades and saying, "Wow, that had profound effects that we did not realize," and some of them turn out to be more costly than we would have imagined.

I think rigorously examining the effects of rules, and, in particular, some of their far-reaching costs, is a very important aspect of the Commission's work.

Senator SHELBY. Thank you, Mr. Chairman.

Chairman CRAPO. Thank you.

Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman. And welcome to you and to your beautiful family. You know, you will have to sit through a whole lot of boring questions, and so we apologize for that. But the position that your father and your husband and your son has been nominated for is incredibly important to the functioning capitalism that we have in this country. And I think that it is critically important that we understand exactly how you intend to administer and participate in that job.

I want to just make a couple quick points that relate to some projects that I have been involved in and that I have been working on, and that is, how the SEC relates to small business. The vast majority of North Dakota business is small business. Many of our startups find challenges in getting startup capital, and we want to make sure that a bill that Senator Heller and myself were able to get passed last time would require the Commission to appoint at least ten individuals across the country to serve on a new small business capital formation advisory committee. I want your commitment that you will make this one of your top priorities if you are confirmed. Say yes.

[Laughter.]

Mr. CLAYTON. I appreciate the assistance. Capital for small business is very important.

Senator HEITKAMP. OK. And I want to make sure that when you are making these appointments and looking at this that you find people with rural experience. And by rural, I do not mean a community of a half a million people. That is not rural. I want you to take a look at, as we look at rural economic development, bringing in broadband. We are going to have more and more opportunities.

We also are working on another bill with Senator Heller, Supporting American Innovators Act, which would raise the number of investors who could participate from 100 to 250. We received unanimous approval out of this Committee a couple weeks ago or last week, and I just want your commitment that you will work with us to implement that if we are able to get it across the threshold here.

Mr. CLAYTON. I am very happy to work with you on anything in the area of small business and recognize your comment about rural being really rural, not quasi-rural.

Senator HEITKAMP. Finally, I only have time for just one more issue that I want to raise, and I think that we can all agree that one of the great frustrations that the American people had after the collapse of 2008 is no one went to jail. No one seemed to be criminally responsible for what seemed like a criminal act. And most people would say, "If I did that, I would be in jail. If I did that, I would be investigated criminally." And so I think we need to have a clearer understanding. As you have said, there is zero room for bad actors, but I think we continue to see difficulties in prosecuting folks in the white-collar area.

I want to ask just one simple question—and it is not simple, but it is really important. Do you believe that executives who act recklessly but not knowingly and as a result cause significant harm to our financial system should be held criminally liable for financial crimes?

Mr. CLAYTON. Senator, let me say this: That is kind of a question for the courts and for the legislature, Congress.

Senator HEITKAMP. Oh, we can legislate. I am just wondering, what is your position on changing the mens rea standard for executives who, in fact, act recklessly even though we might not be able to prove that they act knowingly?

Mr. CLAYTON. If that is where the law is, I will vigorously enforce the law.

Senator HEITKAMP. Well, you do understand that the SEC in the past has weighed in on this and has done a number of speeches and discussions about how do you interject a criminal deterrent. Those of us on this dais who have been prosecutors understand that one of the best areas for deterrence in America is white-collar crime, and I think way too often you can hide behind the knowing. You know, it is hard to prove someone actually knew. But it is not hard to prove that someone actually should have known or acted recklessly moving forward. And I think we could apply that criminal standard, and we would like you guys to be thought leaders on this.

Mr. CLAYTON. I am happy to engage on that topic with my fellow Commissioners. I also want to tell you I agree with you. I think that individual prosecution, particularly in the white-collar area, has a significant effect on behavior.

Senator HEITKAMP. But the difficulty we have is achieving, you know, the level of criminal intent, and I think there is a way that we can rectify that by lowering the standard but still having the deterrent.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you.

Senator Corker.

Senator CORKER. Thank you, sir.

Mr. Clayton, thank you for your desire to serve in the public, and I appreciate the meeting we had in our office. And welcome to your family, since I come from a smaller unit, your tribe who are with you today. We welcome them and glad they are participating.

We talked a little bit about public companies and the fact that there are not many companies, there are not near as many companies going public today as used to be the case. I wonder if you would expand on that and share why you believe that is the way it is today.

Mr. CLAYTON. Thank you, and I am more of a picture person than a written person, so I am going to use my hands. I hope that is OK. But the life cycle of a company is it kind of gets started, people have a good idea, are committed to it, picks up and grows and kind of goes like this, and this is the growth phase of a public company where you are getting capital, you are adding employees, you are doing things, and over time you get up here, success.

My experience is that 20 years ago companies at about this stage would view our U.S. public capital markets, becoming a public company, listing on the stock exchange, as an attractive way to raise capital to grow. For a variety of reasons, including very robust private capital markets, but also the costs of going public, the choice to go public here is a very hard one. Many companies do not do this anymore. We see it with—I am hesitate to use examples, but it is one everybody knows. Uber is a very growing company that is still a private company all through this phase. And then up here, you know, they may be becoming a public company, but oftentimes that is not to raise capital; the company is already mature.

My view of the world is that I would like to see more companies going public here, so more people have a chance to participate in that growth as investors.

Senator CORKER. And they are not doing it, again, just to crystallize that, they are not doing it because?

Mr. CLAYTON. They are not doing it for a variety of reasons, including that it is too costly at this stage to become a public company.

Senator CORKER. I agree there are numbers of reasons. Having served on some public company boards, I cannot imagine desiring to go public as a first choice. But I know that has changed dramatically over time, especially over the last decade or so.

Let me ask you this question: The SEC, unfortunately, has functioned in a very partisan way. It seems like everything ends up being voted on down a party line. It was not that way many, many years ago. As Chairman, I am sure you do not want to operate that way. Can you observe why it has been that way and tell me what you plan to do as Chairman to try to get things decided along the basis of what is good for the country, what is good for the SEC, what is good for all of us who you are protecting, instead of just sort of ideology?

Mr. CLAYTON. Yeah, I do not want to speculate about why it has been that way. I have seen it. I agree with you that——

Senator CORKER. Well, we want you to speculate, though.

Mr. CLAYTON. OK.

Senator CORKER. OK.

Mr. CLAYTON. People have fundamental disagreements, but my job has been—my job for 20 years has been to reach consensus. People do not do transactions unless they agree to do transactions. I believe in consensus. I would very much like as Chair to have unanimous votes on important matters.

Senator CORKER. But what is it that has caused it to be the way that it is right now? You know you are going into it. What is it, seriously, that has caused it to function along party lines?

Mr. CLAYTON. You know what, Senator? I will speculate, and that is, I think that there is a—it is not just at the Commission, but there has been—you know, partisanship is pretty strong right now in Washington. I am new to Washington, but I very much get that sense. But I do believe, having talked to a lot of people, that the mission of the Commission does not have to be a partisan mission.

Senator CORKER. Well, what happens when it functions that way is we have a lack of consistency, right? I mean, every time there is a swing in the balance of power, the SEC and the direction that it takes swings and, therefore, you know, probably keeps people, even more people from wanting to go public. So I am glad you have observed that. I hope that you are going to change that when you become Chairman.

I just want to close with this, Mr. Chairman. I know there has been some criticism of the type of people that Mr. Clayton has represented. I used to build shopping centers around the country and feel like I know the business pretty well and think if this body decided there was going to be some shopping center regulatory body, I think that would be really good.

[Laughter.]

Senator CORKER. Because I know the business. And, look, I know that you have represented numbers of large clients, and my guess is some of them were jerks. OK? And you watched—seriously, you watched some of your clients do some really jerky things. And then you watched some of them do some really great things. And my sense is that someone like you who has represented the broad array of people that you have represented really knows the good actors from the bad actors more so than people who come from the outside. I know we had some folks last time that were academics, and I have nothing against academics, but my sense is you bring a lot of real-life experience. I am glad you are willing to do this, and I look forward to your service.

Mr. CLAYTON. Thank you very much.

Chairman CRAPO. Thank you.

Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Mr. Chairman. Thank you, Mr. Clayton, for being here.

There was some talk earlier in this hearing about efforts to repeal or dramatically scale back Dodd-Frank. I think it is important to remember that Dodd-Frank was a response to the financial meltdown and a lot of bad practices that went on that helped precipitate that and left a lot of people around this country in foreclosure and holding the bag.

As you know, last year Goldman Sachs agreed to a $5 billion settlement in a lawsuit that arose out of what happened during the financial meltdown. The Acting Associate Attorney General of the Justice Department at the time said, and I quote, "This resolution"—referring to the settlement agreement—"hold Goldman Sachs accountable for its serious misconduct in falsely assuring investors that securities it sold were backed by sound mortgages

when it knew that they were full of mortgages that were likely to fail."

This was a very serious breach of trust with respect to Goldman's clients. You mentioned at the outset that you wanted to put an end to shady practices. Would you agree that what Goldman did during that period in falsely assuring investors that securities it sold were backed by sound mortgages when it knew they were not was a shady practice?

Mr. CLAYTON. Senator, I think that settlement speaks for itself. I am not familiar with all of the facts of that matter, but I think the settlement speaks for itself.

Senator VAN HOLLEN. Well, let me ask you, you represented Goldman Sachs, right?

Mr. CLAYTON. I have, yes.

Senator VAN HOLLEN. Did you represent Goldman Sachs in any of the transactions that were the basis of the Justice Department finding of misconduct?

Mr. CLAYTON. My understanding is that was a mortgage—the case of selling mortgage securities. I can tell you that I did not work on any mortgage securities deals for any client that I can—I am very—any mortgage security deal for any client prior to the financial crisis. It was not part of my practice.

Senator VAN HOLLEN. Got it. And so you were not involved in advising some of the investors with respect to the financial instruments that were the subject of the settlement.

Mr. CLAYTON. I want to be very clear. After the financial crisis, I did become familiar with mortgage-backed securities and how they worked. I spent a lot of time trying to understand how they worked. And after the crisis, I have advised a number of people on how those securities were designed to function. But prior to the crisis, mortgage-backed securities were not part of my practice.

Senator VAN HOLLEN. All right. Well, just to pick up on what Senator Heitkamp said—and I have heard my Republican colleagues say it many times—we think that a lot of these settlement agreements where nobody was actually held personally accountable and personally liable actually do not create the kind of deterrence that we want. So I hope going forward the American public will see people not just using their investors' money to pay off settlements but actually be held personally accountable.

Let me ask you this, because there are some disagreements with respect to what has happened at the SEC and its role. Do you think that a stockholder would have an interest in knowing if the company they are invested in is spending $5 million to elect Hillary Clinton or Donald Trump? Do you think that that is something that would be of interest to a stockholder? After all, my understanding is disclosure agreements to the public include things like the salaries that are paid to the top managers, potential conflict of interest between folks, matters of the company, and others. Do you believe that that is something that stockholders should have information about?

Mr. CLAYTON. The touchstone for stockholder information is materiality. What would a reasonable investor making an investment decision, what should they know? This issue of political spending disclosure has been talked about in this Committee and for a while,

and I think where it stands now is there are a number of companies who make that disclosure, making the judgment that it is material to investors or that it may be, and they put it in. Shareholders have access through the shareholder resolution and proxy process to require it if they want. The question of whether it should be mandated is one that I am happy to think about, but, again, my touchstone for these things is materiality.

Senator VAN HOLLEN. Well, thank you, Mr. Chairman. I would just say I believe there is a reputational risk to a company if it is disclosed, if people find out through other means that they may have spent a whole lot of money supporting one political candidate or another. And that is something that investors should know up front so they can take into account the possibility of that information. So I look forward to continuing that conversation because, as you know, there are a number of things that are mandated by the SEC, and it is my view that that is something that would be important to investors. But we can follow up on that conversation.

Mr. CLAYTON. Thank you.

Chairman CRAPO. Thank you.

Senator Toomey.

Senator TOOMEY. Thanks very much, Mr. Chairman.

Mr. Clayton, I just want to say I am delighted that you are willing to serve. I think you are an outstanding choice based on your background, your expertise, the knowledge. We had a great conversation in my office, and I appreciate it. I am particularly pleased that you have some experience overseas. It gives you a comparative basis to help inform your judgment about our regulations. And I am not saying all that because you are Pennsylvanian, but it does not hurt. OK?

You mentioned earlier—and I think we all know—that for decades the U.S. capital markets have been the envy of the world, the deepest, broadest, most accessible markets anywhere ever, but that our lead is diminishing. There is no question, by any number of metrics, our lead is diminishing.

You suggested that it is because at sort of this point in the growth cycle it has become too costly for many companies to go public, to become public issuers of securities. I just want to drill down a little bit. Isn't it really too costly—where does the cost come from? The cost is complying with the regulations. Isn't that the principal cost?

Mr. CLAYTON. Yes, Senator, I believe that regulations broadly is the principal cost.

Senator TOOMEY. All right. So that is what has changed. Certainly it has changed. And we see a corresponding reduction in public issuance, big IPOs, I would argue other—adoption of new technologies as well. So I really hope that you are going to focus on that, and I know you are.

I want to make another point. Isn't it also the case that over the last certainly number of decades we have had a dramatic transformation of the ownership of American companies, a democratization, if you will? If you go back 50 or 60 or certainly 80 years, I am pretty sure it is true that a very small percentage of wealthy Americans owned all of our companies. If you look today, our companies, the people who own the stock in our big companies, are

very often very ordinary Americans who own it through their pensions, their 401(k) plans, their 529 plans, their IRA plans, the universities they send their kids to have it in their endowments, and that those categories now are a huge, huge share of ownership. Isn't that true?

Mr. CLAYTON. That is true, and it is changing the shareholder-company dynamic.

Senator TOOMEY. Right. And if a company decides it has got excess cash and it does not believe it can generate a market return on that cash, isn't it a very reasonable thing for the company to consider returning some of that cash to these ordinary Americans who own this company in the form of dividend or stock buybacks? Isn't that a perfectly reasonable consideration?

Mr. CLAYTON. Senator, it is a perfectly reasonable consideration, yes, and I think some of our greatest investors, most respected investors, say if you cannot use the cash wisely, give it back.

Senator TOOMEY. Right, which is actually good for the ordinary Americans who own those stocks.

One of my criticisms of the SEC in recent years is that it has not done a good job on the capital formation portion of its mission. And I think we have passed some good legislation at times—the JOBS Act being one such case—and I think the SEC has implemented some of these legislative changes with rules that are way too cumbersome. I am thinking of our crowdfunding. I am thinking of Reg A, Reg A-plus now, a very simple reform that got very complex in the regulations. I look at how little American companies are using some of these new technologies, new opportunities. I attribute it to the regulations.

What I would just ask, would you be willing to work with us to review some of the rules implementing the legislation with an eye toward facilitating the use of these reforms as it was intended by Congress?

Mr. CLAYTON. Yes, Senator, I am—I know it is difficult to write a regulation and, as we talked about, know all of its effects. And sometimes I think it takes too long because you worry about all of those effects. At some point you have to move forward. After you move forward, you have to examine whether you got it right. And that is the way I look at these things. It is not I am done, out the door. We tried to do it as well as we could. Let us look back and see if we got it right.

Senator TOOMEY. I think that is a very sensible approach. I look forward to working with you on it, and I think I finished within my time limit.

Chairman CRAPO. You did. Thank you very much.

Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you, Mr. Chair and Ranking Member.

Mr. Clayton, good to see you again, and let me just say thank you so much for taking the time to visit with me and your candor in our conversation. I so appreciate it. It is wonderful to see your family here with you as well.

During our conversation, if you recall, we talked about the fact that I am from Nevada and at the time of the foreclosure crisis was the Attorney General, and so I took a number of enforcement ac-

tions to protect the homeowners in my State. And you were very candid during that time, and when we met we talked about this, and you specifically dismissed the effectiveness of enforcement actions against companies on the grounds that prosecutors unfairly take money from shareholders without holding individuals responsible. I want to just follow up on those comments, and I have some questions as well.

In fact, in a speech just before he left the Department of Justice, Attorney General Holder described current law, saying, "The buck still stops nowhere. Responsibility remains so diffuse and top executives so insulated that any misconduct could again be considered more a symptom of the institution's culture."

And so my question to you is: Do we need to change the law to ensure that individuals you want to go after are not insulated from accountability?

Mr. CLAYTON. OK. Thank you. And just on my view on company accountability and individual accountability, I want to be clear. Companies should be held accountable. If they make illicit profits, those profits should be disgorged. There should be deterrence at the company level. But, you know, shareholders do bear those costs, and we have to keep that in mind.

I also said to you, which I firmly believe, that individual accountability drives behavior more than corporate accountability. And as we work, all of us work together, that will be in my mind.

Senator CORTEZ MASTO. And so then I appreciate that, and that goes back to, I think, what my colleague Senator Heitkamp was getting to when she was talking about mens rea. So let me put it in different terms, and I will talk about strict liability. And, again, it was Attorney General Holder who suggested that Congress change the law to provide for strict liability for financial service executives. In other words, executives should be liable for misconduct that occurs under their watch, whether or not they had intent or knowledge of the wrongdoing. Do you agree with that proposal?

Mr. CLAYTON. Again, it is not for me to make the law. It is for me to enforce law. I do not understand the exact contours of that proposal. If that—can you say it again?

Senator CORTEZ MASTO. Sure, and I think this is what we talked about, and this is a new realm, and I absolutely get it. You are stepping into a different role here as an enforcer. This is an enforcement mechanism that you are going to have authority over, and these are decisions you are going to have to make. So it just comes down to the issue of strict liability. In other words, can executives—or do you believe executives should be held liable for misconduct that occurs under their watch, whether or not they had the initial intent to do it or knowledge of wrongdoing? In other words, whether it was just reckless, whether they intentionally did it or whether it was just reckless disregard, do you agree with this proposal that there should still be strict liability and they should be held accountable?

Mr. CLAYTON. Strict criminal liability without mens rea, I am not—you know, I am not sure about that. Not something I have really thought about, but it strikes me as a big step.

Senator CORTEZ MASTO. OK. Is this something that you intend to look into and really—I guess my concern is the enforcement side

of this and your lack of ability or familiarity with it. And as you step into this position, that is a key piece of oversight, and I am just curious your thoughts on how you intend to pursue or familiarize yourself with the enforcement side of the job.

Mr. CLAYTON. Let me try and answer your question as quickly as I can. In all aspects of this job, if confirmed, I am going to have to rely extensively on the very good people at the SEC, both the Division Directors and the staff. I have a lot of respect for the people at the SEC that I have interacted with, including on the enforcement staff. And I do have more familiarity with prosecutors, working with prosecutors, and, in particular, investigations than most transactional lawyers, and I hope to bring that experience to bear.

Senator CORTEZ MASTO. Thank you. Mr. Clayton, I see my time is up. I look forward to additional questions if there is time, Mr. Chair. Thank you again. I appreciate your willingness to step up for public service.

Mr. CLAYTON. Thank you.

Chairman CRAPO. Thank you.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Clayton, how are you?

Mr. CLAYTON. Well, thank you.

Senator KENNEDY. I am over here in the cheap seats.

[Laughter.]

Senator KENNEDY. I am in the cheap seats. You went to Penn?

Mr. CLAYTON. I did.

Senator KENNEDY. Undergrad?

Mr. CLAYTON. Undergrad.

Senator KENNEDY. And law school?

Mr. CLAYTON. And law school.

Senator KENNEDY. And you went to Cambridge?

Mr. CLAYTON. I did.

Senator KENNEDY. That would be Cambridge in England, right?

Mr. CLAYTON. Cambridge in England, yes.

Senator KENNEDY. What did you study there?

Mr. CLAYTON. I studied economics.

Senator KENNEDY. OK. All right. Are these your three children? I think I met Wyatt. I shook hands when I came in. I was late.

Mr. CLAYTON. Did he look you in the eye?

Senator KENNEDY. Yeah.

[Laughter.]

Mr. CLAYTON. Good.

Ms. Jasper Clayton. I am Jasper.

Senator KENNEDY. OK.

Ms. Haley Clayton. I am Haley.

Senator KENNEDY. All right. Did they give you instructions about how to behave and not make faces and stuff today? You do not have to answer that.

[Laughter.]

Senator KENNEDY. Let me ask you about Sullivan & Cromwell. It is a big place, blue-chip clients, you know, one of the premier firms in the world. You do not get to pick your clients, do you? I mean, if you are a lawyer there and a client comes in and says,

"I am in trouble, and I need help," you do not say, "Well, I do not like the color of your suit, go away"?

Mr. CLAYTON. Generally not.

[Laughter.]

Senator KENNEDY. How long have you been at Sullivan & Cromwell?

Mr. CLAYTON. Over 20 years.

Senator KENNEDY. Would you consider yourself a securities expert?

Mr. CLAYTON. If anyone can be, I think——

Senator KENNEDY. Well, I am kind of like Senator Corker. Since you are going to be running the SEC, I would like you to know something about securities law.

I want to ask you about a matter that is important to many States but also Louisiana. Are you familiar with a gentleman by the name of Allen Stanford, the Ponzi scheme?

Mr. CLAYTON. I am.

Senator KENNEDY. Yeah, he at one point in 2008 was listed on the Forbes top 400, or whatever. He had a net worth of $2.2 billion. Now he has got another number. He has got a prison number. It is 35017183. He defrauded in a Ponzi scheme about 7,800 investors. Two thousands of them were from Louisiana, their life savings. The Securities Investor Protection Corporation, SIPC, denied coverage of them. SEC sued the SIPC. I think a Federal judge threw it out. Obviously, I was disappointed in that.

Here is my question. I wrote it out so I would be precise. What do you intend to do to ensure that investors who lose cash and securities in a failed brokerage or are victims of a Ponzi scheme like this financial scheme, the one I just talked about, receive fair treatment in the event they have to turn to the SIPC for help, which was created to help them?

Mr. CLAYTON. Senator, I am familiar with the Stanford matter, and people like Allen Stanford and other fraudsters who we can name need to be dealt with sternly, severely, et cetera.

As far as their victims and the SIPC, I am familiar with this issue and that there is a line where the SIPC has denied coverage, and in particular, in the instances of fraud, its coverage does not extend that far.

I am familiar with that being an issue. I look forward to working with you and others on what we do about the victims of people like Allen Stanford.

Senator KENNEDY. OK. That is fair enough.

Let me just use my last minute to make an observation. I think this is a really important nomination. I am impressed with your credentials. I think the President has chosen well. I think there is a lot of anger in my State and in this country. I hear from middle-class Americans every day that the problem as they see it is that we have got too many undeserving people at the top getting bailouts and we have got too many undeserving people at the bottom getting handouts, and the folks in the middle get stuck with the bill, and they cannot pay it anymore because their health insurance has gone up and their kids' tuition has gone up and their taxes have gone up. But I will tell you, what has not gone up is their income.

I believe in efficient markets. I believe in supporting capital formation, but I also have lived long enough to understand human nature. Some people cheat. They cheat in all walks of life, and they cheat in all professions. But when people cheat in securities matters, a lot of people get hurt. I hope you will be mindful of that, and I know you will be. I am out of time.

Mr. CLAYTON. Thank you.

Senator KENNEDY. It was nice to meet you, Wyatt.

Chairman CRAPO. Thank you, Senator.

Senator Donnelly.

Senator DONNELLY. Thank you, Mr. Chairman.

We are honored to have you here, and to your whole family, thank you for being here.

I was fortunate—we met in my office, and I just want to read you a little bit about an article in the IndyStar, the *Indianapolis Star,* recently about a Rexnord worker who is losing his job. The jobs are going to Mexico. He did his job great. He is presently training what is called "Team Monterrey," and what Team Monterrey is are the Mexican workers who have come to Indiana to learn the skills to take the jobs away. And let me tell you about John Feltner, who is the individual here.

John's 21-year-old son, Austin, because he knows dad is going to lose his job, his 21-year-old son has taken off time from studying criminal justice at IV Tech, Indiana Vocational Technical School, to manage a pizza shop so that they can raise a few more bucks for the family.

His 19-year-old daughter, Emily, is still in school at Indiana State. Her plans were to become a vet. It is an 8-year track. She has looked up—she has said at this point this is not doable. She has now gone to a 4-year program in nursing, which is still a great thing, but like your dream was to become a lawyer and you had a wonderful granddad who took you around, her dream was to be a vet, and that is over now, because she is trying to help keep the family together.

This is the real-world consequence of what happens on Wall Street and of what you are going to be responsible to try to make sure it does not happen. My State, in my town of Kokomo, at the time there was the economic collapse, the transmission plant there went from 5,000 people to less than 100. Unemployment in Elkhart County went to 22 percent, and that is countywide. That is not one town or this town. That was countywide. That is the real-world effect of what happens. And I have got 2,100 workers who have just been fired from Carrier to pay for a stock buyback, a $16 billion stock buyback, and they fired these workers and shipped the jobs to Mexico because that 3 bucks an hour wage would help them make a few more pennies to pay for the stock buyback. The real world is 2,100 families who have no idea how they are going to cover their mortgage next month or send their kids to school.

So, you know, we talked about all those things, and I want to know your general insight and experience advising and counseling clients on stock buybacks.

Mr. CLAYTON. And, Senator, as we talked about in your office, I am not familiar with Indiana, but there are——

Senator DONNELLY. Pennsylvania is just like a cousin to us.

Mr. CLAYTON. Yes. Reading, PA, is a place I am very familiar with. Look, the issue of jobs going overseas and how that is related to the operation of a company, what choices the management makes, is a difficult—I do not like these results any more than you do. I do not like it at all.

Stock buybacks, there are times when stock buybacks make sense. That is clear. A company has excess cash. They do not know what to do with it. They do not have a good place to put it. They should return it to their shareholders. As far as whether that is always the case and whether they are using the money in a way that we would like to see them use the money, I agree with you. There are a range of outcomes, and there area range of consequences, and there are a lot that as a citizen I do not like. As far as the SEC goes, I am happy to talk about that.

Senator DONNELLY. And I wish I had an hour with you. I really do. We had some good time before. But this was clearly not a case of excess cash. This was firing workers to pick up the difference in their wage from going to Mexico so they could give it to the Wall Street hedge fund speculators. That is what this was. And what happened in 2008 and 2009 was credit rating agencies that abandoned ship and sold their reputation for a few extra bucks, ridiculous, insane, collateralized debt obligations and all of these things, that it was all allowed to go on. And if it was stopped, those 5,000 people at the Chrysler transmission plant would not have lost their jobs. And so you are the sheriff. Besides being a great dad, you now have the opportunity to be a sheriff. And we are very, very hopeful you can fill that role.

Mr. CLAYTON. Thank you. And as I——

Senator DONNELLY. My families are counting on you to do that.

Mr. CLAYTON. As I said to you, I very much believe that if growth looks like this in America, that is a lot better than growth in America looking like this, because this is really bad for everyday Americans.

Senator DONNELLY. And what you do will help to determine that.

Mr. CLAYTON. Thank you.

Senator DONNELLY. Thank you.

Chairman CRAPO. Thank you.

Senator Heller.

Senator HELLER. Mr. Chairman, thank you, and thanks for holding the hearing. And good to see you. I welcome your family also. It is good to see everybody here. And, by the way, congratulations on the nomination and this process.

Mr. CLAYTON. Thank you.

Senator HELLER. I worked in the securities industry for a few years, got my securities license. I worked on the Pacific Stock Exchange, became an institutional broker. I worked in the third market. But subsequently, a few years later, I became Secretary of State in Nevada and ended up regulating the securities industry for our State. And I had real working relationships with the industry and saw some real bad players. I think Senator Kennedy talked about a few of them, and my colleague from Indiana talked about a few of them. And it is usually the States that really dig up some of these issues and some of the problems, even if it is a major trad-

ing firm like Merrill Lynch and I think Pru—back when I was Secretary of State.

I guess my question for you is your commitment to working with these States. Not all securities regulators are in a particular office. I think there are only half a dozen or so in Secretary of State's office, but every State does have regulators. And there is kind of a bit of back and forth. I just want to get your feel for working with these States on some of these issues and helping regulate their industries.

Mr. CLAYTON. I am very interested in working with the State securities commissions and the many others who have jurisdiction over the securities markets, including State law enforcement, the Department of Justice, you know, the SEC.

To your point, it is also my experience that the bad actors, they have been bad for a long time until they are caught. And, you know, early on detection would be much better than later. And where that comes from, if it comes from the States or it comes from self-regulatory organizations, if it comes from, you know, State law enforcement, I am all for it.

Senator HELLER. The word that comes to mind is "restitution." The earlier you get there, first of all, the less damage, but the larger the chance of restoring these individuals that have been defrauded. Do you have any views on that?

Mr. CLAYTON. Yes, I do. It has been—you know, it is very disappointing when you have these types of individuals that the people who bear the brunt of it are ordinary investors, if you have an Allen Stanford like we talked about or a Bernard Madoff.

I do think some of the reforms that we have seen around custody and tracing will help prevent that, so that is my view, and we should be looking—to a point made earlier, we should be looking with technology at better and more efficient ways to monitor those individual financial advisers and brokers.

Senator HELLER. In my office, when we were chatting back in January, I talked about a new regulation called "Industry Guide 7", that is, proposed new regulations that would affect the mining industry in the State of Nevada. I am appreciative of Chairman Crapo and Senator Tester also working with me on this particular issue. All we are trying to do is align the disclosure requirements with global standards so that our domestic mines have economic competitiveness, and we are afraid that we are going to lose that.

What all I am asking from you is if I could get your commitment that you will work with this Committee, that you will work with my office as we take a look at some of these new regulations, make the necessary changes that I think are needed to keep our mining industries across this country competitive.

Mr. CLAYTON. Yes, Senator, I do look forward to working with this Committee and the staff on disclosure, and the disclosure has followed where the market is. The mining industry makes sense. I think the staff just put out for comment another industry guide that had not been updated in some time, so I understand the point and look forward to working with you.

Senator HELLER. Mr. Clayton, thank you. My time has run out. Thank you for being here.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you, Senator.

Senator Warren.

Senator WARREN. Thank you, Mr. Chairman. It is good to see you again, Mr. Clayton.

A big part of the job of the Chairman of the SEC is enforcement, a cop on the beat on Wall Street. And you have said in your testimony today that you intend to enforce the law strictly, and I very much agree with that goal. But I am concerned that you will not be able to achieve it.

It is clear that the SEC will play a critical role in deciding—the SEC Chair will play a critical role in deciding what the enforcement position of the SEC will be. And in recent history, Republican Commissioners on the SEC have favored weaker enforcement while Democratic Commissioners have sought tougher enforcement.

The Chair is often the deciding vote. And, of course, if the Chair cannot vote and the remaining SEC Commissioners split along party lines, then major enforcement actions do not go forward, and serious wrongdoing may go unpunished. So it is important to think about how often the SEC could be caught in such a deadlock.

Under the President's Executive order for ethics, the first 2 years of your tenure as SEC Chairman you would have to recuse yourself from participating in any enforcement matter involving a former client of yours. That is about half of your term as Chair.

So based on your personal client disclosures then, for half of your tenure as SEC Chair, you would not be able to vote to enforce the law against several big banks, including Goldman Sachs, Deutsche Bank, Barclays, and UBS. Is that right?

Mr. CLAYTON. Yes, Senator. The way——

Senator WARREN. Thank you. Those banks have repeatedly violated securities laws in the past few years, but if they violate securities laws again, in your first 2 years as SEC Chairman you cannot vote to punish them, and I think that is a problem. But it is just the tip of the iceberg.

Your recusals would not be limited just to your own former clients. The ethics Executive order also requires you to recuse yourself for 2 years from any matter in which your former law firm, Sullivan & Cromwell, represents a party. Now, Sullivan & Cromwell is a leading New York law firm with a very long list of Wall Street clients. So for half of your term as SEC Chair, you would not be able to vote to punish any corporation or bank that uses Sullivan & Cromwell as their lawyer. Is that right?

Mr. CLAYTON. I believe that is a fair summary, Senator, yes.

Senator WARREN. Thank you. More potential cases with a deadlock and no enforcement, and that is a problem.

And even beyond Sullivan & Cromwell's already long list of Wall Street clients, any reasonably strategic company that wanted to try to avoid an SEC enforcement action could simply hire Sullivan & Cromwell to represent them before the agency, and then you could not vote for enforcement against that company. Is that right, Mr. Clayton?

Mr. CLAYTON. I am not sure about that, Senator.

Senator WARREN. Well, you do know the rule that if they are represented by Sullivan & Cromwell in front of the agency, then you are going to be banned from being able to vote against them.

Mr. CLAYTON. If they are represented by Sullivan & Cromwell in front of the agency, I would not be able to participate——

Senator WARREN. That was my point.

Mr. CLAYTON. ——but that does not mean that it would not be——

Senator WARREN. So more cases—more cases potentially that you cannot participate in, meaning more cases potentially here with a deadlock and no enforcement. I think that is another problem.

So it is important to think about how often as we go through this, if President Trump wanted to make sure that the SEC would have a hard time in going after his Wall Street friends, it seems to me you would be the perfect SEC Chair. You cannot vote to punish some of the biggest names on Wall Street. That means those cases would be at least more likely to end up in deadlock, which means those companies could skate free.

And I just want to point out this is not a theoretical problem. Recusals were a very big issue for the outgoing SEC Chair, Mary Jo White. Like you, she came from a major Wall Street law firm, and according to the *New York Times,* in her short time heading up the SEC, she had to recuse herself in at least 48 enforcement matters because of conflicts involving her former clients, her former law firm, and her husband's clients and law firm—at least 48 cases in which she could not vote to punish a big company. Because the other Commissioners were often split on enforcement matters, Chair White's recusals led the Commission to deadlock time and time again, which meant that corporations that may have broken the law were able to get off easier.

Your recusal problems seem to be even more severe than Chair White's. With you as SEC Chair, it looks like Wall Street can breathe a little easier knowing that you will not be voting against them. And there is likely to be weaker enforcement.

So here is my question: Can you explain why out of all the people who could have been selected to head the SEC you are the right person for this job?

Mr. CLAYTON. Thank you. I want to say that the question of whether I am recused from a matter does not mean that there will be deadlock. I do believe that the current Commissioners——

Senator WARREN. Mr. Clayton, I do not quite understand that. If there is not a majority to go forward on an enforcement action, if the other Commissioners split 2–2, that is a deadlock. And if you are recused, that leaves four Commissioners—two Democrats, two Republicans. Republicans have consistently gone for weaker enforcement, Democrats for strong enforcement. You come here today and say, "I am going to go for stronger enforcement." You are not going for stronger enforcement if you cannot vote.

Mr. CLAYTON. I am not sure about that characterization, but I do know that——

Senator WARREN. The characterization of a deadlock?

Mr. CLAYTON. No. The characterization of who goes for more enforcement.

Senator WARREN. Well, take a look at the data on that.

Mr. CLAYTON. OK. But what I would like to say is that I believe that on enforcement matters—on enforcement matters—the Commission is almost always unanimous on enforcement matters.

Senator WARREN. I think you want to check your numbers on that, Mr. Clayton.

Mr. CLAYTON. OK.

Senator WARREN. And you want to check what has just happened. We have experience on this. I am going to yield because I recognize the Chair has been very indulgent in letting me go over. But I just want to underline the point that holding Wall Street firms accountable is a major job of the SEC's mission, and the SEC Chair needs to be able to participate in those enforcement actions, to be the cop on the beat for the American people, not on the sidelines when former clients and Wall Street firms are able to skate free. And I think that raises a very serious concern about your nomination to be——

Chairman CRAPO. Senator Rounds.

Senator WARREN. Thank you.

Senator ROUNDS. Thank you, Mr. Chairman.

Sir, I would like to just begin by—I would like to just kind of follow up on the questioning here just a little bit about some of the questions that were being asked that required a little bit longer answer than just a yes or a no. I would like to give you an opportunity to perhaps elaborate a little bit.

With regard to the issue of a split vote, a split vote in the case of an enforcement action could possibly come as the result as to whether or not there should be an enforcement action in the first place. Would that be a fair statement?

Mr. CLAYTON. Yes.

Senator ROUNDS. In that particular case then, it would be a matter of making a determination yes or no, and in this country in most cases we do not decide on a split vote whether they are guilty or not and then make the assumption that they are simply guilty because there is a split vote involved in it. Fair enough?

Mr. CLAYTON. I think that is fair, Senator.

Senator ROUNDS. How much time do you think, as the Chairman of the Securities and Exchange Commission, you would spend in terms of breaking ties on the determination of right or wrong on the part of a company who is being brought before, compared to the rest of the job?

Mr. CLAYTON. I would not expect that it would be any meaningful amount of time, Senator.

Senator ROUNDS. If there were parts of the—and recognizing that we are all limited by the amount of time that we have to share, if there were parts of the previous questions that were asked to you that you did not feel like you had the opportunity because of the time constraints, would you like to share a little bit of information to perhaps clarify or expand on your answers?

Mr. CLAYTON. Thank you. As I said in my opening statement, I have zero tolerance for bad actors. I am not only saying that here. I will say it to the enforcement staff at the SEC. I will say it to my fellow Commissioners. I do believe, as I have said before, that individual accountability is extremely important not only to get rid of bad actors, but it sets a tone for the industry.

Much of the enforcement activity of the Commission, as I understand it, is driven by the Enforcement Division and the oversight of the Enforcement Division. I have every confidence that that will

continue, and that any recusals that I have to do will not impact that.

Senator ROUNDS. Are you a Republican?

Mr. CLAYTON. No. I am an Independent, sir.

Senator ROUNDS. It seems to me that the suggestion was that Republicans are lax on enforcement. As an Independent, would you see Republicans as being lax on enforcement?

Mr. CLAYTON. No, that was—I do not see it that way. I think sometimes people of different parties may have different enforcement priorities, but I would not say that Republicans are lax on enforcement.

Senator ROUNDS. Would you see your role in terms of being an Independent and being nominated for this particular position to be an arbiter perhaps in terms of finding common ground with regards to issues of enforcement and in the layout of penalties that are appropriate for organizations that are found to be in violation of the law or the rules?

Mr. CLAYTON. Yes, Senator, and if I wanted to say what I thought my—if I had to pick a single strength that I believe I would bring to this position in that regard, it does go back to what I said at the beginning. Being a transactional lawyer, building a consensus is what your job is. People have different views. They want to get to a place that is happy for everyone, and that is very much what my job has been, and I want to continue to do that if I am confirmed.

Senator ROUNDS. Thank you. Anything else you wanted to add to that at all?

Mr. CLAYTON. No. I really thank you for the time.

Senator ROUNDS. Thank you.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you, Senator.

Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

Mr. Clayton, congratulations on your nomination. Since you and I met in February, there has certainly been quite a bit of activity at the SEC. Of particular concern to me is Acting Chair Piwowar's efforts to scale back the authority of the Commission's Enforcement Division. He unilaterally reopened the comment period on a congressionally mandated rulemaking, disclosure of CEO-to-worker pay ratio, so I want to focus first on the enforcement, and then I will turn to the other matter.

In 2009, former SEC Chair Schapiro gave enforcement staff subpoena power. Before this, only the Commission had the power. This empowered senior enforcement analyst to quickly escalate informal inquiries to formal investigations, ultimately strengthening the Commission's ability to investigate corporate misconduct.

When we met and discussed enforcement issues, you said that bad actors have cost this country billions, and I could not agree more with you. In my view, the SEC functions best with a strong Enforcement Division that stays ahead of the markets.

Unfortunately, Acting Chair Piwowar has taken steps to curb the Enforcement Division's authority by revoking the subpoena authority from 20 enforcement officials and limiting it only to the Enforcement Division Director. That is a major reversal from post-cri-

sis policy designed to assist the Commission in initiating investigations and going after bad actors that ravaged investors and our economy at large. So I just want to get some quick answers to these questions.

In your opinion, do you think that the SEC's enforcement staff has abused its authority since the delegation of subpoena authority in 2009?

Mr. CLAYTON. Senator, I have no idea whether they have abused their subpoena authority or not.

Senator MENENDEZ. Well, you are a practitioner before them. Do you have a sense that they have abused their authority for the last 8 years?

Mr. CLAYTON. Senator, in my experience, which as far as—you know, on the defense side, is very limited, so take it with that. I have not seen an abuse of subpoena authority by the SEC.

Senator MENENDEZ. Were you consulted at all on these policy changes as the potential new Chair?

Mr. CLAYTON. No, I was not.

Senator MENENDEZ. Do you agree with this policy change?

Mr. CLAYTON. I do not know. I will have to discuss this with both Commissioners and with the enforcement staff, if I am confirmed.

Senator MENENDEZ. Well, let me ask you this: Does taking away subpoena power from senior enforcement attorneys better protect investors and deter misconduct?

Mr. CLAYTON. That is—I do not know the answer to that question.

Senator MENENDEZ. Really?

Mr. CLAYTON. No, I do not because the subpoena——

Senator MENENDEZ. In the abstract—forgetting about—just the proposition that taking away subpoena powers from those line entities that are engaged in investigating misconduct and limiting it to only one person and then having to go through a whole process, it seems to me that we are going to largely deter and delay investigations.

Mr. CLAYTON. I think those are good questions.

Senator MENENDEZ. Well, the question—I am looking for good answers.

Mr. CLAYTON. Yeah, I——

Senator MENENDEZ. My good questions do not mean that much if I do not get good answers. I would hope to hear from you that what was happening before in terms of spreading that authority was the better process of making sure that we build on the successes of empowerment at the SEC's enforcement staff. At the end of the day, we need an SEC and a Chair who is going to be a cop on the beat, because what we had at one time is they were asleep at the switch, and that gave us the excesses that all Americans had to pay for.

Let me ask you, I have another concern about Acting Chair Piwowar's unilateral decision—unilateral decision—to open a new public comment period on the rule requiring public companies to disclose the ratio of their total CEO compensation to median worker pay, a rule adopted by the Commission nearly 18 months ago, a year-and-a-half ago.

In addition to obstructing the implementation of a congressionally mandated rule, one that I authored in Dodd-Frank, and diverting staff resources and time seemingly only to justify the personal ideological views of one person, this action actively ignores the tens of thousands of comments from investors and investment managers expressing the view that this information is material and important to shareholders' evaluation of executive compensation.

In fact, yesterday a coalition of 100 investors and investor organizations representing $3 trillion in assets under management wrote to the Acting Chair expressing support for the CEO-to-worker pay ratio rule and urged the SEC to maintain the current effective date for disclosure.

So my question is: Do you agree with the Acting Chair's unilateral decision to open a new public comment period on the rule? And if so, why?

Mr. CLAYTON. Senator, Acting Chair Piwowar is the Acting Chair. That is a decision for him to make.

Senator MENENDEZ. Yeah, but you are going to be, if confirmed, the new Chair. I want to know, do you think—would you do that? Would you have done that?

Mr. CLAYTON. I do not know enough about the issue.

Senator MENENDEZ. Well, that is not acceptable. What do you mean you do not know? You do not know about CEO pay and worker—this is a major issue that has been debated out there for some time.

Mr. CLAYTON. It has been debated for some time——

Senator MENENDEZ. And it is a congressionally mandated provision.

Mr. CLAYTON. It is a congressionally——

Senator MENENDEZ. One that has for 18 months already been a rule, so an arbitrary and capricious decision of the Chair—you will be the next Chair if confirmed—to ultimately undo that seems to me—to tell me you do not know, you do not know is not acceptable.

Mr. CLAYTON. That is not what I am saying, Senator. I am saying that I do not know what motivated Chairman Piwowar——

Senator MENENDEZ. I am asking you what you would do. Would you have done that? If you were the Chair sitting there right now, would you have done that?

Mr. CLAYTON. I cannot answer that question because I do not have the benefit of the interaction with the staff that Chairman Piwowar had and the history with the rule that he had.

Senator MENENDEZ. The history of the rule is it has already been done for 18 months. I am sorry, Mr. Clayton, but those answers are not acceptable.

Thank you, Mr. Chairman.

Mr. CLAYTON. Thank you.

Senator SHELBY [presiding]. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. Mr. Clayton, thank you for being here.

I sometimes go into these committees, and it reminds me of a "Far Side" comic. The caption read, "The floggings will continue until morale improves." So I thank you for your patience.

I want to ask you a question. You know, the primary mission for the SEC is protecting investors—that is more or less enforcement—

maintain fair and orderly and efficient markets, and to facilitate capital formation. Do you have any sense over how well the SEC has done over the last 8 years or the last 20 years? You pick your time horizon.

Mr. CLAYTON. Senator, I think on the—let me focus on the question of capital formation, if you do not mind. I do believe that over the last 20 years, particularly in the area of our public capital markets, we could have done better. We could have done better.

Senator TILLIS. Tell me a little bit, because that spans a couple of Administrations. What were the highs and lows? Just briefly, because I want to keep to my time, and I have got a couple other questions I want to ask.

Mr. CLAYTON. In particular, I believe, for medium-sized companies, companies that are in their growth phase, we have made it more difficult and less relatively attractive for them to be public companies. I think that almost all——

Senator TILLIS. What do we have to do to get on a positive trajectory?

Mr. CLAYTON. You know what? We have to reduce the burdens of becoming a public company so that it is more attractive——

Senator TILLIS. Well, that was going to be another question I would ask you. Why do you think it is we have—I was trying to get the number in front of me so that I am accurate. But just comparing—hold on 1 second. There are one-third fewer public companies today than 20 years ago. Is that healthy or unhealthy?

Mr. CLAYTON. I believe that that statistic should be telling us something, and I think it is——

Senator TILLIS. What is it telling us?

Mr. CLAYTON. I think it is telling us that our public capital markets are less attractive, and our public capital markets, I believe, are a much—they are much more effective for the Main Street investor than other forms of investing——

Senator TILLIS. Is it fair to say that if we do not come up with a way to—with proper regulatory oversight—and I worked in the banking industry. I was a partner at PricewaterhouseCoopers. I have worked with a number of different financial institutions, Bank of America probably being the one I spent the most time with. But is it fair to say that if we do not come up with a way to improve capital formation, we are hurting the little guy? Because capital formation creates jobs. Is that right?

Mr. CLAYTON. I agree with that, Senator.

Senator TILLIS. At every level.

Mr. CLAYTON. At every level.

Senator TILLIS. I know the one thing—so, you know, it is not a matter of going willy-nilly. I was a partner at PW back in the 1990s. I saw the bust. I saw the very real regulatory exposure that Enron gave light to. It had to be fixed. I am not against all regulations. I am against regulations that prevent the little guy from getting a job. And I think if we do not form capital, we do not create jobs, and we do not grow our economy, and we do not reduce the tax burden. There is a right size to regulations, just like there is lean manufacturing techniques and lean process techniques that the private sector uses. And I hope that you will go in there and

look at this organization and right-size the regulations, come up with schemes that promote responsible capital formation.

You know, there is something else that—I feel like sometimes I am living a reality TV version of "Atlas Shrugged." There are a lot of people in this Congress that want to just beat down job creators and employers. And I just decided just on the fly—and I am glad my staff was able to respond to my random request, but just take a look at Goldman Sachs. People want to demonize Goldman Sachs. That is an easy thing to do, right? Just beat up on a financial services institution, an institution that is committed to—let me look at the general numbers here. They have 36,500 employees. There are probably a lot of little guys in there. They have contributed billions of dollars to nonprofits. They have a commitment to investing or financing $150 billion—am I right?—in the clean energy sector by 2025. Demonizing employers that employ the little guy is not looking out for the little guy. And I have heard a marketing department recently using "looking out for the little guy." Look, I was a little guy. When I was 19 years old, I was not in college. We have got to look out for the little guy, and we have got to stop demonizing businesses that have to be held accountable.

You find a bad actor—everybody thinks that I like pharmaceuticals. I like pharmaceuticals who are responsible. Ones who are bad, like Turing, I would like to see them go to jail. Any financial services executive or anybody in a financial services business that acts badly needs to suffer the consequences. But if we just let the American people think that they are all bad, you are hurting the little guy. And I hope you will go to the SEC and promote responsible capital formation and do a good job. And I think that you will.

And, Jasper and Wyatt and Haley, I think your dad is going to do a great job.

Mr. CLAYTON. Thank you.

Chairman CRAPO [presiding]. Thank you, Senator.

Senator Schatz.

Senator SCHATZ. Thank you, Mr. Chairman.

Mr. Clayton, there are 20 regulations mandated by Dodd-Frank that the SEC has not yet drafted or finalized. That is more than 20 percent of the law which was passed 7 years ago. The Acting Chairman has publicly stated that the SEC will halt all work on Dodd-Frank-related rules. What would be the legal basis for not finalizing rules that are required under a statute?

Mr. CLAYTON. Rules required under a statute? Rules required under a statute, rulemaking should go forward with respect to rules required under a statute.

Senator SCHATZ. And at what point does a delay become a refusal to implement the law?

Mr. CLAYTON. I think that depends on the context, Senator. I do not think there is a specific——

Senator SCHATZ. Well, I am giving you this context, a 7-year-old law, 20 percent of the rules not yet implemented, the Acting Chairman refusing to move forward on implementation of the rules. That sounds like a refusal to implement the law as opposed to the normal sort of Administrative Procedures Act stumbling and bumbling.

Mr. CLAYTON. I am not sure I would characterize it that way, but I understand your point.

Senator SCHATZ. But I am asking what you think?

Mr. CLAYTON. Again, as I said with Senator Menendez, in terms of a specific rulemaking, I do not have the benefit of the interaction with the staff and the comment letters and what the—but when—and I hope I do—I become Chairman, assessing the rulemaking calendar, prioritizing and moving forward is something I very much intend to do.

Senator SCHATZ. Do you think the SEC has the authority to refuse to implement a rule required by the law?

Mr. CLAYTON. I think a rule required—a rulemaking required by law should go forward.

Senator SCHATZ. Thank you.

I want to ask sort of an uncomfortable question, and you and I had a good conversation. I also have young kids. We are both in public service. There is a lot of travel. We appreciate it. Your dad is doing fine. You guys are doing better than he is because I am sure this is a little boring for you.

Mr. CLAYTON. They always do.

Senator SCHATZ. Yeah. But thank you for that. But I appreciate the conversation that you had with Senator Warren regarding recusals and conflicts of interest. But there is another aspect of this. Take Mary Jo White's situation, who recently returned to the firm she left to join the SEC. While at the SEC she had to recuse herself from dozens of SEC actions, as you would. This made it harder for the SEC to carry out its mission. But now that she is back at her old firm, it raises questions that she never really severed ties to former colleagues, friends, and clients, and that is not because she is doing anything nefarious. It is because of human nature. It is only human to think that it is—it is only human to think about the next phase of your career, and naturally we know that future options are shaped by current actions. And for a financial regulator, it is especially problematical.

This leads me to a sort of challenging question to ask, and I in no way mean to impugn your personal integrity, but I have to ask: Is it fair to say that you have friends and colleagues at companies and institutions that are subject to the SEC's oversight?

Mr. CLAYTON. Yes. And it is a fair question, and, yes, I do.

Senator SCHATZ. Is it fair to say that you will consider returning to Sullivan & Cromwell after your term is finished?

Mr. CLAYTON. On that, this is a huge change for me and my family, and I am committed to doing this. As far as, you know, whether my term is hopefully a full term, a lot is going to change if that is the case. Even if it is—I mean, your whole life changes when you do something like this. I am severing all ties to the firm. I am divesting myself of all the financial assets. You know, and I know, having done some changes in my life, that when you do a change, your perspective on just about everything changes. Maybe some a little bit, maybe some a lot.

Senator SCHATZ. I guess what I am hearing is you do not preclude the possibility of any professional opportunity that may present itself after you serve as Chair of the Commission.

Mr. CLAYTON. I am not going to preclude it. I do not think that is an appropriate precedent to set. You know, that said, I am committed to this job.

Senator SCHATZ. Sure. I understand. And I think from the standpoint of not this panel or the people in this audience or even the people watching on C–SPAN, but from the standpoint of the regular person, it is not unreasonable to worry about someone who comes from industry, whose social network, whose professional network, whose friendship are within that industry to be put in charge of being the cop on the beat; it is not purely a matter of whether there is a square conflict and whether you do the recusals properly, but whether those relationships infuse all of your thinking about your own life and about the decisions before you.

Thank you, Mr. Chairman.

Chairman CRAPO. Senator Perdue.

Senator PERDUE. Thank you, Mr. Chairman. And, Mr. Clayton, thank you for your forbearance and your willingness to step out in mid-career to do something like this.

As a past public company CEO, I have had a personal relationship with the SEC, and I find it on balance to be a very supportive and constructive agency, so let us put that on the record.

Having said that, I am very concerned that the economic miracle of our lifetime, the last 70 years, in my humble opinion has been based on innovation, capital formation, and the rule of law. And I think we outcompete everybody in the world with regard to the totality of what that means. I am concerned that right now in the last—since 2000, we had 8 years of a Republican President and 8 years of a Democratic President, so this is not a partisan question. But our number of IPOs, initial public offerings, has decreased somewhere between—well, it has gone from an average of around 450 in the decade before to somewhere under 200 now, close to 150. And that is a significant change over a long period of time. It seems to me systemic. It represents, I think, some things that are troubling with regard to our current financial situation. This is my second question I want to come back to, to your USA 10–K. Can you speak to the fact that this reduction in public offerings and also to the number of public companies we have today, what is causing that? What do you think the SEC can do to help us become more competitive with the rest of the world?

Mr. CLAYTON. Yes, Senator, and I agree with you. I believe that a reduction in the number of public companies, which is a function of fewer companies becoming public, is a problem for our capital markets.

The ability to invest in a public company is one of the most efficient ways for a Main Street investor to invest. The price is there. Our equity markets have become very efficient. You can invest. You can divest very easily. It is very important. Who chooses to become a public company? The management of the company. When they come to make that choice as to where they are going to raise capital or how they are going to incentivize their employees or other things that are important when you make these decisions, they look at the landscape now and very often say, "It is just too burdensome." And I think that is a problem.

Senator PERDUE. Do you think that puts us at a competitive disadvantage with other countries?

Mr. CLAYTON. I think it puts us at a competitive disadvantage with other countries, and in particular, it puts us at a competitive disadvantage in terms of something uniquely American: the participation in the capital markets.

Senator PERDUE. What I am concerned about, the private markets are also a very efficient way to raise money, but it only allows a certain percentage of investors to play because the blocks of investment are so much larger, the risk per dollar of investment is so much greater, and, frankly, it is not as liquid. People cannot get in and out as quickly as they can in the public markets.

So I am one that is paying attention to this as having run a public company and a private company. I am very concerned about that imbalance right now, particularly with regard to global investment and the flow of capital around the world.

In my time remaining, I have one quick question. You wrote an article—I think you co-wrote it. It is "USA 10-K." In there, you make a lot of comments. One that really speaks to my heart, though, as one of the reasons I got involved in running for the Senate is I am concerned about our current financial situation. And you talk about complexity risk and the current state of regulatory affairs. Can you just speak to that briefly?

Mr. CLAYTON. I have a problem with regulations that are unnecessarily complex, a real problem with it, because it leads to a lot of things. One is it is very costly to address them up front. The second is it creates loopholes. No one wants loopholes. Complexity allows for that. And, third, it creates an opportunity for "gotcha." That is not what we meant. We meant this: My view on regulation is, to the extent practicable—and you cannot do this in all cases, but to the extent practicable, reducing complexity, clarity are very important. If people know the rules, they can operate more efficiently.

Senator PERDUE. Thank you, Mr. Chairman. You know, the number one thing that I am looking for in this nomination is somebody who can help the SEC create and maintain a level playing field. And I think with your background, I think you have all the skills and personal integrity to do just that. And I applaud you again for being willing to step out and take on this responsibility.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you.

Mr. CLAYTON. Thank you.

Chairman CRAPO. Senator Warner.

Senator WARNER. Good morning, Mr. Clayton. I have got a couple areas I want to bounce around here, so I will try to be fast in my questions, if you could try to be somewhat fast in your answers.

I have been very interested in the emerging challenges around cybersecurity. To me, it was fairly remarkable that Yahoo, for example, had a 500 million user breach and yet did not feel that was material enough to file in their quarterly SEC filing.

Now, I do not want to just pick on Yahoo. The remarkable stat is there are 9,000 publicly traded companies. Less than 100 over the last decade-plus have ever reported any kind of cyber breach or violation as material information.

As more and more companies get more and more often threatened by this type of activity and more of their intellectual property is subject to this kind of attack, do you think the SEC ought to take a fresh look at reporting around the whole threat of cybersecurity?

Mr. CLAYTON. Senator, let me give you my personal view, and I think it answers your question. I do not think that the American public—we can whittle that down to the American investing public, particularly outside of—particularly the ordinary investor, has as great an appreciate for the cyber risks that our businesses face today.

Senator WARNER. Well, I would just hope, though, that—you know, we have got some bipartisan legislation that would at least require someone on the board to have some level of cyber experience. But to me, the whole question of materiality, if Yahoo had 500 million, then there was some question that the breach actually exceeded 1 billion, how that is not material is just beyond belief.

Mr. CLAYTON. I think it would be inappropriate for me to comment on a specific case or a specific matter, but what I want to say is as I look across the landscape of discussion and understanding of cyber threats and their possible impact on companies, I question whether the disclosure is where it should be.

Senator WARNER. I appreciate that.

At one of the hearings Senator Crapo and I had one time—and I think he may have touched on this—RBC Capital brought in a chart that showed—this is around equity market structure. They showed 839 different fee schedules that were composed of 3,722 separate fee variables. In effect, there was an ability for the market makers, through kind of bespoke transactions, to really gear toward people who were going to make the biggest commission off of this. It was not by any means a level playing field, in answer to Senator Perdue's questions.

One of the things that we pushed very hard, the former Chair, but we have really not seen it, is to move forward on a maker-taker pilot so that we can try to bring more clarity to make sure that all bidders in a market are going to get a fair shake. If confirmed, would you pledge to continue to work with us on that type of pilot?

Mr. CLAYTON. Yeah. In my opening remarks, I noted that in our interactions—and I was really glad to meet with you—I learned things. This is a case where I have learned something in the interim thanks to your questions. The Equity Market Structure working group at the Commission is doing—you know, I think is doing a good job of bringing the fact that there is a great deal of complexity. We do not know whether it is as efficient as it should be or as fair as it should be. And I do want to work on this going forward.

Senator WARNER. I would like that because to me, seeing that structure, seeing this chart, to me it looked like it was a total ability to game the system that really allowed market makers to give to a preferred broker and, frankly, was by no means—it was by no means the kind of level playing field that I think we all want.

I want to get in my last question here. I know that you have represented Valeant and Pershing Square. There was potential insider trading in conjunction with the Allergan bid back in 2014. As a

matter of fact, a Federal judge in California ordered both Pershing Square and Valeant to make additional disclosures on their shareholder documents. In a sense, it seemed like they were almost begging the SEC to take on a case around this issue around insider trading. I also believe that one of the challenges—I think Senator Donnelly raised this issue around, you know, long term versus short term. One of the challenges, there is a role for activist investors, but in the United States, we still have under 13D what I think is a very antiquated 10-day reporting period, so somebody can aggregate that 5 percent of the stock, report it after they got that 10 days, then you get another 10 days for somebody else to be able to, in alliance as kind of co-investors, aggregate stock without the level of disclosure that—you know, the U.K. is down to you have got to report this within 2 days. Hong Kong I think has got a requirement of instantaneous disclosure. To me, 13D and the ability for these investors to kind of aggregate shares and then provide kind of an aggressive activist type, you know, sometimes play well, but I do not think we are serving our market or serving the Western investors well. Do you have any comments on 13D and how we might be able to get this kind of information faster out? And then also this notion of whether you think the SEC ought to take a look at the judge's decision in the Pershing Square case. I tried to get a lot in there. I am over time.

Mr. CLAYTON. Yes, that is a lot.

Chairman CRAPO. Quickly, please.

Mr. CLAYTON. On the question of activist investors and the benefits that they bring to the market and some of the questions that people have raised about their activities, you know, that is going to be an ongoing debate. I understand the contours of the debate, and I look forward to working on it.

Senator WARNER. 13D?

Mr. CLAYTON. 13D, I also understand that debate in terms of you want to incentivize people who see something wrong with the company to come in and say, you know, you are not doing a good job. On the other hand, you do not want to give them an unfair advantage. And, in particular, I understand your question about whatever we want to call it, the domino effect, the group effect.

Chairman CRAPO. Thank you.

Senator Reed.

Senator REED. Well, thank you very much, Mr. Chairman. And I apologize for my tardiness. I was leading, along with Senator McCain, a hearing simultaneously with the Supreme Allied Commander in Europe, General Scaparrotti, so I am sorry.

Mr. CLAYTON. It is probably more important.

Senator REED. No, it is not. It is not. Welcome to you. Welcome to your family. I particularly want to salute your father's service in Vietnam. Thank you, sir, very much.

You have said in your public statement, "There is zero room for bad actors in our capital markets. I am 100 percent committed to rooting out any fraud and shady practices in our financial system."

One of your potential predecessors, Mary Schapiro, in 2011 wrote that one of the reasons why there are some inhibitions in doing this is because "the authority to obtain civil monetary penalties with appropriate deterrent effect is limited," i.e., they are capped

at a relatively low level given some of the behaviors and some of the resources. Would you be sympathetic to statutorily raising these penalty thresholds? Senator Grassley and I are working on such a proposal.

Mr. CLAYTON. Senator, actually I have to confess this is the first time I have been asked the question about the penalties, so I am very willing to take a look at the issue and work with you and give you my views after I have been better educated on it.

Senator REED. Well, one of the things that most people—and you do not have to be a financial analyst, just somebody back in Rhode Island reading the newspaper—when you have a company that settles, or admits no right or wrong, they did not do anything wrong and they settle for money which is a fraction of what was suggested they got through these behaviors, people get a little cynical and skeptical. So I would urge you very much to look at that.

Following up on Senator Warner's question about cybersecurity, we also have a proposal—Senator Collins, myself, and Senator Warner have a legislative proposal that will require a publicly traded board to have at least one person on the board who is a cybersecurity expert, and if not, then in their disclosures, explain why they do not need it because of steps they have taken. And let me emphasize it does not require companies to take any actions other than just provide this disclosure. Would you be sympathetic with that legislation?

Mr. CLAYTON. Senator, as I said, I believe in materiality being the touchstone. That said, there are areas where I believe guidance to corporations in terms of what their disclosures should be is appropriate. I think cybersecurity is an area where I have said previously I do not think there is enough disclosure. In terms of whether there is oversight at the board level that has a comprehension for cybersecurity issues, il that is something that investors should know, whether companies have thought about the issues, whether it is a particular expertise of the board or not, but I agree that that is something companies should know. It is a very important part of operating a significant company. Any significant company has cyber risk issues.

Senator REED. And that is not just the traditional sort of financial company nowadays or any company, because the ability to interfere with operations through the Internet is significant.

Mr. CLAYTON. Yes.

Senator REED. Let me ask a question about climate change. It is interesting. BlackRock, which is one of the world's largest asset managers, has just indicated that it would expect companies such as oil producers, miners, or real estate companies to have a demonstrated fluency in how climate risk affects their business and how a given company will address it, which raises, again, a similar issue. Should these companies that are exposed to climate risk specifically be required to make their disclosures in their publicly filed documents?

Mr. CLAYTON. I know that the SEC has issued guidance in this area, in particular, not on the impact of climate change itself on businesses, but potential regulations and other activities. And let me say this: Public companies should be very mindful of that guidance as they are crafting their disclosure.

Senator REED. I will just say this, and this is more of a footnote than anything else. It is an interesting time when the Secretary of Defense seems to be the most fervent believer in climate change and the Director of the Environmental Protection Agency does not seem to believe it at all, placing companies in an awkward position of who do you believe. But I tend to believe the Secretary of Defense, so let us stop there.

A final point we talked about in my office, which is intentions are one thing, resources are another, and resources will affect your behavior. And as I observed, one of the impressions I had in the run-up to the collapse in 2007 and 2008 was the SEC had very good intentions, but they did not have the budget to go out there, and Wall Street knew it. And so they knew that there were a lot of behaviors that might have been in that murky area, but the likelihood of, one, being discovered, two, being prosecuted or anyone held accountable was virtually nil because the resources were not available.

Right now the SEC is operating on a CR of about $1.6 billion. They have asked for $1.7 billion. But looking at the skinny budget, domestic agencies are being decimated. So what happens when you are presented with a budget which you think is absolutely inadequate for the technology, for the enforcement personnel, et cetera, and I think that will translate very quickly on Wall Street, generically speaking, into the sense that there is no sheriff?

Mr. CLAYTON. Well, in terms of using resources, I am very interested in using resources as effectively as possible. In the area of enforcement, as I have said—and I do look forward to discussing this with the staff at the SEC, and the prosecutors who, I know, and will, if confirmed, cooperate with, I do believe that individual accountability has a greater deterrent effect across the system than corporate accountability. And I look forward to pursuing that.

On the question of budget and resources, I know lots of instances where new CEOs have had to go into a particular situation. They wish they had more money; they wish they had less money. One of the things that I would have to do here is get up to speed very quickly on the areas of acute need versus less need and act accordingly. That is what I can tell you.

Senator REED. Thank you.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you, Senator Reed.

Mr. Clayton, that concludes our first round. We have had just a couple of Senators ask for a second round, and so we will do that. I think we have three Senators who have asked to do so. And I will forgo my second round, although I will probably make some wrap-up comments at the end, but let us start the second round right now with Senator Brown.

Senator BROWN. Thank you, Mr. Chairman. I appreciate your indulgence, and I know Senator Warren does and Senator Cortez Masto does. I have to go to Agriculture after this for the confirmation for the Secretary designee there.

Again, thank you for answering the questions that you have so far. You have clearly thought a lot about the Foreign Corrupt Practices Act. As a lawyer in private practice, how would you advise a client interested in complying with the act if that client was weigh-

ing going into business in Azerbaijan with a politically connected family known to be corrupt and tied to the Iranian Revolutionary Guard? And you know that is not just a "what if." That is a real case.

Mr. CLAYTON. No, I think that is a real case, and I am going to not comment on a real case, but I am going to comment on the question of how do you advise a client who is subject to the Foreign Corrupt Practices Act who may be entering into a business in a country that is well known for corruption. I think you have to tell that client to think long and hard about whether you want to have the potential exposure to—and not just the Foreign Corrupt Practices Act, but thankfully now, which was not the case 5, 7 years ago, similar oversight and enforcement from other OECD countries. And, in fact, there are some jurisdictions where in the vast majority of the cases, it may make sense just not to participate.

Senator BROWN. I am sure you know that the President was involved in that situation. In 2012, he said that the FCPA is a horrible law that should be changed because it puts U.S. business at a huge disadvantage. I am not asking you—I know you have had some similar kinds of thoughts, but I think all of us want you to understand how important it is with a President like no other in terms of family investments, in terms of the President's family has gone overseas to do more investing while U.S. taxpayers have paid to protect his family when they are overseas and how those raise questions not for this hearing but that you need to be particularly vigilant because he is your boss. I understand you have a fixed term, but he is your boss, and he continues to appear to be making money from around the world. And I am hopeful that the standard will be high. We should send the message that American businesses—we should not be sending the message American businesses can be so successful partnering with corrupt entities. It is bad for our moral standing in the world. It is bad for a developing country. It is bad for investors. But I would just ask to make that statement.

Let me ask another question. I do not think I have heard anybody in Main Street, Ohio, complain about the lack of IPOs crimping their investment choices. What they really want to know is that we are doing what we can to prevent the busts that can endanger their savings and retirement and to make sure the system is not rigged against them.

I have been troubled for the last 3 or 4 years by the collective amnesia on this Committee and in this Senate about what happened in 2007, 2008, and 2009, and I think most Americans share that concern and wonder about the collective amnesia of too many of our policy holders.

So my question is this, Mr. Clayton: What do you tell people saving and investing about a market where companies can stay private for longer, can limit shareholder voting rights—we are seeing that in a number of very prominent U.S. companies—and where they can make it harder for even large institutions to submit proposals for shareholder votes?

Mr. CLAYTON. Let me try and take those. In terms of—let me go back to your first statement. In terms of whether having fewer public companies, I do think it is—again, I do think it is a problem,

and I do think it is a problem that is not well known because if you have fewer public companies getting on the growth phase, and these are all here, that is fewer returns for people who participate in the public markets. People who participate in the private markets are capturing those returns. I do want to see more public companies.

In terms of, you know, your other questions around amnesia, I can tell you that I do not have amnesia. I worry about where the risks are today. Now, the risks in 2007, 2008 were in one aspect of our economy, and it got away from us, very much got away from us, and we did not—I worry about where those risks are housed today and making sure that we do not have a repeat of that type of situation.

Senator BROWN. Go back to the—thank you for answering the collective amnesia part of it, but we talked, and you said you want companies to be—when I said they stay private for longer, you answered that well enough, but more and more companies are limiting shareholder voting rights, more and more companies are not really particularly welcoming of submitting resolutions by even major institutional shareholders.

Mr. CLAYTON. On the voting rights and governance issue of companies, you know, two things. It is well disclosed and well understood. That is where we are. The ability of companies to come to the market with governance structures like that is a function of does it make sense. I also believe it is a function of what is the supply of public companies coming to the market. My sense—and I could be completely off on this because I have not tested it with experts and things like that. But my sense is that the ability of—there is so much thirst for public companies that it is easier for a company to set a particular set of governance requirements than it may have been in the past.

Senator BROWN. And that is not a good thing?

Mr. CLAYTON. I do not know if it is a good thing or a bad thing, but I think that is a change in the balance.

Chairman CRAPO. Thank you.

Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you, Mr. Chairman. Thank you for the indulgence.

And to Mr. Clayton, I know it has been a long morning, so I appreciate you being here and the answers to the questions. I have two quick ones for you.

One has to do with the forced arbitration clauses. In particular, Dodd-Frank gave the SEC the authority to rein in the use of forced arbitration clauses. Unfortunately, the SEC never so much as studied the issue.

So my question to you is: If confirmed, will you commit to reining in the use of forced arbitration clauses?

Mr. CLAYTON. I am not going to prejudge and commit to that issue. It is actually—I will tell you it is an issue that I do not know a great deal about, but I will say that I will commit to working with you and working with the staff to learn more about it.

Senator CORTEZ MASTO. Thank you.

Second question. A number of my colleagues today have covered how your substantial recusals may impede the work of the SEC.

My specific interest, though, is in transparency. I believe that Government does not do enough of being transparent enough to the taxpayer to understand what is taking place, in Commission hearings, in any type of process or procedure. And while I certainly do not want market-moving information to be disclosed before it is ripe, I think the public should know when you or any Commissioner has recused yourself once an enforcement matter is settled.

Will you commit to report to the public instances when you have recused yourself and what triggered the recusal once that enforcement matter has been settled?

Mr. CLAYTON. I think there are two parts to your question—well, let me say there are three parts to your question. I do agree with transparency. There are situations, as you know as a prosecutor, where, you know, for example, you do not disclose an ongoing investigation until it is over.

In terms of recusals, I think the Commission has a policy for disclosure of recusals, and I look forward to working on that.

As far as the particular reason for recusal, if it is not—I will need to look into it, but there are—it is the first time I have thought about it. There are things going through my mind like, you know, what is the duty to a client, et cetera, those types of things. But I will look into whether the specific reasons for recusal is something that should be disclosed.

Senator CORTEZ MASTO. Thank you. And let me just couch this. Most States, and particularly Nevada, have open-meeting laws, and they require any type of action taken by a commissioner to be put on the record for the public to understand. And I completely agree with you that during a pending investigation, you want to protect the integrity of that investigation, whether it is civil or criminal.

My question to you, though, was: At the end of the enforcement matter, once it is settled and done, at that point in time would you be willing to even change a policy if it is different than what I am asking you to identify if you recused yourself on that particular matter, and then why you had to recuse yourself?

Mr. CLAYTON. I am very open to having that dialog with the SEC Ethics Officer and the people at the SEC who have experience with this—it is not a new issue—finding out what has been done in the past, and discussing it with you.

Senator CORTEZ MASTO. Thank you. I appreciate that. Thank you for the answers to the questions today.

Mr. CLAYTON. Thank you.

Chairman CRAPO. Senator Warren.

Senator WARREN. Thank you, Mr. Chairman, and thank you very much for letting us have an extra round here.

Mr. Clayton, last December, President-elect Trump's transition team announced that Carl Icahn would be serving as special adviser to the President on issues related to regulatory reform. Now, as you know, Mr. Icahn is a long-time activist investor with holdings of more than $16 billion. He has massive holdings in public companies like CVR Energy, an oil refinery, and Herbalife, a medical supplement manufacturer. And as far as we can tell, he has not divested any of these investments despite his role in this Administration shaping regulatory policy that affects the companies that he is invested in.

Now, about 2 weeks after Mr. Icahn was named to this position, you were nominated to lead the SEC, and according to news reports, Mr. Icahn helped President-elect Trump choose you. That is troubling for a number of reasons, especially considering that the SEC is actively investigating Herbalife, one of Mr. Icahn's largest investments.

So, Mr. Clayton, have you had any conversations or other communications with Mr. Icahn since the election on November 8th?

Mr. CLAYTON. The news reports that Carl Icahn had—I do not know—I have no knowledge of——

Senator WARREN. I just asked——

Mr. CLAYTON. No, but—thank you. After I was—after my nomination was announced—I had a bit of a heads up that it was going to be announced, but after it was announced, I got a call to ask me to meet with Carl Icahn, and I met with him.

Senator WARREN. So you met with Carl Icahn not before you were nominated but after you were nominated?

Mr. CLAYTON. Correct.

Senator WARREN. And can you tell us what you talked about?

Mr. CLAYTON. We talked about Mr. Icahn's view on the importance of activist investors and how they, through their methods, drive performance of public companies.

Senator WARREN. And let me guess. He thinks activist investors are a good thing and should be encouraged in the marketplace.

Mr. CLAYTON. I think he thinks they do well for markets.

Senator WARREN. Yeah. Did he talk about any of his investments?

Mr. CLAYTON. No.

Senator WARREN. All right. So he just talked generally about his view and talked about his view about how the SEC should——

Mr. CLAYTON. No. No real specifics on——

Senator WARREN. So he just wanted to give you his general view on activist investors, knowing that you were the SEC Chair nominee.

Mr. CLAYTON. Correct.

Senator WARREN. And that was the only conversation you had with him——

Mr. CLAYTON. No, we——

Senator WARREN. ——or with any of his people?

Mr. CLAYTON. No, we talked—oh, you mean that conversation?

Senator WARREN. Yes.

Mr. CLAYTON. That was the only time I have spoken with Mr. Icahn or his people before or after, during——

Senator WARREN. And that was the only topic of the conversation when you met, the two of you?

Mr. CLAYTON. He congratulated me. We talked——

Senator WARREN. Fair enough.

Mr. CLAYTON. ——about people we knew in common, that kind of things. That is the first time I met him.

Senator WARREN. OK. If you are confirmed, do you agree that it would be inappropriate for you to have any conversations with Mr. Icahn about the SEC's regulatory or enforcement plans, especially given his massive financial interests in various SEC decisions?

Mr. CLAYTON. If I am confirmed and I am in the seat of the Chairman of the SEC, I think it is important to talk to participants in the markets of all types.

Senator WARREN. Including those that there are massive ongoing investigations?

Mr. CLAYTON. That is something that needs to be navigated very carefully. If there is a massive ongoing investigation, that is why we have counsel and protocol, and it may be that it is completely inappropriate to talk to somebody. But what I want to say is receiving information about what participants in our capital markets think about them from all different types of people is an important part of the job. But to your point, Senator, I agree with you. If there is an ongoing investigation and there would be the appearance of impropriety or—you know, even the appearance of impropriety, it may be inappropriate to have that kind of——

Senator WARREN. I would like you to upgrade that "may be inappropriate" to you believe it is inappropriate.

Mr. CLAYTON. I am not going to—I am not going to totally prejudge it, but I totally—I totally get your point.

Senator WARREN. I would feel totally a lot happier if you would totally prejudge that this is inappropriate.

[Laughter.]

Senator WARREN. So let me go on from there just a little bit.

Mr. CLAYTON. OK.

Senator WARREN. In February, Mr. Icahn purchased a significant stake in Bristol-Myers Squibb, the massive multinational drug company. And to be clear, he purchased this stake months after he was appointed as a special adviser to the President for regulatory policy. So let me do this as quickly as I can.

Mr. Clayton, I just want to ask you generally, can the Federal Government's regulatory decisions affect the value of holdings in a drug company like Bristol-Myers Squibb?

Mr. CLAYTON. Yes, Senator.

Senator WARREN. Yes, good. And can the value of those shares be affected by FDA policies?

Mr. CLAYTON. Yes.

Senator WARREN. Good. And patent decisions?

Mr. CLAYTON. Yes.

Senator WARREN. And Medicare and Medicaid decisions?

Mr. CLAYTON. Yeah.

Senator WARREN. Good. Because, of course, they could. And Mr. Icahn is helping dictate Trump administration policy at the same time that he is buying stock in this company. It is almost impossible to imagine how he would not have some inside information about how these policies would affect a company like Bristol-Myers.

So, Mr. Clayton, if Mr. Icahn had inside information about Federal regulatory policy affecting Bristol-Myers and he chose to purchase shares in the company based on that information, is that potentially a violation of securities laws?

Mr. CLAYTON. As we both know——

Senator WARREN. In general.

Mr. CLAYTON. OK. As we both know, the question of the scope of the securities laws around insider trading, et cetera, is—it is a very facts and circumstances analysis.

Senator WARREN. If he had inside information——

Mr. CLAYTON. But it depends—it depends on where it came from, what duty, those types of things.

Senator WARREN. How about it came from the fact that he was appointed by the President to get this information and actually to create this inside information?

Mr. CLAYTON. I think we are assuming a lot.

Senator WARREN. I do not think we are assuming a lot, Mr. Clayton. And I appreciate that you want to be fair here. I know I need to stop because I am over my time, and the Chair has been very indulgent here. But we are talking about an Administration that just has conflicts everywhere, and it is very difficult to determine whether someone is actually working in the interests of the American people or they are just lining their own pockets or doing some secret blend of the two. The American people should not be on guess about that. And when Carl Icahn is influencing policy that will affect companies and then he is investing in those companies, buying and selling in those companies, that creates a conflict of interest that just—is just beyond what we are even talking about everywhere else.

I just want to make the point that we are going to have to count on you, the American people are going to have to count on you, and I want to hear that you are clear that this is not right, that this will be investigated, that there is not going to be chummy conversations, and that we will see some real enforcement of the law on insider trading. I do not understand how we can have someone who continues to trade in a market and is influencing regulatory policy simultaneously, and I want to hear the Chair of the SEC say he is going to look into this and I hope put a stop to it.

So I will stop there. Thank you, Mr. Chairman.

Chairman CRAPO. Thank you, Senator Warren.

Mr. CLAYTON. Thank you.

Chairman CRAPO. And, Mr. Clayton, that concludes the questioning. I do want to make a couple of comments and supplement the record on one issue, and I am glad you are still here, Senator Warren, because it relates to something you said earlier that I want to supplement.

In your first round of questioning, you indicated that you believe that the Republican Commissioners were more lenient in enforcement actions than the Democratic appointees to the Commission. And I just have some information here from two articles back in October of 2016 in which Reuters in one case and Law360 in another case analyzed all of the enforcement actions of the SEC from Mary Jo White's tenure—it was about a 3-year period of time. There were 1,400 defendants, over 400 cases. And the conclusion of that lay was that over that 3-year period of time, the Commission was unanimous in virtually all of them. There were 4 of those 414 cases in which there was a single negative vote from one Commissioner. And so I just wanted to make it clear—I did not want to let your allegation that Republican nominees are lenient stand without at least a response, and I am glad that you—I know you would like to make a response now as well, and you are welcome to do so.

Senator WARREN. That is right, and I have not prepared for this, but I do want to say I think we have a *New York Times* analysis showing in the 48 cases where Mary Jo White recused herself that the Republicans wanted less enforcement.

Chairman CRAPO. I am not familiar with that article, but you are welcome to——

Senator WARREN. And the Democrats wanted more enforcement.

Chairman CRAPO. ——present it.

Senator WARREN. But we can continue to talk about this issue.

Chairman CRAPO. We will do so.

Mr. Clayton, thank you again for your willingness to serve and your coming and participating in this hearing here today.

I have just one announcement for our Members, and that is that the questions for the record—which will be submitted, and we ask you to respond to promptly, Mr. Clayton—are due by the end of business on Monday.

And, once again, thank you for being here. That concludes our business. The hearing is adjourned.

Mr. CLAYTON. Thank you, Senator.

[Whereupon, at 11:55 a.m., the hearing was adjourned.]

[Prepared statements, biographical sketch of nominee, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN MIKE CRAPO

MARCH 23, 2017

This hearing will come to order.

This morning, we will hear testimony on the nomination of Jay Clayton to be the Chairman of the United States Securities and Exchange Commission.

Mr. Clayton has extensive expertise in our financial markets as a highly regarded securities lawyer.

For decades he has helped companies access our capital markets, increase their ability to invest in the U.S., and grow and create jobs.

One area on which Mr. Clayton has already indicated he will focus is capital formation.

Capital markets drive innovation and job creation, and access is the lifeblood of our economy.

The JOBS Act helped revitalize the primary markets, and both Congress and the SEC should continue to find ways to help companies go public and allow investors to share in their success.

Recently, this Committee marked up several bipartisan securities bills and we encourage you, if confirmed, to help us identify other securities areas which could use legislative improvement.

The SEC has an important three part mission: protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

Each part of the mission is equally important and should not come at the expense of another.

I raise this because the SEC's mission is critical to every U.S. citizen and retiree.

Investors should be able to participate in our markets, on fair footing, so that they can pay for life events such as college and save for retirement.

We also need to help investors make sure they have material information to make informed investment decisions.

I have repeatedly stressed the need for the U.S. financial system and markets to remain the preferred destination for investors throughout the world, and the SEC has an important role to that end.

I look forward to hearing more from you on how we can help companies grow, Americans get hired, and investors share in the wealth creation by these companies.

Another important issue that the SEC is tasked with is ensuring that the stock market rules and regulations are still appropriate, given that most of them were promulgated in a time where technology was much less advanced.

It is imperative that these rules serve the needs of companies and investors.

In that vein, it is important for the SEC to do retrospective reviews of its own regulations to ensure they are working out as intended and are still appropriate. This is in line with the President's own executive orders on regulation.

Other regulators are subject to EGRPRA, the Economic Growth and Regulatory Paperwork Reduction Act, which statutorily mandates a review and evaluation of existing regulations in order to identify which are outdated, unnecessary, or unduly burdensome.

While technically the SEC is not subject to EGRPRA, your predecessor, Chair White, indicated before this Committee that she was "very much committed to reviewing [the SEC's] rules in that fashion." A commitment that many would like to see continue.

Additionally, it is important for the SEC to have robust cost benefit analysis. I have long stated this position and our President recently echoed the importance of cost-benefit analysis in an executive order.

I look forward to hearing from you today on these issues, as well as what you hope to prioritize when you are at the SEC.

Congratulations on your nomination, and thank you and your family for your willingness to serve.

PREPARED STATEMENT OF SENATOR MARK R. WARNER

MARCH 23, 2017

Mr. Clayton, I appreciated the opportunity to meet with you prior to today's hearing to discuss your nomination to lead the Securities and Exchange Commission (SEC).

America has the deepest, most liquid markets in the world. If confirmed, you will have the responsibility of protecting investors against fraud while preserving a system that fosters capital formation and ensures fair and efficient markets.

One area that I have been passionate about is equity market structure and ensuring our markets operate efficiently and on behalf of all investors. Over the past few decades, we have seen remarkable technological progress and innovation in our securities markets, coupled with substantial regulatory reform. Some of these advances and reforms, including decimalization, have brought considerable rewards for individual investors by narrowing spreads and increasing liquidity. Most trades today can happen within fractions of a second, providing good prices and counterparties for those seeking to buy equities around the world.

But at the same time, we have seen increased volatility and periodic dislocations. These include a Flash Crash in 2010, "Mini" flash crashes in individual equities, a Flash Freeze at the NASDAQ in 2013 that halted trading for hours, a glitch at the NYSE in July 2015, and numerous allegations (resulting in settlements) of misbehavior at dark pools. Such events do little to engender confidence, and indeed may hinder investment in the stock market, adversely affecting the broader economy.

As a result, I have been a vocal proponent of market structure reforms that will improve the resiliency and efficiency of markets, and protect retail investors. Specifically, I have, on a bipartisan basis with Chairman Crapo, called for the SEC to implement a maker-taker or access fee pilot that will help shed light on order routing. I also supported a tick-size pilot, which will provide data on whether improvements can be made to help foster capital formation and improve secondary market trading. Chair White had announced she would implement a maker-taker pilot while also conducting a holistic review of market structure, and I hope that you will move forward on both—without letting the latter impede pilots that can offer valuable data in the interim.

In ensuring fair and efficient markets and protecting investors, I also hope that you will take an aggressive stance towards insider trading. As you know, there have been prominent cases in recent years where federal judges have practically begged the SEC to bring an enforcement action for suspect illicit behavior, and yet the SEC has failed to do so. A key test of your chairmanship will involve whether you will take a more pro-investor, pro-market stance by aggressively pursuing such violations.

Capital markets exist to help foster capital formation that can be used to expand the investment, hire workers, and grow the economy—not to allow machines to arbitrage fractions of pennies or to allow participants to drive a company towards short-term maximization of profits at the expense of the longer-term value creation and, often, the viability of the firm. And so I believe the SEC, in carrying out its function in promoting capital formation, should encourage companies, through its regulatory process, to adopt policies that foster longer-term growth and investment, as opposed to the more recent and disturbing trend of short-termism.

I look forward to hearing your views on these topics.

PREPARED STATEMENT OF JAY CLAYTON

TO BE CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION

MARCH 23, 2017

Chairman Crapo, Ranking Member Brown, and Members of the Committee, I am honored to appear before you today as President Trump's nominee to Chair the Securities and Exchange Commission. I want to thank you and your staff for the time you have spent with me. I have enjoyed, and learned from, our meetings.

Our capital markets have far-reaching and profound effects for every American. Making sure our markets are fair, open, orderly, and efficient—and ensuring that investors are protected—is the fundamental responsibility of the SEC. If confirmed, I will take up this responsibility with energy and purpose. I pledge to work with my fellow Commissioners, the SEC Staff, this Committee, and the many others who support and defend our capital markets.

The importance of Government service was instilled in me from a young age. Six weeks after I was born, my father shipped out to Vietnam as a Second Lieutenant and my mother, 20 at the time, and I moved to her childhood home in Lykens, Pennsylvania. We lived with her parents and her four younger brothers.

My grandfather, Pat Kerwin, the 8th and last child of coal miners, a small town lawyer, and perpetual public servant, both in title and action, took a strong interest in me. We were great friends for 20 years. Remarkably, for as far back as I can remember, he took me with him to township meetings, real estate closings, and estate auctions. Those experiences, much more Main Street than Wall Street, made a deep and lasting impression on me.

My parents, Kathi and Walt Clayton, are here today along with my youngest brother Andrew. I thank them for a lifetime of support.

When I entered the 9th grade, we moved as a family for the last time to Delaware County, Pennsylvania. I met new friends, mostly through sports. One of those friends, who has long been my best friend, is my wife Gretchen. We met 36 years ago and have been married for 25 years. I want to specifically thank Gretchen for her encouragement, love, and support. We are also joined here today by our three children—Jasper, age 14, Wyatt, age 13, and Haley, age 12. As Chair of the SEC, I will be mindful of my responsibility to their generation.

During the course of my 20+ year career as a transactional lawyer, it has been my privilege to work with leaders in the public and private sector, including on landmark transactions, such as the world's largest IPO, as well as important transactions during the dark days of the financial crisis. From my 5 years in Europe—where I worked on matters involving the laws and markets of no fewer than a dozen countries, including France, Sweden, Turkey, Switzerland, Italy, England, Greece, and Germany—I learned that the world's capital markets are very interconnected and, more broadly, that America is, indeed, the greatest country.

My work has included counseling to a number of small private businesses and individuals. During my college and post-graduate years, my mother and father operated a small warehousing and logistics business. I worked with them on various projects, including lease negotiations, inventory system design and establishing a 401(k) plan for employees. There were ups and downs, and I learned first-hand the many challenges small- and medium-sized businesses face as well as their importance to our economy.

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.

I am 100 percent committed to rooting out any fraud and shady practices in our financial system. I recognize that bad actors undermine the hard-earned confidence that is essential to the efficient operation of our capital markets. I pledge to you and the American people that I will show no favoritism to anyone.

One last comment: For over 70 years, the U.S. capital markets have been the envy of the world. Our markets have allowed our businesses to grow and create jobs. Our markets have provided a broad cross-section of America the opportunity to invest in that growth, including through pension funds and other retirement assets. In recent years, our markets have faced growing competition from abroad. U.S.-listed IPOs by non-U.S. companies have slowed dramatically. More significantly, 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.[1] Here, I see meaningful room for improvement. I am excited to work with you, 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.

Thank you for this opportunity. I look forward to receiving your advice and answering your questions.

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[1] Today, the number of U.S.-listed public companies is down over 35 percent from 1997. In 1996, there were approximately 845 U.S. IPOs, while in 2016, there were approximately 128. See, e.g., Anne VanderMey, Fortune.com, "IPOs Are Dwindling, So Is the Number of Public Companies" (Jan. 20, 2017), available at *http://fortune.com/2017/01/20/public-companies-ipo-financial-markets/*. WilmerHale 2016 IPO Report (March 24, 2016), available at *https://launch.wilmerhale.com/uploadedFiles/Shared__Content/Editorial/Publications/Documents/2016-WilmerHale-IPO-Report.pdf*.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

Name: **Clayton III** (Last) **Walter** (First) **Joseph** (Other)

Position to which nominated: Chair, Securities and Exchange Commission

Date of nomination: January 4, 2017

Date of birth: 11 (Day) July (Month) 1966 (Year) **Place of birth:** Fort Eustis, Newport News, VA

Marital Status: Married **Full name of spouse:** Gretchen Butler Clayton

Name and ages of children: Jasper Anne Clayton, 14; Wyatt James Clayton, 13; Haley Zehring Clayton, 12

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Strath Haven High School	8/80-6/84	Diploma	6/84
Lafayette College	8/84-12/85	N/A	N/A
University of Pennsylvania	1/86-6/88	B.S.E.	6/88
University of Cambridge	8/88-6/90	B.A.	6/90
University of Pennsylvania	8/90-5/93	J.D.	5/93

Note: Dates above are estimated.

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships and any other special recognitions for outstanding service or achievement.

See Attachment A (Awards)

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations.

See Attachment B (Organizations)

Employment record: List below all positions held since college, including the title or description of job, name of employment, location of work, and inclusive dates of employment.

See Attachment C (Employment Following College)

Government experience: List any experience in or direct association with Federal, State, or local governments,

including any advisory, consultative, honorary or other part time service or positions.

Law clerk to the Honorable Marvin Katz, Judge in the U.S. District Court for the Eastern District of Pennsylvania, from 1993 to 1995.

Intern, Office of the United States Attorney for the Eastern District of Pennsylvania, 1993.

LBJ Congressional Intern for the Honorable Curt Weldon (7th District, Pennsylvania), 1990.

Student Representative to the School Board, Wallingford-Swarthmore School District (Delaware County, Pennsylvania), 1983-1984.

Published Writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

See Attachment D (Published Writings)

Political Affiliations and activities: List memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

I am not affiliated with a political party.

I was a member of the Finance Committee for the campaigns of Cyrus R. Vance, Jr. for Manhattan District Attorney, 2009-2014.

Political Contributions: Itemize all political contributions of $500 or more to any individual, campaign organization, political party, political action committee or similar entity during the last eight years and identify specific amounts, dates, and names of recipients.

Date	Amount	Recipient
3/31/2016	$1,000	Friends of Schumer
3/17/2016	$1,000	Heaney for Congress
10/17/2015	$1,700	Jeb 2016, Inc.
10/8/2015	$2,000	Shelby for U.S. Senate
8/6/2015	$1,000	Mike Crapo for U.S. Senate
6/15/2015	$500	Bennet for Colorado

5/26/2015	$1,500	Portman for Senate
2/10/2015	$1,000	Right To Rise PAC
11/18/2014	$2,500	Cyrus Vance for Manhattan District Attorney
9/5/2014	$250	Kim Council 2014
7/29/2014	$1,000	Capito for West Virginia
11/26/2013	$1,000	Ted Cruz Victory Committee
11/6/2013	$1,000	Friends of Mark Warner
7/22/2013	$1,000	Cory Booker for Senate
6/25/2013	$1,000	Biden for Attorney General
6/23/2013	$500	Friends of Kimberly Council
5/8/2013	$500	Friends of Kimberly Council
4/25/2013	$1,000	Capito for West Virginia
1/9/2013	$2,500	Cyrus Vance for Manhattan District Attorney
9/29/2012	$1,000	Josh Mandel Senate Victory Committee
7/16/2012	$1,000	Ted Cruz for Senate
6/19/2012	$4,000	Connecticut Democratic State Central Committee
5/24/2012	$1,000	Romney Victory, Inc.
5/8/2012	$5,000	Cyrus Vance for Manhattan District Attorney
12/11/2011	$2,500	Cyrus Vance for Manhattan District Attorney
12/9/2011	$1,000	Ted Cruz for Senate
12/07/2011	$1,000	Andrew Cuomo 2018
10/12/2011	$500	Friends of Rob Astorino
9/26/2011	$1,000	Citizens for Josh Mandel
9/13/2011	$1,000	Shelley Moore Capito for Congress
5/26/2011	$1,000	Romney for President
4/7/2011	$5,000	Cyrus Vance for Manhattan District Attorney
9/17/2010	$1,000	Friends of Mike Lee.
6/22/2010	$500	Jim Himes for Congress
5/26/2010	$500	Taxpayers for Wilson
1/15/2010	$500	Scott Brown for U.S. Senate
12/22/2009	$500	Friends of Dan Maffei
12/22/2009	$1,000	Cyrus Vance for Manhattan District Attorney
6/23/2009	$2,500	Cyrus Vance for Manhattan District Attorney

Qualifications: State fully your qualifications to serve in the position to which you have been named. (attach sheet)

See Attachment E (Qualifications)

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

   As described in the ethics agreement that I have entered into with the U.S. Securities and Exchange Commission's (SEC) ethics official, which has been provided to the Committee, if confirmed by the Senate, I will sever all such connections. Note that pursuant to the Sullivan & Cromwell LLP Group Defined Benefit Plan for Partners and the Sullivan & Cromwell LLP Supplemental Pension Plan for Partners, I am eligible to receive monthly lifetime retirement payments from the firm commencing at age 65. If confirmed by the Senate, I will remain a participant in these defined benefit plans but will not be entitled to benefits prior to that age (approximately 15 years from now).

2. As far as can be foreseen, state whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

   No.

3. Has anybody made you a commitment to a job after you leave government?

   No.

4. Do you expect to serve the full term for which you have been appointed?

   Yes.

Potential conflicts of interest:

1. Describe any financial arrangements or deferred compensation agreements or other continuing dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

   If confirmed, I will resign from Sullivan & Cromwell LLP. Under the terms of the Sullivan & Cromwell LLP Group Defined Benefit Plan for Partners and the Sullivan & Cromwell LLP Supplemental Pension Plan for Partners, I am eligible to receive monthly lifetime retirement payments from the firm commencing at age 65. As described in my ethics agreement, which has been provided to the Committee, if

confirmed by the Senate I will remain a participant in these defined benefit plans, but I will not be entitled to benefits prior to that age (approximately 15 years from now).

2. List any investments, obligations, liabilities, or other relationships which might involve potential conflicts of interest with the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the SEC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the SEC's ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

3. Describe any business relationship, dealing or financial transaction (other than tax paying) which you have had during the last 10 years with the Federal Government, whether for yourself, on behalf of a client, or acting as an agent, that might in any way constitute or result in a possible conflict of interest with the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the SEC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the SEC's ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

4. List any lobbying activity during the past ten years in which you have engaged in for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation at the national level of government or affecting the administration and execution of national law or public policy.

None.

5. Explain how you will resolve any conflict of interest that may be disclosed by your responses to the items above.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the SEC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the SEC's ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

Civil, criminal and investigatory actions:

1. Give the full details of any civil or criminal proceeding in which you were a defendant or any inquiry or investigation by a Federal, State, or local agency in which you were the subject of the inquiry or investigation.

   None.

2. Give the full details of any proceeding, inquiry or investigation by any professional association including any bar association in which you were the subject of the proceeding, inquiry or investigation.

   None.

Confidential Financial Statement

Net Worth

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

See Attachment F (Confidential Financial Statement)

SOURCES OF INCOME LAST 3 YEARS

1. List sources and amounts of all income received during the last 3 years, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (if you prefer to do so, copies of U.S. income tax returns for these years may be substituted here, but their submission is not required.)

   See Attachment F (Confidential Financial Statement)

2. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services and firm memberships or from former employers, clients, and customers.

   Under the terms of the Sullivan & Cromwell LLP Group Defined Benefit Plan for Partners and the Sullivan & Cromwell LLP Supplemental Pension Plan for Partners, I am eligible to receive monthly lifetime retirement payments from the firm commencing at age 65. As described in my ethics agreement, which has been provided to the Committee, if confirmed by the Senate I will remain a participant in these defined benefit plans, but I will not be entitled to benefits prior to that age (approximately 15 years from now). Also as described in my ethics agreement, I will receive a refund of my capital account and a *pro rata* partnership share for services performed in 2016 and 2017 before I assume the duties of the position of Chair. Also as described in my ethics agreement, my interests in the firm's defined contribution plans (whose assets are invested in the Sullivan & Cromwell LLP Master Trust) will be paid out to me as soon as possible following confirmation, but no later than 90 days after confirmation. See Attachment F (Confidential Financial Statement) for information on the amounts of these payments and payouts.

The undersigned certifies that the information contained herein is true and correct.

Signed: _____ Date: March 3, 2017

Attachment A

Awards

1. Thouron Award, University of Pennsylvania
   Scholarship for Study in the United Kingdom
2. Tau Beta Pi (college)
3. Dean's List (college)
4. Math Honor Society (college)
5. Hexagon Senior Society (college)
6. James Howard Weiss Award (college)
7. Hugo Wolf Prize (college)
8. Anette Estrada Award (college)
9. Moot Court Board (law school)
10. Order of the Coif (law school)
11. Bergman Business Prize (law school)

Attachment B

Organizations

Professional Organizations

1. American Bar Association
   Member, 2001 (estimated) to present

2. New York City Bar Association
   Member, 2010 to present
   Chair of the Committee on International Transactions, 2011-2012

3. Ad Hoc Group (Securities Lawyer Dinner Group)
   Member, 2001 to present

4. International Bar Association
   Member, 2000 – 2006 (estimated)
   Secretary, Securities Law Committee
   Chair (Prague Conference 2005), Securities Issues in Mergers, Acquisitions and Reorganisations

Non-Profit Organizations

5. University of Pennsylvania
   Various formal and informal groups following college, including Adjunct Professor of Law, Thouron Society, Institute of Law and Economics, Alumni Interviewer and Hexagon Senior Society

6. University of Cambridge
   Various formal and informal groups following college, including Cambridge University Basketball Team (1988-1990) and American Friends of Cambridge

7. Governor's Island Alliance
   Member, 2011 to present
   Board Member, 2011-2014

8. United States Naval Institute
   Member, 2014 to present

9. Metropolitan Golf Association
   Executive Committee Member, 2016 to present

Social Organizations

10. Philadelphia Cricket Club
    1995 to present

11. Philadelphia Racquet Club
    1993-1997

12. Stoke Park Club, England
    2000-2001

13. Wisley Golf Club, England
    2002-2005

14. Bayonne Golf Club
    2006 to present

15. Manatee Golf Club
    2012 to present

16. Hidden Creek Golf Club
    2012 to present

17. Baltusrol Golf Club
    2013 to present

18. The Links
    2013 to present

Attachment C

Employment Following College

Employer	Position	Dates
Ocean City Beach Patrol	Lifeguard	6/83 - 8/89 (summers/weekends)
ClayMark Distribution Services, Inc. / PennTech Transfer Corp.	Analyst/Programmer	approx. 3/87 – approx. 6/93 (various ad hoc projects)
Hon. Curt Weldon	LBJ Intern	6/90 - 8/90
Dechert, Price and Rhoads Philadelphia, PA	Summer Associate	6/91 - 8/91
Sullivan & Cromwell LLP, New York, NY	Summer Associate	6/92 - 8/92
Judge Marvin Katz, U.S. District Court for the Eastern District of Pennsylvania, Philadelphia, PA	Law Clerk	8/93 - 8/95
Sullivan & Cromwell LLP, Washington, DC	Associate	10/95 - 5/98
Sullivan & Cromwell LLP, New York, NY	Associate	5/98 - 3/00
Sullivan & Cromwell LLP, London, England	Associate and Partner (as of 1/01)	3/00 - 8/05
Sullivan & Cromwell LLP, New York, NY	Partner	8/05 - present
University of Pennsylvania School of Law	Adjunct Professor	2009 - present

Attachment D

Published Writings

1. Co-Author of "'Ten Commandments' of Cyber Security Can Enhance Safety", Knowledge@Wharton, February 2016

2. Co-Author of "We Don't Need a Crisis to Act Unitedly Against Cyber Threats", Knowledge@Wharton, June 2015

3. Chair of the Drafting Committee for a Report of the International Business Transactions Committee: "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?", International Business Transactions Committee, New York City Bar Association, December 2011

4. Co-Author of "USA 10-K: Why America Needs an Annual Report", Knowledge@Wharton, July 2012

In addition, Sullivan & Cromwell LLP frequently publishes client alert memoranda describing legal developments. Below is a list of such memoranda for which I have acted as a principal draftsperson. This list does not include memoranda that I reviewed (rather than drafted) prior to publication.

5. Non-GAAP Financial Measures: Update on the SEC's Increased Scrutiny of Non-GAAP Disclosure (10/4/16)

6. The Evolving Landscape of Shareholder Activism: Key Developments and Potential Actions (3/10/15)

7. Maintaining Auditor Independence Requires Close Attention from the Issuer's Audit Committee, Management and Outside Auditors (10/31/03)

8. SEC Staff Narrows the Scope of Foreign Issuer Transactions Eligible for Confidential Review (5/21/01)

9. New Form 20-F - SEC Staff Interpretation Could Result in New Audit Procedures for Non-US Issuers, Including an Increase in Auditor Communication with Outside Counsel - Issuers and Outside Counsel Should Take Care to Protect the Confidentiality of Such Communications (2/19/01)

10. SEC Issues Order Finding that E.On AG Violated U.S. Securities Laws by Issuing False Denials of Ongoing Merger Negotiations - Reminder to Non-U.S. Issuers to Consider U.S. Securities Laws when Commenting on Market Rumors (10/20/00)

11. Forward-Looking Statements Update - How Recent Court Decisions Have Construed the Cautionary Statements of the Safe Harbor (9/9/99)

12. SEC Proposes Sweeping Changes to the Regulatory System for Securities Offerings (11/20/98)

13. SEC Proposes Major Reform to the Regulatory Systems for Securities Offerings and Business Combinations (10/15/98)

14. SEC Adopts Rules Requiring Broker-Dealers and Transfer Agents to File Year 2000 Readiness Reports and Solicits Further Comment on Accountant's Review of the Reports (8/4/98)

15. SEC Proposes Rule Requiring Broker-Dealers to Submit Year 2000 Readiness Reports (3/16/98)

16. SEC Proposes Alternative Exchange Act Registration Regime for OTC Derivatives Dealers (12/30/97)

17. SEC Proposes Definition Related to Federal Blue Sky Exemption for Certain Offering Documents Prepared by or on Behalf of the Issuer (2/21/1997)

18. National Securities Markets Improvement Act of 1996 -- Capital Markets Provisions (10/9/96)

19. SEC Issues Concept Release Seeking Comment on Reforms Relating to Securities Offerings (8/19/96)

20. 1996 Amendments to the Rules Under Section 16 of the Securities Exchange Act of 1934 (6/27/96)

21. Congress Overrides Veto and Enacts Private Securities Litigation Reform Act of 1995 (12/27/95)

Attachment E

Qualifications

It is a great honor to be nominated to be Chair of the United States Securities and Exchange Commission. If confirmed by the Senate, I will work zealously on behalf of the American people with my fellow Commissioners and the SEC staff in pursuit of the Commission's tri-partite mandate to protect investors, maintain fair markets and facilitate capital formation.

My qualifications for this position fall into three categories, (1) education and expertise, (2) practical experience and (3) beliefs and commitment.

Education and Expertise

Capital markets, by their nature, are multidisciplinary. They bring together an array of diverse participants, including, to name only a few, large and small businesses of all types, local, state and national governments, individual investors, pension funds, institutional investors, traders and financial services providers. Moreover, the performance of our capital markets has had, and will continue to have, profound effects throughout our society, including on employment, growth and security.

No person (or computer) can predict how markets will perform over the long term or the effects that market performance will have on various sectors of our society. There are many factors outside of our control and understanding that will affect future results. That said, the Commission must strive to anticipate the effects its actions, and the actions of others, will have and take actions designed to ensure that those anticipated effects reflect the Commission's mandate.

I have studied and received degrees in Engineering, Economics and Law and, over the course of my career, have developed a technical expertise in various aspects of securities law, including in the contexts of capital raising, securities regulation and mergers and acquisitions. I believe this multi-disciplinary education and expertise and the perspective they bring, when combined with the personnel and other resources of the Commission, will substantially contribute to my effectiveness as Chair, if confirmed.

Experience

During the course of my 20+ year career at Sullivan & Cromwell (15 as a Partner), it has been my privilege to engage with the public and private sector on a wide range of matters, including the world's largest IPO, mergers and acquisitions, corporate governance matters, multiple transactions during the financial crisis (e.g., TARP investments, the sale of Bear Stearns to JP Morgan, and the purchase of Lehman assets by Barclays), and the consumer relief aspects of various mortgage-related settlements with the Department of Justice and other authorities.

I also have acted as the principal legal advisor on various international matters, including while resident in my firm's London office from 2000 to 2005. These matters involved navigating the markets, laws and policies of no fewer than a dozen countries, including England, France, Sweden, Germany, Greece, Italy and Turkey and include securities offerings, mergers, joint ventures and cross-border regulatory matters and investigations. In the area of securities regulation and trading, I frequently advise market participants on trading matters in the United States and abroad and was a substantial contributor to (and listed as one of the inventors of) a trading platform for privately issued securities.

My experience in law and business is not limited to large institutions and transactions. Over the course of my professional career, I have provided advice and counseling to a number of small private businesses

and individuals, including some that faced acute financial and personal risks. In addition, during my college and post-graduate years, I assisted my mother and father with the operation of a small steel warehousing and logistics business. From 1987 to 1993, I worked on various matters, including lease negotiations, loan negotiations, the design of an inventory control system and establishing a 401(k) plan for employees. The business had successes and failures and, on a personal level, provided me with a first-hand understanding of the importance of small and medium sized businesses to our local and national economies and the many challenges they face, including as consumers of financial products and services.

Beliefs and Commitment

My grandparents and parents, through their words and actions, including military and long-term State and Federal government service, instilled in us from a young age a deep belief in the core principle of America: for each of us individually, and all of us collectively, our best days are yet to come. I believe this wonderful, uniquely American commitment to the future has carried our country through good times and challenges. It has enabled us to recover from tragedy, admit our mistakes and strive to make our children's lives better than our own for 240 years.

I believe our market-based economy has been (and remains) fundamental to this promise and our ability to make good on it. Said another way, you cannot confidently and effectively invest in the future without fair and well-functioning markets. In this regard our government has a critical role: it has the ultimate responsibility to ensure that our markets are fair, open, orderly and efficient.

My years of international work, including living abroad for a total of seven years, have reinforced this belief in the promise of America and the importance of our capital markets. Our markets are more liquid, more efficient, more fair and, I believe, provide substantially broader opportunities than the markets of any other country or region. I believe we should celebrate this position cautiously, protect it dearly and strive to improve it with energy and purpose.

These beliefs are in line with the mandate of the Commission. If confirmed, I am committed to putting these beliefs into action and look forward to working with the many talented women and men at the Commission, my fellow Commissioners, and others who support and defend our capital markets.

Client List*

Clients of Sullivan & Cromwell LLP during 2014 to 2016 where my work exceeded ¾ of 1% of billed legal services rendered by me in one or more of those years.

Ally Financial Inc.
Avid Technology, Inc.
Bessemer Trust Company
Brown Brothers Harriman & Co.
CA, Inc.
Capital Products Partners, L.P.
Castleton Commodities International LLC
Citigroup Global Markets Limited
William Charles Erbey
Evercore Partners
Goldman Sachs Philanthropy Fund
The Goldman Sachs Group, Inc. and its subsidiaries
Gottwald Family
Reid Hoffman
Hudson Capital Management, L.P.
Idenix Pharmaceuticals Inc.
Paul Tudor Jones II
Outerstuff Ltd.
Pershing Square, L.P.
Steven Price
Philip Reid Shawe
SunTrust Banks, Inc.
TeliaSonera AB
TerraForm Global, Inc.
TerraForm Power, Inc.
Tudor Investment Corp.
Underwriting Syndicate for Alibaba Group
Underwriting Syndicate for Ally Financial Inc.
Underwriting Syndicate for Och-Ziff Capital Management
Vanguard Group Directors
Vector Group Ltd.
Roy J. Zuckerberg

* In addition, I represented 3 clients where disclosure of the representation is the subject of attorney-client privilege or other confidentiality obligations that do not permit disclosure. Those clients in the aggregate represented less than 2.5 percent of my total billed legal services from 2014 to 2016, and none of those clients individually represented more than 1.5 percent of my total billed legal services during that period.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR HELLER FROM JAY CLAYTON

Q.1. Do you believe the Securities and Exchange Commission should be a merit-based regulator picking individual winners and losers, or do believe that the Securities and Exchange Commission should be a disclosure-based securities regulator and let investors make investment decisions with accurate information?

A.1. I believe that the Commission's efforts should focus on advancing its tri-partite mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation. In this regard, I believe that the disclosure-based regulatory framework governing our public markets and companies has been and remains fundamentally important and, based on my experience with, and understanding of, the establishment, operation and evolution of various regulatory systems in other countries and regions, has proven to be superior to merit-based systems.

Q.2. Under your leadership how will the Securities and Exchange Commission help encourage more initial public offerings in order to drive future job growth?

A.2. Small and large businesses rely on our capital markets to raise the capital they need to buy equipment, expand their operations, and, importantly, hire American workers. In my experience, in the past two decades, a number of factors have developed or have become more relevant that may discourage a private company from accessing our public markets to raise capital. These factors include various immediate one-time costs and ongoing incremental costs compared with remaining a private company. In my view, we should examine whether these costs can be addressed in a manner such that more companies choose to go public—which would help them access capital they need to drive job growth—without lessening, and with an eye toward enhancing, investor protection.

Q.3. How can the Securities and Exchange Commission better ensure that the perspective of all stakeholders are better incorporated into the Commission's policymaking process in order to promote more job growth?

A.3. As I stated at my nomination hearing, I strongly believe it is important for the Commission to engage with market participants of all types. Receiving information about what participants in our capital markets think about various issues before the SEC, and the funding of our markets more generally, is an important part of the job, and I look forward to engaging with those participants if I am confirmed. This would include engaging with issuers, investors and other market participants who rely on our capital markets to access the capital they need to create jobs.

Q.4. One of the main duties of the Securities and Exchange Commission is to facilitate capital formation that is necessary to sustain economic growth. What will be your priorities at the Securities and Exchange Commission to promote more capital formation for businesses and help create jobs in Nevada? Do you support legislative initiatives that would spur more capital formation for small- to mid-sized businesses?

A.4. Capital formation is a critical element of the SEC's tri-partite mission. Without commenting on any particular legislative proposal, I generally support initiatives that would spur capital formation for small- to mid-sized businesses while maintaining or enhancing protection for investors. I understand that the SEC is already taking steps to "stand up" the new Office of the Advocate for Small Business Capital Formation and to begin the search for the new Small Business Advocate. If confirmed, I look forward to working with the staff and my fellow Commissioners to continue this effort, and to explore ways in which we can promote capital formation for small- to mid-sized businesses and help them access and navigate our public and private capital markets.

Q.5. Last Congress, Chairman Crapo and I held a hearing looking at changes in the fixed-income markets and there are early signs that fixed-income markets are becoming more fragile and less liquid than they used to be. Do you recognize the changes occurring in the fixed-income markets and do you believe regulations are affecting liquidity?

A.5. Fixed income markets have become increasingly important to investors, including retirees with self-directed retirement assets. I understand that Erik Sirri, former Director of the SEC Division of Trading and Markets, and a co-author, recently delivered a paper where they argued that " . . . the domestic fixed income markets are both larger and more in need of market structure reform than their equity counterparts. Whereas the market capitalization of listed equity markets is about $26.5 billion, the corporate asset-backed, mortgage, treasury, agency and municipal bond market in aggregate totaled $37.1 billion."[1] I believe the Commission and other regulators should be mindful of whether these markets are as efficient and resilient as we would expect them to be and whether regulatory and market developments have had adverse impacts.

Q.6. Each year, institutional investors cast millions of votes that determine corporate governance policies at thousands of publicly traded U.S. companies. Many institutions outsource the analysis and process of developing voting recommendations to proxy advisory firms. Today, two firms dominate the proxy advisory industry. There has been serious allegations of conflicts of interest, lack of transparency, and errors in reports by these firms. Do you have any concerns about proxy advisory firms and would you address these issues at the Securities and Exchange Commission?

A.6. I believe that this is an evolving industry that has seen change, including in response to staff guidance to various participants as well as industry commentary and industry engagement, including with proxy advisors. I believe the area requires continued scrutiny, including in light of the importance and influence of these firms. By way of example, I understand that, following the release of the 2014 staff guidance, the SEC's Office of Compliance Inspections and Examinations listed as a priority the examination of proxy advisory firms with respect to their process for making voting recommendations and how they address potential conflicts of

[1] Ryan Davies and Erik Sirri, "The Economics and Regulation of Secondary Trading Activities" (Draft of March 16, 2017), at 70-71, available at *http://www.law.columbia.edu/sites/default/files/microsites/capital-markets/davies__sirri__economics-of-trading-markets.pdf.*

interest. If confirmed, I look forward to studying these and other issues, including the results of OCIE's efforts, and discussing them with the staff and my fellow Commissioners.

Q.7. Given the rapidly changing nature of the global securities markets, will you commit to working to promote more market innovations while ensuring proper investor safeguards?

A.7. I believe that market innovations are relevant to all three elements of the SEC's tri-partite mission. They can be an important driver of capital formation, market efficiency and investor protection, including through various efforts designed to drive more efficient and effective monitoring and reporting such as the Consolidated Audit Trail. If confirmed, I look forward to working with the staff and my fellow Commissioners to continue to explore ways in which innovations can advance the SEC's mission, including through engagement with investors and other industry participants, while being mindful of related risks, including, for example, cybersecurity risks.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR SASSE FROM JAY CLAYTON

Q.1. How can the SEC better define the scope of lawful trading-related activity defined in its rulemakings? Where is clarity most necessary? Will you commit to taking concrete action to this end within 6 months of your confirmation?

A.1. This is in response to Questions 1 and 2. I recognize that this is an issue that has received attention, particularly in light of recent high-profile court cases, which have created some uncertainty regarding the contours of various aspects of insider trading and market manipulation under our securities laws. As a general matter, I believe that clarity should be a goal of regulation and that appropriate guidance is one method to foster clarity. If confirmed, I look forward to engaging with my fellow Commissioners, the SEC staff and the many other regulatory and enforcement officials with interests in this area to explore whether and, if so, by what means, further clarity should be pursued.

Q.2. How can the SEC increase its use of informal guidance to provide better clarity about the scope of unlawful trading-related activities? Where is clarity most necessary? Will you commit to taking concrete action to this end within 6 months of your confirmation?

A.2. Please see my response to Question 1 above.

Q.3. I'd like to learn more about your approach to securities regulations.

Is there a risk that regulations can give large incumbent firms a competitive advantage over smaller farms? If so, what can be done to mitigate this risk?

A.3. In my experience, many costs associated with regulatory compliance are more "fixed" than variable and, as a result, may in some circumstances, have a greater effect on smaller- and medium-sized companies as compared with "large cap" companies. I believe we should be mindful of the effects that regulations can have on

all businesses and, in particular, smaller businesses in this regard. If confirmed, the Commission's tri-partite mission is paramount and will be at the front of my mind. I agree with the fundamental principles of our disclosure-based regulatory system. I agree that securities trading markets should be fair, efficient, and deep. I believe in the importance of capital formation to our markets, our economy, and our society more generally. I also agree that there is no place for "bad actors" in our markets.

At a more granular level, I believe that regulators should recognize risks and limitations of rulemaking and other actions, including that certain actions may unnecessarily impair competition, have unforeseen costs and other consequences, and otherwise not be as beneficial or effective as expected. In this regard, the notice-and-comment rulemaking process and economic analysis can be very helpful, and, to address unforeseen consequences, retrospective review may be appropriate and, in this regard, the Commission has exemptive authority. At a more general level, if confirmed, I intend to assess the actions of the Commission through the lens of what is in the interest of Main Street investors.

Q.4. Is it appropriate—in the words of former Chair Mary Jo White—to "effectuate social policy or political change through the SEC's powers of mandatory disclosure"?

A.4. As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure. In that regard, I believe that the SEC's core mission is best served when the Commission's efforts with respect to mandatory disclosure requirements are focused on ensuring that investors have access to material information in an effective and efficient manner, without regard to unrelated facts. If confirmed, I look forward to engaging with my fellow Commissioners and the staff to advance the SEC's core mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation.

Q.5. Is there a danger that disclosure requirements become so voluminous that they become unhelpful to investors? If so, what can be done to avoid this problem?

A.5. I firmly believe in our disclosure-based regulatory system for public companies and the general approach that we have followed for the past eighty-plus years. Public companies should provide core required disclosures, and those core disclosures should be supplemented by other information material to investors, in each case reflecting Commission and staff guidance that has been reviewed and updated to ensure that our disclosure requirements are achieving their important investor protection objectives in an effective and efficient manner.

In this regard, I recognize that investors also bear the costs of disclosure mandates. If I am confirmed, I look forward to working with my fellow Commissioners and the SEC staff on this topic, including engaging with them on the Disclosure Effectiveness Initiative.

Q.6. In light of the SEC's mission to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation," I'd like to ask you about the SEC's rulemaking schedule.

What factors should dictate the SEC's rulemaking schedule?

Does the SEC's rulemaking schedule reflect the right balance between focusing on these three missions? If not, how would you change it?

A.6. Rulemaking, both mandatory and discretionary, is a critical function of the SEC. I believe it should, among other things, reflect the Commission's tri-partite mandate, include effective economic analysis, seek clarity over complexity wherever practicable, reflect input from a diverse array of affected parties and market participants and proceed as efficiently as practicable. The rulemaking process is important, and in many cases demands significant resources. The Commission's resources are limited and, accordingly, the overall approach to rulemaking should reflect the Commission's mandate and be the product of consultation among the Commissioners, the staff and, in the case of multi-agency rulemaking, other authorities, being mindful of the obligation to proceed with mandatory rulemaking at a reasonable pace and also being responsive to market developments. Because I have not yet had the opportunity to discuss the rulemaking schedule with the Commissioners and the staff, it would be premature for me to make an assessment as to whether the schedule properly balances the SEC's tri-partite mission and reflects the principles outlined above and any other important factors. If confirmed, I look forward to engaging with my fellow Commissioners and the staff regarding the current rulemaking calendar and outlook, including any necessary or advisable changes.

Q.7. During your confirmation hearing, you rightly spoke of the importance of helping more firms go public.

What is the role for private capital markets in a high-functioning economy, particularly given the prominent role you envision for public markets?

Are the private capital markets high-functioning at the moment?

A.7. Based on my experience, I believe that over the past several decades, private capital markets have grown substantially and, as a result, have increased the availability of private capital (including to medium- and larger-sized companies). These markets also appear to have experienced greater competition and appear to have become more efficient providers of capital. I believe the private capital markets hold a significant place in our economy and have significant effects on our capital markets generally. In light of this importance and interconnectivity, if confirmed, I look forward to engaging with the SEC staff and my fellow Commissioners on these issues with an eye toward ensuring that the Commission's approach to the regulation of the private capital markets reflects the Commission's tri-partite mandate.

Q.8. In 2014, former SEC Commissioner Dan Gallagher said that "issues specific to small business capital formation too often remain on the proverbial back burner. This lack of attention doesn't just harm small business; it also harms investors and the public at large."

Do you agree?

If so, as SEC Chair how will you work to improve small business capital formation and respond to our economy's near-historic low levels of firm creation?

The SEC Small Business Advocate Act of 2016 created the Office of the Advocate for Small Business Capital Formation. If confirmed as Chair, will you work closely with this advocate and seriously consider the Office's recommendations?

The SEC Small Business Advocate Act of 2016 also created the Small Business Capital Formation Advisory Committee, which will issue recommendations on improving small business capital formation. Unfortunately, the SEC has traditionally largely ignored these sort of recommendations, such as those of the annual Government-Business Forum on Small Business Capital Formation. While the SEC is required to respond to the recommendations of the Advisory Committee, it is are not required to follow them. If confirmed as Chair, will you strongly consider supporting the recommendations of the Advisory Committee?

A.8. As I stated at the hearing, availability of capital for small business is very important. I also agree with Commissioner Gallagher that addressing issues specific to small business capital formation can yield benefits for small businesses, investors, and the public at large.

I understand that the SEC is already taking steps to "stand up" the new Office of the Advocate for Small Business Capital Formation and to begin the search for the new Advocate.[1] If confirmed, I look forward to working with the staff and my fellow Commissioners to continue this effort, and to explore ways in which we can promote capital formation for small businesses and help them access and navigate both our public and private capital markets.

With respect to the Small Business Capital Formation Advisory Committee, it would be premature for me to take a position on a potential recommendation without further exploring the issue. However, if I am confirmed, I look forward to engaging with my fellow Commissioners, the SEC staff, the Advisory Committee and other interested parties regarding the Advisory Committee's recommendations on improving small business capital formation.

Q.9. Some have criticized proposals to increase investment options to the public because it would be allegedly risky for investors. This has particular relevance for debates about Reg. D and crowdfunding.

What role, if any, does the SEC have as a prudential regulator?

A.9. As a general matter, I believe we should be exploring means to increase the number and type of investment options available to the public, including through various forms of private placements. I also recognize the concerns of many that these types of investments can involve more investment risk and more risk of fraud than more familiar public market investments, and agree that these are important considerations. If confirmed, I am interested in identifying and acting on opportunities, including in connection with current rulemaking and in response to technological and other

[1] Opening Remarks of SEC Acting Chairman Michael Piwowar before the SEC Advisory Committee on Small and Emerging Companies (Feb. 15, 2017), available at *https://www.sec.gov/news/statement/piwowar-opening-remarks-acsec-021517.html.*

advancements and changes, to increase investor choice while preserving investor protections.

Q.10. Is it ever appropriate for the SEC to engage in the "merit review" of investment choices, where the SEC would elevate its evaluation of a particular investment over the evaluation of a private investor?

A.10. As a general matter, I do not believe that the Commission should elevate its evaluation of a particular investment over the evaluation of that investment by a private investor. In this regard, I believe that the disclosure-based regulatory framework governing our public markets and companies has been and remains very important.

Q.11. How would you strike the balance between investor protection and investor freedom when it comes to the definition of accredited investor?

A.11. I believe investor protection and investor freedom are, in many circumstances, complementary. In my experience, this positive dynamic depends on other factors, including reasonable disclosure requirements and enforcement of anti-fraud laws, and is not without limit. With regard to the definition of accredited investor, I believe that the Commission should assess whether changes in the definition will affect, among other things, market protocols that have developed in response to the current definition, the size and composition of the pool of accredited investors, and, significantly, investor protections. If confirmed, I look forward to reviewing these issues with my fellow Commissioners and the staff.

Q.12. Would you support expanding the definition of "accredited investor" beyond income and assets to also include investor expertise, such as possessing a graduate degree in a related field, or passing a test for investor sophistication?

Does it trouble you that according to some reports, roughly 90 percent of Americans cannot invest in Regulation D securities? [2]

Would you consider withdrawing the two Reg. D amendments proposed in July of 2013? [3]

A.12. I understand that the SEC has been examining these issues, and that the staff recently issued a report that analyzed, among other things, the feasibility of using qualification metrics other than wealth or income. If confirmed, I look forward to reviewing this issue further and working with SEC staff and my fellow Commissioners in revisiting the accredited investor standard more generally, including considering whether the metrics should be adjusted and/or expanded beyond income and net worth, as well as the status of current rule proposals.

With respect to the 90 percent figure cited above, as I discussed at the hearing, it is of concern to me that certain types of investment opportunities for Main Street investors may be more limited than they reasonably could be.

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[2] *https://www.mercatus.org/system/files/peirce_reframing_ch11.pdf*, p. 278.

[3] See Securities and Exchange Commission, "Proposed Rule: Amendments to Regulation D, Form D and Rule 156", *Federal Register*, Vol. 78, No. 142 (July 24, 2013), pp. 44806–44855.

Q.13. How would you strike the balance between investor protection and investor freedom when it comes to evaluating proposals to expand or improve upon federal crowdfunding regulations?

Are Federal crowdfunding regulations workable?

A.13. If confirmed, I intend to consult with the staff, my fellow Commissioners and other market participants on these and other crowdfunding-related issues. For example, I understand that the SEC staff has been collecting data on crowdfunding efforts since the SEC's Regulation Crowdfunding became effective. I look forward to hearing more about the staff's analysis of that data and how it may inform the Commission's approach going forward.

Q.14. Last Congress, Rep. Emmer introduced H.R. 4850, the "Micro Offering Safe Harbor Act", the original version of which would have allowed an issuer to sell up to $500,000 worth of securities, upon certain conditions. How would you evaluate a legislative proposal to introduce a safe harbor for small equity raises?

A.14. If confirmed, I look forward to working with Congress on important legislative proposals that affect our markets. Before taking a position on a particular proposal relating to the introduction of a safe harbor for small equity raises, I would, if confirmed, want to engage with my fellow Commissioners and the SEC staff to review the details and consider the potential impacts, positive or negative, of such a proposal. As a general matter, I am supportive of efforts focused on capital formation for small businesses and recognize that there should not be a one-size-fits-all approach to securities regulation.

Q.15. Many argue that despite the JOBS Act, Reg. A+ is still prohibitively costly for smaller firms. Only around 44 firms qualified for Reg. A+ during its first year,[4] compared to 33,429 who used Reg. D in 2014.[5] I've been told that few if any investors in my State find it worthwhile to use Reg. A+.

Is Reg. A+ currently workable for most smaller firms?

As SEC Chair, will you examine how the SEC can make Reg. A+ easier to use for smaller firms, and advocate for such changes?

A.15. I have not yet had the opportunity to engage with the Commissioners and the SEC staff regarding Regulation A+, but if confirmed as Chair, I look forward to studying this issue, including the potential impacts of any potential reform options. As a general matter, I believe we should be looking for means to increase the number and type of investment options available to the public, including through various forms of private placements. I also recognize the concerns that these types of investments can involve more investment risk and more risk of fraud than more familiar public market investments.

Q.16. The marketplace online lending ecosystem has grown significantly as of late.

How would you approach this field?

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[4] *https://www.crowdfundinsider.com/2016/07/87745-looking-regulation-one-year-later/* (cited by *https://www.mercatus.org/system/files/peirce_reframing_ch11.pdf*, p. 278.

[5] *https://www.mercatus.org/system/files/peirce_reframing_ch11.pdf,* p. 278. See also *https://www.nextgencrowdfunding.com/static/uploads/2016/10/03/NextGenCrowdfundingRegA+WhitePaper*_October62016.pdf.

My understanding is that SEC regulations require online marketplace lenders such as Proper and Lending Tree to update their regulatory filings with the SEC every week or so. Do you believe this is the most effective way to regulate these firms?

A.16. While I have not yet had an opportunity to engage with the Commissioners or the staff regarding regulatory issues related to online marketplace lending, I do have some experience with these types of businesses as a practitioner and recognize that their operations, and the operations of other participants in the marketplace, involve, or potentially involve, various regulatory regimes and agencies, including the SEC. I also recognize that this industry is growing and changing. In this regard, if confirmed, I would expect to work with my fellow Commissioners, the staff, other regulators, market participants and other interested parties to understand the current and evolving practices in this area and to consider the effectiveness and adequacy of existing regulation, including the timing and content of the SEC filings you identify. I also recognize the importance of coordination and discussion with other agencies involved in regulating marketplace online lending, and, if confirmed, would encourage the SEC staff to pursue such coordination and discussion.

Q.17. Under what circumstances is it appropriate for the SEC to send cases to Administrative Law Judges?

A.17. I understand that certain matters involving the Commission's Administrative Law Judges are subject to current court proceedings, and as such, it would not be appropriate for me to comment on those matters. As a general matter, I recognize that Congress has authorized the SEC to use Administrative Law Judges in a number of circumstances, and that some commentators have questioned the scope of the Commission's use of Administrative Law Judges as well as its exercise of discretion, including on due process grounds. If confirmed, I would expect to engage with the staff and my fellow Commissioners on these issues, including with respect to any potential impacts the pending matters could reasonably be expected to have on the operations of the Commission.

Q.18. Does anything need to be done to improve the use of cost-benefit analysis at the SEC? If so, will you commit to advocating for these steps?

A.18. I believe economic analysis—including assessing the expected relevant costs as well as the relevant benefits of a proposed regulation—is an integral part of the rulemaking process. In my experience, in most cases, the initial analysis is reasonably designed, but history has shown that, over time, rules can have wide-ranging effects, and that those effects can be under- or over-estimated at the time a rule is initially adopted, or even missed entirely. History also has shown that recurring costs, including compliance costs, often grow faster than expected, including because yesterday's "state of the art" becomes today's expectation. As the market changes, which it inevitably does, the divergence between expectations and reality can grow over time; accordingly, a rule that may have seemed reasonable from an economic perspective at the time it was adopted may later be viewed differently. For this reason, I

believe retrospective review can be appropriate and important, and certain rules may merit re-evaluation over time.

I also believe that it can be important to reassess not only the subject of a prior analysis but also the prior analysis itself, with an eye toward improving future efforts. If confirmed, I look forward to discussing this issue—what has been learned from past economic assessment exercises that can inform future efforts—with the staff and my fellow Commissioners.

Q.19. Some have criticized the SEC's treatment of machine-readable, open data, including for its implementation of a dual-filing requirement for both XBRL and old fashioned documents, and a slow transition toward allowing the filing of inline XBRL, which is both human-readable and machine-readable. By one estimate, more than 600 of the SEC's various forms are still document-based. As you know, a recently proposed SEC rulemaking would require public firms to file their financial statements in Inline XBRL. Should the SEC work to modernize its treatment of Government data and transition toward open-data? If so, how would you support this transition as SEC Chair?

A.19. As a general matter, I believe that the Commission should be actively looking for ways to improve efficiency at the Commission and for the markets as a whole, including through technology. I have not yet had an opportunity to engage with the Commissioners or the SEC staff regarding the proposed rules addressing the technical formatting of SEC filings, but I look forward to doing so if I am confirmed.

Q.20. Australia has created a Standard Business Reporting regime (SBR) that allows a firm to complete one filing to comply with multiple regulatory disclosure requirements. This has extensively reduced the amount of required data fields, saving the Australian economy more than A$1.1 billion annually by one estimate.[6]

As SEC Chair, would you examine if a similar SBR system would be possible in the United States?

If so, would you work with other regulatory agencies to make this vision a reality?

A.20. As a general matter, it is my expectation that, due to advances in technology, there is room for improvement in regulatory coordination with respect to reporting and information gathering. If confirmed as Chair, I look forward to consulting with my fellow Commissioners, SEC staff, other regulators, including but not limited to the CFTC, and other interested parties to identify specific areas for potential improvement and to explore possible reform options.

Q.21. I'd like to ask about the SEC's 2005 adoption of Regulation NMS.

What have been the most significant changes—technological and otherwise—to securities market since the adoption of Regulation NMS? For example, has the market become more complex since the adoption of Reg. NMS?

Were any of these changes unexpected?

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[6] See *https://www.xbrl.org/sbr-savings-in-australia-soar/*.

Do you think there have been any unintended consequences that have resulted from these changes, specifically from how the Reg. NMS rules were expected to impact the market?

Do the aforementioned changes and unintended consequences merit a comprehensive review of Regulation NMS, such as one that is "part of formal rulemaking" as former SEC Commissioner Paul Atkins has called for?

A.21. As a general matter, I agree that the public equity trading markets have become more complex over the last decade, and that the factors contributing to this increased complexity include, but are not limited to, technological developments. While I do not know with specificity the scope and contours of expectations at the time Regulation NMS was adopted, I believe it is almost certainly true that there have been unexpected developments and changes, some of which have been significant.

Promoting fairness and efficiency in our markets is a core element of the SEC's tri-partite mission, and I recognize that important concerns have been raised, including with respect to transparency, fee structures, and potential conflicts of interest. I understand that the SEC staff has been reviewing structural market issues, and that the Equity Market Structure Advisory Committee and its Regulation NMS Subcommittee have proposed a framework for an access fee (or maker-taker) pilot and made other significant recommendations. For example, I understand that Regulation NMS is on the current list of rules to be reviewed pursuant to the Regulatory Flexibility Act, and, if confirmed, I look forward to reviewing the public comments on the regulation and engaging with my fellow Commissioners and the staff.

As a general matter, I also believe that retrospective review of existing rules and regulations can be appropriate and important. If confirmed, I look forward to discussing the status of the current review of equity market structure with my fellow Commissioners and the SEC staff, with an eye toward ensuring that the Commission is pursuing its mandate effectively in the area of market structure.

Q.22. I'd like to ask about the Securities Information Processor (SIP).

Should policymakers be concerned about the public SIP as a single point of failure?

In terms of market efficiency, how much should policymakers be concerned about latency between the public SIP and private data feeds, including any potential for arbitrage between exchanges?

Does the centralized nature of public SIP limit the ability of technical improvements to the SIP to reduce latency?

A.22. I am not in a position to comment meaningfully on specific aspects of the SIP, including the types and severity of risks. I do, however, recognize the general risks associated with core systems, and, as an example, I am focused on cybersecurity risks. I expect that, if confirmed, I will study these issues, along with market structure issues, with my fellow Commissioners and SEC staff.

Q.23. Within a reasonable timeframe of your confirmation, will you promise to provide the Senate Banking Committee with an evaluation of the SEC's policies and procedures to protect sensitive infor-

mation about markets and participants, along with any recommendations for improvement?

A.23. If confirmed, I look forward to engaging with the Staff and my fellow Commissioners to learn more about the SEC's policies and practices regarding the protection of sensitive market-related information, as well as any potential areas for improvement. I agree that protection of this type of sensitive information is an important issue, and, if confirmed, I look forward to working with you and other Members of the Committee to address these policies and procedures, including seeking to identify areas where improvement is needed or advisable.

Q.24. Should the SEC be allowed to ask for nonpublic, sensitive information about investment strategies from regulated entities? If so, when? What kind of protections should exist to protect the proprietary information?

A.24. I am aware that, in connection with various functions, the SEC requests and reviews material, nonpublic information, including in the mergers and acquisitions space. In my experience, the Commission and the staff have taken the responsibilities that come with receipt of this type of information seriously and, to my knowledge, have acted responsibly. It also is my experience that the staff has not requested more information in this area than would be reasonably necessary to effectively carry out the Commission's mandate. If confirmed, I look forward to engaging with my fellow Commissioners and the staff on this issue, and intend to discuss with them whether the Commission brings a similar perspective to receipt of the type of information that you cite, recognizing that the contexts are different.

With regard to protections and in particular protections from cyber and other forms of theft, if confirmed, I look forward to engaging with my fellow Commissioners and the staff on this issue as well.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR COTTON FROM JAY CLAYTON

Q.1. Since FINRA's launch in 2007, the number of broker-dealers has declined by 23 percent. Does this decline concern you, and what can the SEC do to address it?

A.1. I believe that investors of all types should have reasonable access to investment advice and an appropriate range of investment options, and declines in the availability of advice and investment options would concern me. I also believe that, on balance, having more broker-dealers in the industry would be likely to promote competition, which is beneficial to the industry as a general matter and investors specifically. If confirmed, I look forward to consulting with the staff, my fellow Commissioners, FINRA and other market participants on the state of the market, including the decline in the number of broker-dealers, any resulting adverse effects on the market and, if so, what should be done to address them.

Q.2. As SEC Chair, how will you evaluate FINRA rules to make sure the rulemaking is not unnecessarily burdening competition?

A.2. In reviewing SRO rulemaking proposals, the SEC is required to determine whether the proposal is consistent with the requirements of the Exchange Act and the applicable rules and regulations thereunder.[1] Among other things, I understand this review generally includes consideration of the effects of the proposed rule on efficiency, competition, and capital formation, including a consideration of whether any resulting burden on competition is necessary or appropriate.[2] If confirmed, I look forward to working with FINRA on rulemaking proposals, and with the staff and my fellow Commissioners, as well as other interested parties, to ensure the SEC fulfills its statutory requirements.

Q.3. How can the SEC ensure that political activists don't abuse the shareholder proposal-submission process?

A.3. If confirmed, I intend to enforce the SEC's rules governing permissible shareholder proposals. I understand that opinions differ on the shareholder proposal process, including, for example, the requirements that a shareholder should be required to satisfy in order to submit a proposal for inclusion in the company's proxy and a shareholder vote. I also understand that this is an issue that has been previously reviewed by the Commission and that market practices are continuing to evolve. If confirmed, I would want to work with the staff and my fellow Commissioners, as well as investors and issuers, to review the current state of the market and the details of any particular recommendations on this issue. In doing so, I would pay particular attention to the potential effects on capital formation, investor protection and the maintenance of fair and efficient markets.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR PERDUE FROM JAY CLAYTON

Q.1. *Shareholder Communications:* Mr. Clayton, the SEC's shareholder communications and proxy voting rules have not been updated since 1985. In 2010, the SEC issued a wide-ranging and comprehensive Concept Release on the U.S. Proxy System. Will you support making the modernization of the SEC's shareholder communications and proxy rules a high priority at the Commission? Would you be inclined to update proxy rules with the view towards ensuring quicker and cheaper communications both between companies and their shareholders as well as between shareholders?

A.1. I am aware of the Concept Release and that it discussed a number of issues related to the mechanics of shareholder communications and proxy voting. As a general matter, I believe it is important that investors, particularly retail investors, have access to information that will enable them to make informed voting decisions, and that they are able in practice to cast their ballots. I also recognize that various changes in the market, including changes in communications and investor services, as well as the concentration of holdings in certain companies, have affected the issuer-share-

[1] 15 U.S.C. § 78s(b)(2)(C)(i). See also id. §§ 78c(f); 78o-3(b)(6), (9).

[2] In addition, Section 23(a)(2) of the Exchange Act prohibits the Commission itself from adopting any rule under the Exchange Act that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. § 78w(a)(2).

holder communications and voting dynamic. If confirmed, I look forward to discussing the Concept Release and subsequent efforts and developments in this area with the staff and my fellow Commissioners. I also look forward to exploring with them ways in which we may be able to improve the efficiency of these processes as well as efficient and informed retail shareholder participation in the proxy process.

Q.2. *Investment Disclosure Rules:* Mr. Clayton, I know that you are familiar with the SEC Form 13F and more importantly that it has not been substantively updated since 1979. Since 1979, the ownership of publicly listed companies have dramatically shifted from individuals to institutions and therefore increases the importance of these disclosure forms. Before the widespread adoption of the internet, I understand the need for a 45 days buffer after the end of a quarter to report investment holdings. However, the unintended consequence means that most of the ownership information in these filings is no longer accurate by the time it reaches the market. Without an update, these rules inhibit the ability of public companies to identify and engage with their shareholders and accommodate shareholder demands for greater board accountability. Would you support an SEC initiative to modernize the 13(f) rules, so that all market participants would receive more timely information?

A.2. I understand that opinions differ on the length of time that should be permitted to pass before an institutional investor is required to report its holdings on Form 13F. I also recognize that, while there are various important factors to consider, the Commission generally has an interest in promoting the public availability of data, thereby increasing investor confidence in the integrity of the U.S. securities markets, and for issuers to know in a timely manner who is holding their stock, including to promote shareholder engagement. I also understand there is an interest for institutional investors to protect their investment allocation decisions and proprietary investment ideas, including against "free-riding" and "front-running" of their proprietary investment ideas by other investors. There have been petitions to the Commission with respect to this issue,[1] and it would be inappropriate for me to prejudge it or make a policy recommendation at this time, but, if confirmed, I would look forward to discussing the matter further with the staff and my fellow Commissioners, as well as receiving the views of market participants, including issuers and institutional investors.

Q.3. *SEC Cybersecurity:* Mr. Clayton, cybersecurity and the protection of personally identifiable information of Americans has risen to the forefront of Congress's priorities. The cyber-breaches at Yahoo, OPM, and others have highlighted just how vulnerable the personally identifiable information of average Americans are to a cyber-intrusion. Therefore, I raise my concern with a potential vulnerability in the National Market System Plan to implement a

[1] See Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934, submitted by NYSE Euronext, Society of Corporate Secretaries and Governance Professionals, and the National Investor Relations Institute, File No. 4-659 (Feb. 1, 2013), available at *https://www.sec.gov/rules/petitions/2013/petn4-659.pdf*.

Consolidated Audit Trail (CAT NMS Plan). Although I agree that the consolidation of all market activity in a central repository would facilitate regulators' ability to oversee the securities market and help create greater confidence in the system, I have deep reservations with the fact that SEC staff do not have to abide by the same stringent security protocols that all other users of CAT data must abide by. GAO has previously identified several weaknesses related to the SEC's cybersecurity protocols that the SEC has yet to address. Would you take active measures to ensure that the SEC adopt the same security safeguards required of all other CAT participants under the NMS Plan?

A.3. As a general matter, I place great importance on cybersecurity, both for entities regulated by the SEC as well as at the SEC itself. I recognize that cyber-risks, including denial of service threats and data thefts, raise fundamental risks for organizations of all types, as well as systemic risks. If confirmed, I intend to prioritize cybersecurity efforts at the SEC, including with respect to the CAT NMS Plan. I recognize that it will be important regularly to discuss those efforts with the staff, my fellow Commissioners and this Committee.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR TILLIS FROM JAY CLAYTON

Q.1. In recent years, the SEC has spent a disproportionate amount of its time and resources pursuing enforcement actions, and as everyone knows, enforcement is merely one facet of the SEC's three-part mission. How do you plan on restoring the balance of the SEC's mission, and how does doing so ensure that we have a system that enables robust enforcement?

A.1. If confirmed, each aspect of the Commission's tri-partite mission will be at the front of my mind. I agree with the fundamental principles of our disclosure-based regulatory system, including the focus on information material to an investment decision. I agree that securities trading markets should be fair, efficient, and deep. I believe in the importance of capital formation to our markets, our economy, and our society more generally. I also agree that there is no place for "bad actors" in our markets. If confirmed, all of these principles will be important to me in the context of balancing the SEC's agenda.

Q.2. What is your plan for identifying and addressing some of the operational inefficiencies that exist at the SEC?

A.2. If confirmed, I also would look forward to discussing with the staff and my fellow Commissioners the operational efficiency of the SEC, and whether there are ways in which it may be improved to enable us to more efficiently promote the SEC's mission. I do not believe I am in a position to identify specific areas for potential improvement without the input of the staff. While I expect my areas of inquiry will change as I learn more, I am interested in learning from the staff about the SEC's coordination with other agencies and authorities, as well as its coordination across offices.

Q.3. There has been increased attention to market structure reform efforts after the 2008 crisis. Some have argued that our market

structure systems have become increasingly complex and that the layered regulations have created incentives to game the system. Can you help me understand your views on reforming our domestic market structure and can you commit to working with the Committee in addressing some of the languishing issues that have been pervasive in market structure over the last 10+ years? I am interested in your general thoughts as well as on Reg. NMS, venture exchanges, and anything else you find pertinent.

Can you give me your short- and medium-term assessments of challenges and risks in our equity market structure, and can you commit to this body that you will take a comprehensive approach to reviewing US equity market structure?

A.3. Promoting fairness and efficiency in our markets is a core element of the SEC's tri-partite mission, and I recognize concerns have been expressed with respect to aspects of market structure. I understand that the SEC staff has put forth certain initiatives to assess market structure issues. For example, I understand that Regulation NMS is on the current list of rules to be reviewed pursuant to the Regulatory Flexibility Act, and, if confirmed, I look forward to reviewing the public comments on the regulation and engaging with the staff, my fellow Commissioners and the Committee. I also understand that the Equity Market Structure Advisory Committee and its Regulation NMS Subcommittee have proposed a framework for an access fee (or maker-taker) pilot and made other significant recommendations.

If confirmed, I look forward to discussing the status of these issues and efforts, and other important matters related to equity market structure, with the staff, my fellow Commissioners, and this Committee to ensure that the Commission is pursuing its mandate effectively in this area.

Q.4. What are the short-and medium-term risks for the domestic capital markets?

A.4. Risks to the markets generally are of concern to me, along with the related issues of responsiveness, mitigation, and resiliency. I believe we need to be vigilant in identifying and assessing risks, recognizing that the risk landscape is changing. By way of general illustration, I believe that the potential short- and medium-term risks for the domestic capital markets that the Commission should consider monitoring include, but are not limited to: (1) market risks, such as the types of risks we have seen in the past, including in the financial crisis, where consequences are severe and confidence is undermined on a systemic basis; (2) shocks, where market confidence is undermined for exogenous reasons, such as an extra-jurisdictional event; (3) system failure, with cybersecurity issues being front of mind for me; and (4) fraud, which, as we have seen, does direct damage to many individuals, undermines market confidence and has lasting effects. I recognize that the SEC and other regulators are monitoring these and other risks and, if confirmed, I look forward to engaging with my colleagues in this regard.

I also believe that the risks facing the domestic capital markets include risks that have not yet been identified. If confirmed, I would want to work with the staff, my fellow Commissioners, this

Committee and others to be proactive in connection with the identification, assessment, and mitigation of risk.

Q.5. What are the biggest impediments that you see to companies going public in the U.S., and can you commit to working with my office on legislative solutions to address these issues?

A.5. In my experience, a number of factors may discourage a private company from becoming a public company, including but not limited to various immediate one-time costs and ongoing incremental costs compared with remaining a private company. We should examine whether these costs can be addressed so that more companies choose to go public without lessening, and with an eye toward enhancing, investor protection.

Audited financial statements form a key basis of our disclosure regime and, along with clear disclosure of the issuer's business and financial condition, are a fundamental and important aspect of our investor protection framework. In addition to the cost of preparing such financial statements and important financial and business disclosures, today, companies that transition to public status must also establish and maintain a system of reporting and compliance controls and procedures, and comply with various additional ongoing disclosure, compliance and other requirements that comparable, well-run private companies may determine are not in the best interests of shareholders. Other significant incremental costs typically include those relating to the retention of internal and outside professionals and advisors, including auditors, accountants, attorneys, investor relations personnel, and others. Companies preparing to go public also often need to retain additional experienced executives and board members and, relatedly, secure substantially increased insurance coverage.

In my experience, certain companies view the operational and other pressures inherent in quarterly earnings as costly, including because they detract from long-term planning and strategic initiatives. In addition, companies considering going public must consider, and in my experience put substantial weight on, the greater risks and potential costs, including the diversion of management attention, associated with the risk of public and private litigation and regulatory proceedings.

Many of these costs go beyond out-of-pocket costs and the direct costs of regulation and are more "fixed" than variable and, as a result, may in some circumstances, have a greater effect on smaller and medium-sized companies as compared with "large cap" companies.

I believe strongly in our disclosure-based public market regulatory regime and, in particular, the value of well-prepared SEC registration statements and Exchange Act reports, but also believe we should be examining this situation with an eye toward identifying less burdensome means to achieving effective regulation of newly public companies that encourages well-run companies to participate in our public capital markets, while always being mindful of investor protection. If confirmed, I look forward to working with you and your office, as well as with my fellow Commissioners and the SEC staff, to address these issues.

Q.6. Private funds are extremely important to the U.S. and North Carolina economy, and I am concerned that the current regime and rule structure under the Investment Advisers Act of 1940 is outdated and has placed a large burden on advisers to private funds. Can you commit to working with me on addressing issues with the Advisers Act of 1940, and on ensuring that it is appropriately structured for our modern economy?

A.6. I understand that this is an issue that has been raised, particularly with respect to smaller, private funds. If confirmed, I look forward to working with you and your office, as well as my fellow Commissioners and the SEC staff, to explore the issue further.

Q.7. Given your experience as a transactional attorney, what value does a strong SEC enforcement program play in ensuring that investors and issuers feel comfortable using our capital markets to invest and raise money?

A.7. I believe that the enforcement of our securities laws has significant value in promoting investor confidence in American markets. Market participants need to know that regulators are seeking to punish and exclude "bad actors." At the same time, it is important that investors and regulated entities alike are confident that we are enforcing our laws vigorously and doing so fairly.

Q.8. Cybersecurity is an area of great concern for companies that the SEC regulates. What will you bring from the expertise you developed in advising companies about cybersecurity to your role at the SEC? How do you plan on addressing cybersecurity concerns in our public and private capital markets?

A.8. As a general matter, I place great importance on cybersecurity, both in the context of the entities regulated by the SEC as well as at the SEC itself. I recognize that cyber-risks, including denial of service threats and data thefts, raise fundamental risks for organizations of all types, as well as systemic risks. I believe that my experience advising public companies on cybersecurity matters will be beneficial in considering these issues. For example, 2 years ago, I co-organized an educational cybersecurity conference for public company directors and other decision makers to discuss practical solutions and tools for more effective and efficient management through all stages of cyber-risk prevention, response and recovery. Since then, I have advised companies on a number of cybersecurity matters and recognize that effectively dealing with these matters generally requires information technology and cybersecurity expertise and coordination across an organization. If I am confirmed, I believe these experiences will be helpful in my work with the SEC staff, my fellow Commissioners, market participants and this Committee as we consider cybersecurity concerns going forward.

Q.9. Financial institutions, due to their size and complexity, are more at risk of cybersecurity breaches than ever before. There is a robust body of guidance that exists domestically and internationally to assist financial services entities with developing a cybersecurity risk management strategy. Given these entities are already tasked with implementing a number of regulations to ensure safety and soundness, the common sense approach for U.S. financial regu-

lators would be to leverage cyber-risk management guiding principles over prescriptive, onerous requirements. What approach do you think would be best?

A.9. Although I have not yet formed a view on a principles- vs. rules-based approach in this context, I believe as a general matter that we should be mindful that cybersecurity risks are continuously evolving, and regulation in this area should take into account its dynamic nature including that, in such circumstances, specific requirements may be appropriate but also have the risk of becoming outdated. If confirmed, I look forward to exploring potential options in this area with the staff, my fellow Commissioners, market participants and this Committee.

Q.10. IT modernization enables financial services firms to protect constituent financial information. In an environment of increasing cybersecurity threats, how will you use your role at the SEC to promote IT modernization across the financial services sector and at the SEC? How will you ensure that regulations set by the SEC do not impede progress on IT modernization?

A.10. I believe that the Commission should be actively looking for ways to promote IT modernization and improve efficiency, resiliency, and security in financial services firms. The Commission should also be aware of these objectives, where appropriate, when promulgating new regulations.

Q.11. I am interested in creating a formalized process for the SEC to conduct a retrospective review of its existing rules and regulations. As I am sure you are aware, President Obama issued two executive orders directing independent agencies to conduct such reviews, but the SEC's previous efforts failed to produce meaningful results. Can you commit to working with me and my office in creating a system, like EGRPRA, for the SEC?

A.11. I believe that, as a general matter, it is appropriate to consider whether rules and regulations have had their intended effects and whether actual effects, both intended and unintended, are consistent with expectations. History has shown that many expected effects can be under- or over-estimated at the time a rule is initially adopted.

For these reasons, I agree that retrospective review of existing rules and regulations can be appropriate and important. I understand that the SEC reviews certain rules under the Regulatory Flexibility Act. If confirmed, I look forward to working with you and your office, as well as with my fellow Commissioners and the SEC staff, to explore potential additional approaches to retrospective review.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR BROWN FROM JAY CLAYTON

Q.1. Chair White expanded SEC policy to seek admissions from defendants in enforcement proceedings. Under her leadership, she required enforcement staff to seek admissions in a larger universe of cases.

In your view, did Chair White's admissions policy go far enough? What changes would you need to make in order for the SEC to

start seeking admissions from all, or more, defendants in enforcement actions?

A.1. I have a great deal of respect for Chair White, and, accordingly, if confirmed, I will be mindful of her comments regarding the SEC, particularly in the enforcement area. I also agree that pursuing admissions from defendants in enforcement proceedings should be a key consideration for the Commission. As I stated at my nomination hearing, I strongly believe in the deterrent effect of enforcement proceedings that include individual accountability. However, I also understand the SEC's interest in avoiding, where appropriate, drawn-out proceedings that strain the staff's resources and lengthen the time it would take for resolution, including for investors to receive restitution. I believe each matter should be decided based on its own facts and circumstances, including analysis of whether the added deterrent effect of securing admissions will be offset by other relevant factors. It would be premature for me to make a general policy recommendation in this regard without the benefit of consulting with the staff and my fellow Commissioners.

Q.2. In 2009, under Chair Schapiro, the SEC's Enforcement Division was empowered to pursue investigations without a Commission vote. Chair White expanded some of those powers. In February, however, Acting Chair Piwowar withdrew those powers authority from senior Enforcement Division staff.

Do you commit to restoring those powers to the senior enforcement staff, or even expanding them? If not, how does limiting the authority of the enforcement staff help you attract the best prosecutors?

During your confirmation hearing, you stated "I have zero tolerance for bad actors. I'm not only saying that here, I will say it to the enforcement staff at the SEC."

Do you believe the Enforcement Division will be able to achieve a "zero tolerance" policy if investigatory powers continue to be limited?

A.2. In my view, a key element of effective management is empowerment. I believe most people do their best work if they have clarity on their objectives and sufficient autonomy and support to pursue them. I also believe effective empowerment and functioning of the Enforcement Division are very important to the fair and efficient functioning of our markets and the protection of investors. I am also mindful that even the commencement of an investigation can have significant adverse impacts on respondents, particularly public companies and their shareholders. If confirmed, I am committed to consulting with my fellow Commissioners and the senior members of the Enforcement Division staff on organizational matters, including the appropriate and most effective delegation of authority within the Enforcement Division, including subpoena authority, and I will work to promote the effectiveness of the Division and its personnel.

Q.3. On January 17, 2017, two days before she left the Commission, Mary Jo White gave a speech titled "The SEC After the Fi-

nancial Crisis: Protecting Investors, Preserving Markets."[1] In that speech, former Chair White expressed serious concern that the SEC's independence was being compromised.

She said:

> In short, the environment necessary for independent agencies to be able to do the jobs you all want us to do is not getting better. Indeed, recent trends have even raised the question of whether or not the independence of the SEC can be preserved at all.

Does her opinion concern you?

A.3. I have great respect for Chair White. Independence is fundamental to the tri-partite mission of the SEC. If confirmed, I will be mindful of protecting the Commission's independence, and I believe that focusing on its core tri-partite mission should facilitate that objective.

Q.4. In that speech, Chair White also cited a bill[2] that passed the House of Representatives this January that imposes additional cost-benefit analysis on the SEC.

In your practice you have read the very detailed, often hundreds of pages long rules issued in recent years by the SEC that contain extensive economic analysis. In what ways have you found them to be deficient?

A.4. I believe economic analysis—including assessing the expected relevant costs as well as the relevant benefits of a proposed regulation—is an integral part of the rulemaking process. In my experience, in most cases, the initial analysis is reasonably designed, but history has shown that, over time, rules can have wide-ranging effects, and that those effects can be under- or over-estimated at the time a rule is initially adopted, or even missed entirely.

History also has shown that recurring costs, including compliance costs, often grow faster than expected, including because yesterday's "state of the art" becomes today's expectation. As the market changes, which it inevitably does, the divergence between expectations and reality can grow over time; accordingly, a rule that may have seemed reasonable from an economic perspective at the time it was adopted may later be viewed differently. For this reason, I believe retrospective review can be appropriate and important, and certain rules may merit re-evaluation over time.

Q.5. During the financial crisis, you saw first-hand banks that were on the verge of collapse or that failed.

Did the incentive system lead to excessive risk-taking? Have we learned any lessons from those excesses? What would have happened if the Treasury and Federal Reserve were not able to step in either with the TARP program or federal backstops? Where can the SEC do more to improve financial stability and support the other financial regulators?

A.5. I believe a number of factors contributed to the financial crisis, some of which were also hallmarks of past crises such as new, more risky forms of credit that, in the end, had various unforeseen detri-

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[1] *https://www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html*

[2] SEC Regulatory Accountability Act, H.R. 78, available at *https://www.congress.gov/115/bills/hr78/BILLS-115hr78eh.pdf.*

mental effects on our market, including driving a bubble in asset prices. I also agree that misguided incentive compensation programs can contribute to excessive risk taking. We should remain mindful of those and other factors as we monitor our capital markets. I cannot speculate on what would have happened if the Treasury and Federal Reserve had acted differently.

The SEC has an important role in safeguarding the stability of our securities and capital markets and coordinating with other financial regulators, including, without limitation, in monitoring the compliance of broker-dealers with capital and other requirements. Another more general way the SEC can do this is through effective pursuit of its tri-partite mission, including promoting fair and efficient markets that are well understood by market participants and others who depend on those markets.

Q.6. In 2009, the SEC amended Item 407 of Regulation S-K to require companies to disclose in proxy statements whether a nominating committee considers diversity in identifying nominees for the company's board of directors and, if it is considered, how it is considered. The rule also requires that if the company has a policy with regard to the consideration of diversity in identifying director nominees, how that policy is implemented and how its effectiveness is assessed.

In 2015, several leading public fund administrators submitted a petition for rulemaking that would require new disclosures related to nominees for board seats in order to provide investors with the information they need to make informed voting decisions. In a July 2016 speech, former Chair White recognized the importance of diversity on corporate boards and the interest investors have in diversity disclosure about board members and nominees.[3] She further added that the SEC's 2009 rule change had resulted in vague reporting and investors were not satisfied with the disclosures.[4] Accordingly, she directed SEC staff to review the rule and prepare a recommendation to propose an amended rule to require companies to include more meaningful board diversity disclosure on their board members and nominees.[5]

In February 2017, the SEC's Advisory Committee on Small and Emerging Companies (ACSEC) submitted the following recommendation regarding corporate board diversity disclosure to the Commission:

> The Commission amend Item 407(c)(2) of Regulation S-K to require issuers to describe, in addition to their policy with respect to diversity, if any, the extent to which their boards are diverse. While, generally, the definition of diversity should be up to each issuer, issuers should include disclosure regarding race, gender, and ethnicity of each member/nominee as self-identified by the individual.[6]

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[3] *https://www.sec.gov/news/speech/chair-white-icgn-speech.html*
[4] Id.
[5] Id.
[6] *https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-021617-coporate-board-diversity.pdf*

If confirmed, will you continue former Chair White's efforts to enhance diversity disclosure for board nominees and work to advance rulemaking based on the recommendation from the ACSEC?

A.6. I believe diversity has value, including at public companies and their boards. I have witnessed this first hand and I know that many experienced investors share this view. I understand that there has been meaningful and ongoing engagement on this issue between companies and their shareholders, including institutional investors, and that disclosure practices are evolving as a result. If confirmed, I will work with my fellow Commissioners, the staff (including the Office of Minority and Women Inclusion) and the ACSEC to monitor this issue and compliance with Item 407 of Regulation S-K.

Q.7. In February 2016, a group of Chinese investors led by the Chongqing Casin Enterprise Group announced its intention to acquire the Chicago Stock Exchange (CHX).

If confirmed, will you commit to review the CHX acquisition for compliance with SEC rules and requirements, in particular with respect to limits applicable to beneficial ownership and voting rights?

A.7. It would not be appropriate for me to comment on a specific pending proposal. If confirmed, one of my goals will be to hold non-U.S. acquirers to the same standards as U.S. acquirers, including disclosure standards. If confirmed, I will work with the staff and my fellow Commissioners to review this and any other proposal for consistency with the standards set forth in our securities laws.

Q.8. During your confirmation hearing you stated, "[w]e have to reduce the burdens of becoming a public company, so that it's more attractive." Additionally, you stated, "[f]or a variety of reasons, including very robust private capital markets, but also the costs of going public, the choice to go public here is a very hard one." Please detail the "variety of reasons" other than costs or regulations that you believe discourage companies from going public and describe whether those factors will have less impact if costs or regulations are reduced.

A.8. In my experience, a number of factors may discourage a private company from becoming a public company, including but not limited to various immediate one-time costs and ongoing incremental costs compared with remaining a private company. We should examine whether these costs can be addressed so that more companies choose to go public without lessening, and with an eye toward enhancing, investor protection.

Audited financial statements form a key basis of our disclosure regime and, along with clear disclosure of the issuer's business and financial condition, are a fundamental and important aspect of our investor protection framework. In addition to the cost of preparing such financial statements and important financial and business disclosures, today, companies that transition to public status must also establish and maintain a system of reporting and compliance controls and procedures, and comply with various additional ongoing disclosure, compliance and other requirements that comparable, well-run private companies may determine are not in the best interests of shareholders. Other significant incremental costs typically include those relating to the retention of internal and outside

professionals and advisors, including auditors, accountants, attorneys, investor relations personnel, and others. Companies preparing to go public also often need to retain additional experienced executives and board members and, relatedly, secure substantially increased insurance coverage.

In my experience, certain companies view the operational and other pressures inherent in quarterly earnings as costly, including because they detract from long-term planning and strategic initiatives. In addition, companies considering going public must consider, and in my experience put substantial weight on, the greater risk and potential costs, including the diversion of management attention, associated with the risk of public and private litigation and regulatory proceedings.

Many of these costs go beyond out-of-pocket costs and the direct costs of regulation and are more "fixed" than variable and, as a result, may in some circumstances, have a greater effect on smaller- and medium-sized companies as compared with "large cap" companies.

I believe we should be examining this situation with an eye toward identifying less burdensome means to achieving effective regulation of newly public companies. We should encourage well-run companies to participate in our public capital markets, while always being mindful of investor protection.

Q.9. The JOBS Act amended the Securities Act of 1933 to facilitate initial public offerings (IPOs) and the Securities Exchange Act of 1934 to expand the number of security holders a private company may have without registering with the SEC. Previously, companies would consider an IPO as they approached the old limit of 500 investors—notably Google in 2004 and Facebook in 2012. To what extent did the JOBS Act's expansion of the allowable number of security holders at private companies negatively impact the number of IPOs?

A.9. The JOBS Act did expand the allowable number of security holders at private companies. However, at this time I cannot state for certain its significance in the decision of whether or not to become a public company.

Q.10. Which specific regulations do you believe are hindering IPOs? How may they be revised in ways that do not weaken investor protection?

A.10. I believe the disclosure-based regulatory framework governing our public markets and companies has been and remains very important—for example, I believe in the value of well-prepared SEC registration statements and Exchange Act reports. In connection with efforts to encourage more well-run companies to access the public capital markets, as an example, an avenue I would consider exploring is comparing the reporting and control environments at respected private companies with public company requirements and practices. If confirmed, I look forward to working with my fellow Commissioners and the staff, and consulting with market participants, regarding such an exercise or other means through which we can identify measures that will facilitate access to our public markets while maintaining or enhancing protections for investors.

Q.11. If regulations are rolled back in the hopes of promoting more IPOs, what are the measures by which you would determine or define success? Specifically, is success achieved by increasing the number of IPOs in a year? What if IPOs increase, but more companies delist anyway, resulting in a decrease in the aggregate number of listed companies?

A.11. The focus on increasing the attractiveness of our public capital markets is driven by the three-part mandate of the Commission. I believe our public equity markets have, over time, proven to be an efficient and fair means for investors, particularly Main Street investors, to participate in the growth of the American economy. Success should be defined by whether the Commission is addressing its mandate, including whether Main Street investors have efficient means to participate in investment opportunities with appropriate investor protection.

I also am very open to exploring other avenues to achieve this objective and, if confirmed, look forward to discussing this issue with the staff and my fellow Commissioners and this Committee.

Q.12. According to a recent report by Credit Suisse, concurrent with the decline in IPOs since the peak in 1996, there has been substantial increase in the volume of mergers and acquisitions (M&A) activity and the assets managed by venture capital funds (nearly 7x higher) and buyout funds (over 10x higher). If IPOs increase, do you expect a commensurate decrease in M&A activity or the size of venture capital and buyout funds? If so, are IPOs preferred to M&A activity or private fund investments? If not, what would prevent such a decrease?

A.12. There are a variety of factors that drive M&A activity, both in the public and private markets, and private investment activity. It is not clear to me that there is a correlation between IPOs and M&A activity and I cannot predict the effect that an increase in IPOs would have on public M&A activity or the size of venture capital and buyout funds.

Q.13. Among the significant differences between public and private companies are required disclosures by public companies and transferable shares that generally confer voting rights and allow input on governance matters. If the burdens of being a public company, including these, are to be reduced to encourage more IPOs, please explain how limiting either or both of these elements would be positive for transparency or shareholder rights.

A.13. I believe the disclosure-based regulatory framework governing our public markets and companies has been and remains very important and, in this regard, I believe transparency and shareholder rights have substantial value. I believe that any efforts to make our public markets more attractive to companies should take into account these fundamental principles, recognizing that many factors drive decisions around governance structures.

Q.14. In February, I joined the other Democratic Members of the Senate Finance Committee in a letter to Chairman Hatch requesting that then Department of Health and Human Services Secretary nominee Tom Price provide accurate and complete responses regarding his answers to questions about privileged and discounted

access to a private placement of stock by an Australian biomedical company. In addition, other Members of Congress questioned the numerous stock transactions by Mr. Price while he was Chairman of the House Budget Committee and a member of the House Ways and Means Subcommittee on Health. Mr. Price's financial disclosures show that he engaged in transactions involving the stock of 40 different companies in the health care sector. Given his prior positions, Mr. Price potentially had access to information that could impact the companies he invested in and that was not available to the public. Please confirm that the Division of Enforcement staff will have your full support to consider the issues raised by Mr. Price's investments and the applicability of the STOCK Act and that all appropriate regulatory actions will be pursued.

A.14. As I noted at my nomination hearing, matters such as these are highly dependent on the facts and circumstances and it would not be appropriate for me to comment on any specific matter at this time. As a general matter, however, if confirmed, I will actively support the staff in investigating violations of the securities laws and pursuing enforcement actions and can assure you that no individual will be above the securities laws.

Q.15. At your confirmation hearing, you agreed to provide the names of current Trump administration officials, or its transition team, that you communicated with prior to being selected by the President as his nominee, and if you know whether any of those individuals have businesses regulated by the SEC. Accordingly, please provide that information for the record.

A.15. Based on my recollection, I communicated on a substantive basis with the following current Trump administration officials or former transition team members prior to being selected by the President as his nominee to Chair the Commission: President Donald J. Trump, Reince Priebus, Stephen Bannon, Ambassador Martin Silverstein, Ira Greenstein, Darren Blanton, Peter Thiel, and Rebekah Mercer. While I have not specifically looked into it, I believe it is fair to presume that one or more of these individuals may be affiliated with one or more public companies or other companies that are regulated by the SEC. Also, on January 4th, after my nomination had been publicly announced, I met with Carl Icahn. On December 24th, following press reports of my meeting with then President-elect Trump earlier in the week, Mr. Icahn's office contacted me to request a meeting on a to-be-determined date. That meeting was not set until several days after I received word that I would be nominated.

Q.16. Please describe examples of steps you plan to take to improve investor protection. How will an Ohioan saving for retirement or to send her kids to college know you are working to protect her?

A.16. Investor protection, particularly the protection of Main Street investors, is a critical element of the SEC's tri-partite mission, and it is very important to me. If confirmed, I intend to make this aspect of the SEC's mandate clear both in word and deed. I will make it clear that protection of Main Street investors is a touchstone for our rulemaking, enforcement, and other related activities.

Q.17. The Foreign Corrupt Practices Act (FCPA) forbids U.S. companies and their subsidiaries from paying foreign Government officials to obtain or retain business. What is your specific plan for enforcement of the FCPA?

A.17. Bribery and corruption have no place in society. Moreover, they often go hand-in-hand with many other societal ills, including inequality and poverty, and have anti-competitive effects, including disadvantaging honest businesses. Accordingly, combating corruption is an important governmental mission.

U.S. authorities, including the SEC, other financial regulators, and law enforcement agencies, both at home and abroad, play an important role in combating Government corruption. I believe the FCPA can be a powerful and effective means to effect this objective. I also believe that international anti-corruption efforts are much more effective at combating corruption if non-U.S. authorities are similarly committed and seek to coordinate. Fortunately, international enforcement efforts appear to be more prevalent than they were a decade ago. If confirmed, I look forward to working with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws. In particular, I believe that coordination with the Department of Justice is integral to effective enforcement of the FCPA.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR REED FROM JAY CLAYTON

Q.1. The Securities and Exchange Commission still has not finalized all of the rules required under Title VII of the Dodd Frank Wall Street Reform and Consumer Protection Act. Will you give us your commitment that the Commission, if you are confirmed, will finalize these derivatives rules before your term is complete? If so, how will you sequence the completion of these remaining rules so that they are all complete by the end of your term?

A.1. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law and that such rulemakings should be pursued on a basis that is timely and feasible. The rulemaking process is important, and in many cases demands significant resources. The Commission's resources are limited and, accordingly, the overall approach to rulemaking should reflect the Commission's mandate and be the product of consultation among the Commissioners, the staff and, in the case of multi-agency rulemaking, other authorities, being mindful of the obligation to proceed with mandatory rulemaking at a reasonable pace and also being responsive to market developments. If confirmed, I look forward to engaging with my fellow Commissioners and the staff regarding these issues and working to carry out the statutorily mandated rulemakings.

Q.2. The Public Company Accounting Oversight Board (PCAOB) was created in the wake of a series of corporate accounting scandals, such as Enron and WorldCom, which cost investors billions of dollars and hurt the U.S. economy. But the 2002 Sarbanes-Oxley law creating the Board also required PCAOB's disciplinary pro-

ceedings to be kept confidential through charging, hearings, initial decision, and appeal. For example, an accounting firm that was subject to a disciplinary proceeding continued to issue no fewer than 29 additional audit reports on public companies without any of those companies knowing about its PCAOB disciplinary proceedings. PCAOB's closed proceedings run counter to the public enforcement proceedings of other regulators, including the Commission you have been nominated to chair, the Securities and Exchange Commission, as well as the Department of Labor, the Federal Deposit Insurance Corporation (FDIC), the Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), and others. Since you are "100 percent committed to rooting out any fraud and shady practices in our financial system," would you agree that the PCAOB's disciplinary proceedings should be made transparent?

A.2. As a general matter, I believe that effective enforcement and oversight are critical to the fair and efficient functioning of our markets and the protection of investors. I also firmly believe in our disclosure-based approach to regulation. I am also mindful that the disclosure of an investigation related to a public company can have significant adverse impacts on the company and its shareholders, even if the investigation is of an accounting firm and does not relate to conduct by the company or its personnel and would not be expected to affect the company's performance. I am also mindful that the scope of the PCAOB's disciplinary authority was set forth by Congress in the Sarbanes-Oxley Act of 2002.

If confirmed, I would want to study this issue in more detail with my fellow Commissioners and the SEC staff, including with the benefit of the PCAOB's experience with this issue over the past decade, keeping in mind the principles and considerations discussed above, including the value of transparency.

Q.3. During your hearing, there was some discussion regarding why fewer companies may be choosing to go public. Is it possible that the JOBS Act itself through its expansion of exempt offerings might have contributed to fewer initial public offerings? If you believe otherwise, how have you arrived at this conclusion?

A.3. The JOBS Act did expand the allowable number of security holders at private companies. However, at this time I cannot state for certain its significance in the decision of whether or not to become a public company.

If confirmed, I would expect to study these issues in more detail, including with the SEC staff, to determine whether my experience is consistent with the views and experience of the staff and market participants.

Q.4. Also during the hearing, I asked about my bipartisan legislation with Senator Grassley that would increase the SEC's authority to obtain civil monetary penalties. You stated that you would appreciate a moment to look at the issue and that you would provide your views after you had looked at the issue. Now that you have had time to reflect on this issue, I would appreciate knowing your views. To restate the question, in 2011 former SEC Chair Mary L. Schapiro explained that "the Commission's statutory authority to obtain civil monetary penalties with appropriate deterrent effect is

limited in many circumstances." Do you agree with former Chair Schapiro?

A.4. As a general matter, I believe that the effective empowerment and functioning of the SEC Enforcement Division are fundamental to the fair and efficient functioning of our markets and the protection of investors. Under existing law, the Commission has the authority to seek civil monetary penalties in a number of circumstances. I would not want the Division or the Commission to be unnecessarily or inappropriately constrained in pursuing civil monetary penalties, which can serve an important deterrent effect in appropriate circumstances. If confirmed as Chair, I will work with my fellow Commissioners and the Enforcement Division staff to enforce the law as it is written, including with respect to civil monetary penalties. I also would be willing to engage with Congress regarding any changes to the SEC's statutory authority to seek monetary penalties that Congress deems appropriate.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR MENENDEZ FROM JAY CLAYTON

Q.1. Mr. Clayton, as we discussed during your confirmation hearing, in 2009, former SEC Chair Mary Schapiro gave subpoena authority to the Commission's enforcement staff. Prior to then, only the Commission itself could authorize subpoenas. This change empowered senior enforcement attorneys to quickly escalate informal inquiries to formal investigations, ultimately strengthening the Commission's ability to investigate corporate misconduct.

Unfortunately, Acting Chair Piwowar has taken steps to rein in the enforcement division by revoking subpoena authority from 20 enforcement officials and limiting it to the enforcement division director. This is a major reversal from post-crisis policy designed to assist the Commission in initiating investigations into bad actors that ravaged investors and our economy.

During the hearing, you were unable to answer any questions on this topic. Now that you have had time to research and develop an opinion, please answer the following questions.

Do you agree with this policy change?

In your opinion, does taking away subpoena authority from senior enforcement attorneys better protect investors and deter misconduct?

If confirmed, do you plan to continue this policy?

What specific actions will you take to empower the SEC's enforcement division?

A.1. I believe that effective and appropriate empowerment and functioning of the Enforcement Division are very important to the fair and efficient functioning of our markets and the protection of investors. I am also mindful that even the commencement of an investigation can have significant adverse impacts on respondents, particularly public companies and their shareholders.

If confirmed, I am committed to consulting with my fellow Commissioners and the senior members of the Enforcement Division staff on organizational matters, including the appropriate and most effective delegation of authority within the Enforcement Division,

including subpoena authority, and I will work to promote the effectiveness of the Division and its personnel.

Q.2. Mr. Clayton, as we discussed during your confirmation hearing, Acting Chair Piwowar recently decided to open a new public comment period on the CEO-to-worker pay ratio rule, as required by section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The rule was adopted by the SEC in 2015. Acting Chair Piwowar's unilateral decision not only obstructs the implementation of a congressionally mandated rule and diverts staff resources away from other responsibilities, but it selectively ignores the tens of thousands of comments from investors expressing the view that this information is material and important to shareholder evaluation of executive compensation.

In fact, last week, a coalition of 100 investors and investor organizations representing $3 trillion in assets under management wrote to Acting Chair Piwowar expressing support for the rule and urging the SEC to maintain the current effective date for the disclosure.

During the hearing, you were unable to answer any questions on this topic. Now that you have had time to research and develop an opinion, please answer the following questions.

Do you agree with Acting Chair Piwowar's decision to open a new public comment period on the rule?

Is it your sense that the first comment period on the rulemaking failed to appropriately capture issuer concerns about compliance? If so, please provide a detailed explanation.

Does it concern you, from an SEC governance perspective, that one commissioner, without consulting the other, decided to reopen a public comment period on a rule that has already been adopted by the Commission?

Can I have your commitment that, if confirmed, you will adhere to this congressional mandate and implement the 953(b) rule, including retaining the current effective date, without delay?

A.2. A statement on the SEC's website indicates the reason for the extension was to better understand the nature of unanticipated compliance difficulties encountered by some issuers and to determine whether additional guidance or relief may be appropriate. If confirmed, I look forward to working with the staff and my fellow Commissioners to understand the nature of these concerns and to proceed in an appropriate fashion with the rulemaking process for this rule.

Q.3. In 2011, a bipartisan group of corporate and securities law professors filed a rulemaking petition with the SEC that would require publicly traded companies to disclose political expenditures to their shareholders. To date, more than 1.2 million securities experts, institutional and individual investors, and members of the public have pressed the SEC for such a rule, including support from former Republican SEC Chair William Donaldson and former Democratic SEC Chair Arthur Levitt.

As a matter of corporate governance and investor protection, the case for disclosure is clear and convincing. This information is material to how shareholders decide where to invest their money and how they vote in corporate elections.

In response to a question from Sen. Van Hollen, you acknowledged that a number of companies already make this disclosure. You also said that you would be willing to think about whether this disclosure should be mandated.

Do you agree with the concept that shareholders, those that actually own the wealth of corporations, should be able to access information regarding a company's political spending decisions?

As noted above, you acknowledged during the hearing that a number of companies provide information to shareholders on political spending. As more and more companies begin to recognize this information is material to shareholders, do you agree that a standardized disclosure regime would provide shareholders with access to clear and comparable disclosures?

As you said in response to questions on the need for the political spending regulation, materiality is the touchstone for making disclosure decisions at the agency. Materiality is defined as relevant information to investors. With that in mind, can you explain why a disclosure rulemaking petition that has received the most investor (institutional, retail, and pension) support—tenfold times any other proposed rulemaking in agency history—could realistically be deemed immaterial?

Currently, the SEC has the authority to take preliminary steps to consider a rulemaking that would require publicly traded companies to disclose their political spending to shareholders, including holding a public roundtable on the issue. If confirmed, will you commit to hold a public roundtable on the issue of corporate political spending disclosure?

Given the record support for this rulemaking petition, I am concerned that the SEC has been too dismissive of the comments from investors and members of the public regarding an issue that goes to the core of the SEC's mission. What assurances can you provide that you will take seriously these 1.2 million comments in support of a rule to require publicly traded companies to disclose their political spending to shareholders?

A.3. I am aware that issues related to corporate disclosure of political spending have generated significant interest and divergent views. As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure.

I understand that through shareholder engagement, a number of companies have elected to provide information regarding their political spending activities. In addition, under the SEC's shareholder proposal rule, Rule 14a-8, investors can submit proposals to be included in a company's proxy materials that would require specific disclosure of items regardless of whether they meet the materiality threshold. Based on publicly available information, shareholder support for political spending and lobbying disclosure proposals under Rule 14a-8 has averaged close to but less than 25 percent in recent years.

If confirmed, I would expect to engage with the staff, my fellow Commissioners, and market participants to further consider this issue.

Q.4. I worked with former Senator Akaka on section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection act to

authorize the SEC to require broker-dealers that provide investment advice about securities to retail customers to adhere to a fiduciary standard. In January 2011, as mandated by section 913, the SEC published a study on gaps in the protection of retail investors, and SEC staff recommended a uniform fiduciary standard for broker-dealers and investment advisers.

Specifically, the study states, "[r]etail customers do not understand and are confused by the roles played by investment advisers and broker-dealers, . . . They should not have to parse through legal distinctions to determine whether the advice they receive was produced in accordance with their expectations." [1]

Consistent with Congress's grant of authority to the SEC in section 913, the study recommends the consideration of a rulemaking that would apply a uniform fiduciary standard to both broker-dealers and investment advisers, when providing personalized investment advice about securities to retail customer. Former SEC Chair Mary Jo White agreed with the findings and recommendations of this study, but the SEC has filed to take any additional steps to date.

If confirmed, what significance will you place on SEC staff findings and recommendations?

If confirmed, will you commit to move forward with a uniform fiduciary duty rulemaking as authorized under section 913 and as recommended by SEC staff?

A.4. I am aware that this issue has generated significant interest. I believe investor protection, particularly protection of Main Street investors, is a critical element of the SEC's tri-partite mission. Based on my experience, I believe that as a general matter it is important that our regulations are designed to ensure that Main Street investors making an investment decision are well informed. I understand the current debate regarding the duty owed to these investors, including key issues raised by the related fiduciary rule issued by the Department of Labor, such as potential divergence of regulatory standards across account types, uncertainty in application, compliance costs, coordination among regulatory agencies, potential limitations on investor choice and investment opportunities, and, importantly, investor protection. These would be important issues to consider when assessing whether the SEC should issue a similar rule. If confirmed, I look forward to working with my fellow Commissioners and the SEC staff, and consulting with market participants, to determine whether the Commission should move forward and, if so, in what manner, always keeping in mind the interests of Main Street investors.

I also recognize the importance of coordination and discussion with other agencies and stakeholders generally and with respect to these issues in particular. If confirmed, I would encourage the SEC staff to pursue such coordination and discussion.

Q.5. In 2009, the SEC adopted a rule requiring publicly traded companies to disclose more information on director selection and diversity. However, because the rule failed to actually define diversity, the disclosures are vague and provide little information to investors on actual board diversity. Last year, former Chair White

[1] *https://www.sec.gov/news/studies/2011/913studyfinal.pdf*

acknowledged that the rule has not resulted in particularly meaningful disclosures. Earlier this year, the SEC's Advisory Committee on Small and Emerging Companies submitted a memo to Acting Chair Piwowar recommending that the Commission amend the rule to include "disclosure regarding race, gender, and ethnicity of each board member/nominee as self-identified by the individual."

What is your view on the effectiveness of the SEC's corporate board diversity rule?

Will you commit to working to update the rule so that investors have access to meaningful disclosures such as the racial, ethnic, and gender composition of boards, and any company efforts or strategies to improve board diversity?

A.5. I believe diversity has value, including at public companies and their boards. I have witnessed this first hand and I know that many experienced investors share this view. I understand that there has been meaningful and ongoing engagement on this issue between companies and their shareholders, including institutional investors, and that disclosure practices are evolving as a result. If confirmed, I will work with my fellow Commissioners, the staff (including the Office of Minority and Women Inclusion), and the SEC's Advisory Committee on Small and Emerging Companies (ACSEC) to monitor this issue.

Q.6. Given your role in representing Ally Financial in the fallout of the subprime mortgage crisis, I wanted to get your perspective on Goldman Sachs' activities to meet the consumer relief portion of its settlement with the Federal and State Governments. As I'm sure you know, last January, Goldman Sachs entered into a settlement of more than $5 billion over its role in packaging and selling toxic mortgage-backed securities in the years leading up to the crisis. The settlement requires Goldman to provide $1.8 billion in consumer relief, and to satisfy that portion of the settlement, Goldman has purchased approximately 26,000 severely delinquent mortgage loans from Fannie Mae for approximately $4.5 billion, loans which represent $5.7 billion in unpaid principal balance.

In essence this deal allows Goldman to purchase loans for pennies on the dollar, and once borrowers restart their monthly payments, the ability to sell the loan for a profit and receive credit under the terms of their settlement.

And because Goldman gets settlement credit for purchasing these loans, it has the financial ability to outbid other more community-oriented buyers that may have a greater incentive to keep borrowers in their homes.

Do you think it's fair that Goldman Sachs, who pedaled toxic mortgage-backed securities and paid a record $550 million penalty in a settlement with the SEC for misleading investors about subprime mortgage products, can meet its settlement obligations by purchasing delinquent mortgage loans and reselling them for a profit?

A.6. It would not be appropriate for me to comment on a particular enforcement matter. As a general matter, I believe that all participants to a settlement should fulfill their settlement obligations.

Q.7. In my mind, the Office of the Whistleblower serves a critical function at the SEC, empowering whistleblowers to provide key in-

formation to the Commission. As you know, Dodd-Frank required the SEC to establish a whistleblower program, and since 2011, the SEC has received more than 18,300 tips and awarded more than $111 million to 34 whistleblowers. Importantly, since 2014, the SEC has pursued enforcement actions against a number of companies that retaliated against whistleblowers.

Do you agree that the Office of the Whistleblower has been successful?

In your view, what can the Commission do to enhance protections for whistleblowers and ensure that tips and information on misconduct and illegal activity continue to flow to the Commission?

A.7. As a general matter, I believe that effective enforcement is critical to the fair and efficient functioning of our markets and the protection of investors. While I do not have substantial experience with the SEC's whistleblower program, it is my general understanding that the Office of the Whistleblower provides an important tool for identifying misconduct and facilitating restitution to investors. I understand certain protections on which the Office has been focused include preserving the confidentiality of whistleblowers and taking action to protect against retaliation. If confirmed, I look forward to learning more about the efforts of the Office from my fellow Commissioners and the staff and hearing their views on how to make the Office a more effective component of the SEC's enforcement efforts specifically and its tri-partite mission more generally.

Q.8. The shareholder proposal process set forth in Rule 14a-8 describes the process by which shareholders can file resolutions. The rule provides an important mechanism whereby eligible shareholders can place proposals in proxy statements, thereby allowing shareholders to vote on a proposed change in the company's bylaws or make recommendations to management to amend company policies. In February, the Business Roundtable sent a letter to Gary Cohn, the Director of the National Economic Council, detailing recommendations on various Federal regulations.[2] The letter specifically identifies the shareholder proposal process and suggests, among other recommendations, that the threshold requirements for being able to file, refile, and vote on shareholders resolutions should be significantly increased.

What is your opinion of proposals to curtail the shareholder proposal process as outlined in Rule 14a-8?

Do you believe that the current shareholder proposal process needs any changes? If so, please provide a detailed explanation of such changes.

A.8. I understand that opinions differ on the shareholder proposal process, including, for example, the requirements that a shareholder should be required to satisfy in order to submit a proposal for inclusion in the company's proxy and a shareholder vote. I also understand that this is an issue that has been previously reviewed by the Commission and that market practices are continuing to evolve. If confirmed, I would want to work with the staff and my fellow Commissioners, as well as investors and issuers, to review

[2] *https://businessroundtable.org/sites/default/files/Regulations%20of%20Concern%20Letter%20and%20List%201702_22.pdf*

the current state of the market and the details of any particular recommendations on this issue. In doing so, I would pay particular attention to the potential effects on capital formation, investor protection and the maintenance of fair and efficient markets.

Q.9. There are currently two petitions for rulemaking pending with the SEC requesting rules to require disclosure of short positions in parity with the existing required disclosure of long positions (File No. 4-689 and File No. 4-691). The current lack of transparency around short positions deprives companies, investors, and the market of valuable information and may encourage trading behaviors that unfairly harm growing companies and their investors.

Would you support a disclosure regime for short sellers, modeled after the Regulation 13D disclosures required of long investors, to shine a light on manipulative behaviors, protect long-term business growth, and allow all market participants to make informed trading decisions?

A.9. I am generally aware of these rulemaking petitions. It would not be appropriate for me to pre-judge the issue or to make policy recommendations at this time. However, if confirmed, I look forward to consulting with SEC staff and other interested parties to understand the types of data currently available to the public, the staff's knowledge and assessment of the identified concerns, the expected effect that additional disclosures would be anticipated to have on those concerns, and the expected effects that such additional disclosure requirements may have on other matters such as liquidity and price discovery in the market.

Q.10. Title VIII of the Dodd-Frank Wall Street Reform and Consumer protection act added a new regulatory framework for financial market utilities designated by the Financial Stability Oversight Council as systemically important. U.S. clearinghouses that have been determined to be systemically important financial market utilities, SIFMUs, are subject to prudential regulation by the Federal Reserve Board. Title VIII allows SIFMUs to maintain accounts at a Federal Reserve Bank and provides access to the Fed's discount window in unusual and exigent circumstances. SIFMUs are currently able to compete for business opportunities abroad because these rules align with international standards. However, certain legislative proposals in Congress have proposed repealing Title VIII.

Will you commit to work with Congress to ensure SIFMUs are not denied access to foreign markets?

A.10. As a general matter, I agree that we should be mindful of the issue of SIFMU access to foreign markets, recognizing the international nature of many aspects of our capital markets. If confirmed, I look forward to working with Congress on important legislative proposals that, consistent with the SEC's mission, affect our markets.

Q.11. As you know, the SEC is currently reviewing the proposed acquisition of the Chicago Stock Exchange by a group of Chinese investors led by the Chongqing Casin Enterprise Group.

Given Chongqing Casin's various business lines in China including property development, insurance, and municipal commercial

banks, and its likely ties to the Chinese Government, in your opinion, does the potential acquisition raise U.S. market integrity, transparency, and confidence concerns?

If confirmed, what specific steps will you and your staff undertake to thoroughly review the near and long-term implications of Chongqing Casin's acquisition of a U.S. exchange?

A.11. It would not be appropriate for me to comment on a specific pending proposal. If confirmed, one of my goals will be to hold non-U.S. acquirers to the same standards as U.S. acquirers, including disclosure standards. If confirmed, I will work with the staff and my fellow Commissioners to review this and any other proposal for consistency with the standards set forth in our securities laws.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR TESTER FROM JAY CLAYTON

Q.1. *Foreign Corrupt Practices Act:* Mr. Clayton, I am a strong believer that our markets and our Government work best when we shine a light on them. Transparency and eliminating conflicts of interest are key to a strong democracy.

Now I want to ask you about a paper you co-wrote back in 2011 with nine other lawyers, about the Foreign Corrupt Practices Act.

Your paper to the New York City Bar Association is critical of the law.

I think it is also important to note that President Trump has also publicly shared his disdain for the FCPA. Which is concerning given the fact that the President's company has a history of doing business internationally in places like Azerbaijan.

So I guess my first question is do you continue to oppose the FCPA?

Would you elaborate on your thoughts about corporations and bribery, and what you will do to ensure that these two things do not cross paths?

A.1. Bribery and corruption have no place in society. Moreover, they often go hand-in-hand with many other societal ills, including inequality and poverty, and have anti-competitive effects, including disadvantaging honest businesses. Accordingly, combating corruption is an important governmental mission.

U.S. authorities, including the SEC, other financial regulators, and law enforcement agencies, both at home and abroad, play an important role in combating Government corruption. I believe the FCPA can be a powerful and effective means to effect this objective. I also believe that international anti-corruption efforts are much more effective at combating corruption if non-U.S. authorities are similarly committed and seek to coordinate. The New York City Bar Association paper you reference focused on this coordination point but also was clear that effectively combating Government corruption is an important policy objective that should be pursued vigorously. Fortunately, international enforcement efforts appear to be more prevalent than they were a decade ago. If confirmed, I look forward to working with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws.

In particular, I believe that coordination with the Department of Justice is integral to effective enforcement of the FCPA.

Q.2. *CFIUS:* Mr. Clayton, the Committee on Foreign Investment in the United States is an inter-agency committee who reviews transactions that result in the control of American businesses by foreign entities. The CFIUS review examines the potential effects that foreign investment could have on national security. In the SEC space, a Chinese company is in the process of purchasing a U.S. Stock Exchange. Now the SEC Chair is not a permanent member of CFIUS, but often plays a role, when an entity under its purview is under consideration by CFIUS.

My question to you is will you commit to working with CFIUS in a vigorous manner to ensure that Americans' financial information is not placed into harm's way?

A.2. While it would not be appropriate for me to comment on a specific proposal pending before the Commission, I can confirm to you that I am aware of the important role of CFIUS and, if confirmed as Chair, look forward to working with CFIUS in matters of overlapping jurisdiction to facilitate its mission.

Q.3. Given your history in mergers in acquisitions, you have obviously seen and participated in transactions involving foreign investment into the U.S.

Do you believe our financial markets and investors here in the U.S. are at an increased risk lately with increased foreign investment, particularly from Chinese entities, looking to steal proprietary information?

A.3. I am aware of policy and competitive concerns that have arisen in the context of foreign investment in U.S. capital markets, including market-related and investor protection concerns as well as other issues which overlap with other authorities and extend beyond the scope of the SEC's authority and mandate.

If confirmed, I will engage with my fellow Commissioners and the SEC staff regarding these market-related and investor protection issues, and, as noted in connection with your question regarding CFIUS, engage with other authorities on issues of common interest, including, but not limited to, issues related to protection of proprietary information.

Q.4. *Priorities/Consensus Building:* Mr. Clayton, I know you have a long history in the mergers and acquisitions space, but I am curious about what is most important to you today.

If confirmed, what will be your priorities be as SEC Chair?

A.4. If I am confirmed, I will focus my efforts on advancing the Commission's tri-partite mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. For example, as I stated at the hearing, 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. I also intend, if confirmed, to assess the actions of the Commission through the lens of what is in the interest

of Main Street investors. If confirmed, I will work with my fellow Commissioners and the SEC staff to pursue these and other goals that are consistent with the SEC's mission.

Q.5. When I think about strong nominees, I think about folks who are willing to put partisanship aside to work together on issues.

How will you work with the other commissioners to more effectively promulgate rules on a timely basis, including on difficult issues that will require consensus building among Commissioners?

A.5. As I stated at the hearing, an important aspect of my job over the past two decades has been to facilitate consensus. It is my experience that consensual decision making often has lasting value, including that it facilitates future, constructive engagement. I recognize that there are situations in which individuals will have fundamental disagreements, but if confirmed, I plan to work constructively with my fellow Commissioners to advance the SEC's tripartite mission as an independent agency. I am hopeful that we will be able to reach consensus on the many important issues facing the Commission, including those that are yet to be identified.

Q.6. How will you work to implement regulations, including those that you may have been outspoken about in the past, but carry a Congressional mandate?

A.6. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law and that such rulemakings should be pursued on a basis that is timely and feasible. If confirmed, I look forward to working with my fellow Commissioners and the SEC staff to carry out the statutorily mandated rulemakings.

Q.7. *Corporate Political Disclosure:* Mr. Clayton, I am a strong proponent of transparency around our campaign finance system and I strongly believe we have to do something to slow the flood of dark money into campaigns which undermines our democracy. On a number of occasions, I and many others on this Committee has been pushing the SEC to promulgate a rule which would require corporate political spending disclosure. Unfortunately, the Appropriations Committee prevented the SEC from doing anything for the last few years.

In the future, if Congress were not preventing the SEC from promulgating a rule, would you support such a rule as Chair?

A.7. I am aware that issues related to corporate disclosure of political spending have generated significant interest and divergent views. As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure.

I understand that through shareholder engagement, a number of companies have elected to provide information regarding their political spending activities. In addition, under the SEC's shareholder proposal rule, Rule 14a-8, investors can submit proposals to be included in a company's proxy materials that would require specific disclosure of items regardless of whether they meet the materiality threshold. Publicly available data indicates that shareholder support for political spending and lobbying disclosure proposals under Rule 14a-8 has averaged close to but less than 25 percent in recent years.

If confirmed, I would expect to engage with the staff, my fellow Commissioners, and market participants to further consider this issue.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR WARNER FROM JAY CLAYTON

Q.1. Two entities that you have represented, Valeant and Pershing Square, have come under significant legal scrutiny for potential insider trading in connection with the Allergan bid in 2014. In fact, a Federal judge in California ordered Pershing Square and Valeant to make additional disclosures on their shareholder documents, including that he had found their alliance may violate insider trading rules and practically begged the SEC to bring a case against the entities. To date, the SEC has not done so. If confronted with a situation in which a Federal judge indicates insider trading has occurred, will you take the Federal judge's plea as a cue to investigate and if warranted bring a case?

A.1. This is in response to Questions 1 through 4. I appreciate your recognition that my ability to discuss the matter that is the focus of Questions 1 through 4, the proposed Valeant/Allergan transaction, which is the subject of ongoing legal proceedings, is constrained by ethical duties and other obligations.

Valeant's initial proposal to combine with Allergan was announced in April 2014, and my firm represented Valeant. I was not part of the transaction team or involved in, or to my recollection aware of, the proposal prior to its public announcement.

On certain occasions in June 2014, months after the initial announcement of the proposed combination, I was consulted by other lawyers at my firm on certain discrete legal issues. The aggregate time I recorded on this matter was less than 3 hours. I am not in a position to comment further on the matter.

Please see my response to Question 5 below regarding insider trading laws generally.

Q.2. You have disclosed that you represented Valeant and Pershing Square. Can you please describe for us what exactly your representation entailed without violating confidentiality? Specifically, were you involved in helping either or both entities launch a hostile tender offer for Allergan?

A.2. Please see my response to Question 1 above.

Q.3. The decision in the California case, Allergan Inv. v. Valeant Pharms, Inc., recognizes that a major loophole exists in insider trading law. A strategic bidder can tip a hedge fund provided that it had not yet taken a "substantial step" towards making a tender offer. In Allergan, the defendants claimed that they had only agreed to propose a merger and not a tender offer. Do you agree that the distinction between planning a merger and planning a tender offer from the shareholder's perspective is very thin and meaningless in terms of materiality of information?

A.3. Please see my response to Question 1 above.

Q.4. Do you believe entities should be able to escape liability for insider trading by virtue of calling themselves "co-bidders" and

then exchanging information? If so, please explain why; if not, please explain how you would approach that scenario.

A.4. Please see my response to Question 1 above.

Q.5. As Prof. Jack Coffee has written, the 2nd Circuit's United States v. Newman decision may create a new legal safe harbor to engage in insider trading that can be called "Don't Ask, Don't Tell." Under Newman, a tippee cannot be convicted unless it is proved "that the tippee knew an insider disclosed confidential information and that he did so in exchange for a personal benefit," which significantly narrows the scope of insider trading prosecution. Do you agree with the court's analysis in Newman? If not, would you support legislation to eliminate the need to prove a "personal benefit" to the tipper in order to prove an insider trading case?

A.5. I recognize that this is an issue that has received attention, particularly in light of the Newman case and other recent high profile court cases, which have created some uncertainty regarding the contours of various aspects of insider trading under our securities laws. As a general matter, and without commenting on a particular matter or proposal, I support efforts for clarity in this area. With regard to the effects of the Newman case, and this area of the law more generally, I am also aware that in Salman v. United States, the United States Supreme Court clarified some of the uncertainty that had been presented by the Newman decision, holding unanimously that a tippee can be held liable for trading on material, nonpublic information received from an insider relative or friend even where the tipper received no direct financial benefit from disclosing that information. If confirmed, I will actively work with the Enforcement Division staff and my fellow Commissioners to follow that decision and enforce our securities laws, including, importantly, insider trading laws.

Q.6. Last year, I saw a stunning graphic from RBC Capital Markets that charted 839 different fee schedules that are composed of 3,729 separate fee variables. When one examines these variables in detail, it appears that exchanges are using their "fee engineers" to put together "bespoke" pricing terms for one or a small handful of customers in order to attract and retain order flow—essentially catering to high-frequency traders. Given this incredible complexity, it is likely very difficult for market participants to know whether they are getting best execution and the benefit of a "fair and orderly" market. Hence, Sen. Crapo and I have called for the SEC to engage in an access fee (or maker-taker) pilot, which would collect data and hopefully create better insight into how to deal with potential conflicts in order routing. If confirmed, will you pledge to work with us to design and implement equity market structure pilots in a timely fashion?

A.6. Promoting fairness and efficiency in our markets is a core element of the SEC's tri-partite mission, and I recognize concerns with respect to transparency of the equity markets and fees, and with respect to potential conflicts of interest in routing orders. I understand that the SEC staff has been looking at a review of structural market issues, and that the Equity Market Structure Advisory Committee and its Regulation NMS Subcommittee have proposed a framework for an access fee (or maker-taker) pilot and

made other significant recommendations. If confirmed, I look forward to discussing the status of the pilot and other efforts to ensure that the Commission is pursuing its mandate effectively in the area of market structure with the staff, my fellow Commissioners, and this Committee.

Q.7. The last time a real case for Treasury manipulation was brought was in 1991, after the Salomon Brothers scandal. I suspect that is because the SEC has no idea manipulation is occurring because regulators don't have access to the trading data. After the Flash Rally on October 15, 2014, when yields plummeted 37 basis points in the 10-year Treasury over 12 minutes, the Fed had to request data from the banks and electronic brokers to reconstruct what happened. That led the Treasury Department to announce that the public sector will begin collecting data on Treasury trade reporting in 2017, but for regulatory purposes only. Public trade reporting rules create substantial transparency for the market and apply to equities, mutual funds, corporate bonds, municipal securities, options, futures, and swaps—when can they apply to U.S. Treasuries? Will you support public trade reporting rules for U.S. Treasuries?

A.7. I understand that the SEC recently approved a FINRA proposal that will require non-public reporting of certain transactions in U.S. Treasury securities to FINRA's Trade Reporting and Compliance Engine (TRACE). I recognize that there are competing views on whether this data, like data on other securities reported through TRACE, should be made public. For example, I understand that some commenters have expressed concern about the potential impacts on market liquidity, particularly in the context of certain types of trades. At the same time, I also understand some commenters have advocated for making trade reporting data public in an effort to, among other things, improve price transparency and reduce information asymmetry in the marketplace. I have not had the opportunity to consult with the SEC Commissioners, staff or other market participants on this issue, but, if I am confirmed, I look forward to exploring this further with them.

Q.8. In the 1960s about half of corporate profits were reinvested back into the business—in R&D, in new services, or in investments in the workforces that built these businesses. Yet today around 95 percent of corporate profits are paid out to shareholders in dividends or stock buybacks, fueled by an increasing focus on the short-term. Do you agree with me that we should promote policies that further incentivize American businesses to invest in themselves for long-term growth, innovation, and job creation—and try to curb the preoccupation with short-term profits and stock prices that detracts from the investments that have historically made American businesses great?

A.8. I fully support measures to facilitate job growth and investment in the future of America. In addition, consistent with the Commission's tri-partite mission, including capital formation, I believe the Commission should be receptive to considering proposals that facilitate job growth and investment in America. I am aware of various important policy concerns that have arisen in the context of stock buybacks, including employment issues that can have far-

reaching adverse effects and market-related and investor protection issues such as stock price manipulation and insider trading. I also recognize that, depending on the circumstances, businesses may determine that returning capital to investors in an appropriate and efficient manner, including Main Street investors, is in the best interests of shareholders.

If confirmed, I intend to engage with my fellow Commissioners and the SEC staff regarding these issues and the issue of facilitating capital formation and investment more generally.

Q.9. Would you be interested in looking at things like stock buybacks, quarterly reporting, and proxy access with me to see where the SEC might play a role in helping businesses re-orient themselves towards long-term value creation?

A.9. If confirmed, I would look forward to working with you and other Members of the Committee on these important issues, being mindful of the importance of long-term value creation.

Q.10. Financial Services institutions have numerous regulations and guidance that address cyber security and specifically encryption of data; however, according to breachlevel.com, only 4 percent of breaches are secure breaches where encryption was in use and the data was rendered useless. As SEC Chairman and a member of the Financial Stability Oversight Council, how would you ensure that the SEC's regulated entities are implementing best practices necessary to account for and guard against cyber threats? How will you enable the Commission, along with the financial institutions that it regulates, to leverage innovation in the IT space to protect financial data?

A.10. I share your concern about cybersecurity from a regulatory perspective with respect to the companies and markets regulated by the SEC, from a systemic perspective with respect to potential threats, and from the perspective of the Commission itself and the proprietary and market-sensitive data it holds. If confirmed, I expect to view this issue as a priority and look forward to working with my fellow Commissioners and the staff, and consulting with market participants and industry experts, to address the issue of cybersecurity in these contexts. For example, I look forward to learning more about the staff's experience in administering Regulation SCI, which requires certain critical market infrastructure participants to, among other things, implement policies and procedures reasonably designed to ensure that their systems have sufficient levels of capacity, integrity, resiliency, availability, and security.

I also understand that cybersecurity remains an examination priority for the Office of Compliance Inspections and Examinations, and I look forward to learning more about the results of those examinations. In addition, if confirmed, I look forward to understanding the perspective of the staff on the issue of whether companies should be disclosing more about their potential cyber-related risks and senior-level expertise to address those risks.

Q.11. Since 2009, the SEC has required public companies to report their financial statements twice—once as a plain-text document, then again as searchable data, using the XBRL data format. In

2015, now-Chairman Crapo and I sent a letter to Chair White asking for the SEC to end this duplicative system and instead adopt a single format that is both human-readable and machine-readable, so that companies only need to file a single document, with electronic tags embedded within it. On March 1, 2017, the two current Commissioners unanimously proposed new rules to accomplish exactly this goal. Do you agree with Commissioners Piwowar and Stein that corporate disclosure should be both human-readable and machine-readable? Would you have favored proposing new rules to accomplish this goal for corporate financial statements?

A.11. Although it would not be appropriate for me to comment on a pending rulemaking before the Commission, as a general matter, I believe that the Commission should be actively looking for ways to improve efficiency in disclosure practices and our markets as a whole, including through the use of technology. There may well be a number of instances in which the Commission can use technology, or direct the use of technology, in an efficient manner to improve the accessibility of disclosures to the public.

Q.12. Although the SEC does collect corporate financial statements in a machine-readable format, most other corporate disclosures are not machine-readable. For example, the cover pages of corporate disclosure forms require public companies to "indicate by check mark" which category they fall into. These check marks are text, not searchable data fields, and companies express these simple categories in over 500 different ways. Both the SEC and market data companies must manually rekey this information into databases, or else use unreliable parsing software, to track the categories of public companies. Do you agree that corporate disclosures in general, and these cover page items in particular, should be expressed using machine-readable data instead of plain text? Would you support reforms to modernize corporate disclosure requirements to replace documents with data?

A.12. As a general matter, I believe that the Commission should be actively looking for ways to improve efficiency in disclosure practices and our markets as a whole, including through the use of technology. And, while I am not in a position to comment on this specific matter, it is my general view that, in today's marketplace and in light of technological advances, there are few areas where the manual reentry of data should be required.

Q.13. Mr. Clayton, the mutual fund industry prints and mails about 240 million shareholder reports in paper a year, which means 2 million trees killed every year. According to industry estimates, that costs investors $308 million a year. The Commission failed to move forward last year on a proposal to allow funds to mail them a brief notice with the website where the report is available online, along with a postage-paid reply form and toll-free number that they could use to opt back in to a hard copy. If confirmed, will you commit to take a fresh look at this proposal and do what you can to reduce the cost and environmental impact of investing?

A.13. Without commenting on any proposal specifically, if confirmed, as a general matter I look forward to working with the staff and my fellow Commissioners to explore potential disclosure reforms, including reforms that may be able to reduce costs and envi-

ronmental impacts while preserving investors' access to information.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR WARREN FROM JAY CLAYTON

Q.1. At your nomination hearing, you reiterated that you want the SEC to focus on holding individuals accountable for violating securities laws. One major way to create more individual accountability is to make sure executives don't have compensation packages that let them get rich by bending the rules, skirting the law, hurting people, or crashing the economy. That's why Section 956 of Dodd-Frank directs the SEC, along with several other regulators, to work together to "prohibit any types of incentive-based payment arrangement . . . that the regulators determine encourages inappropriate risks."

It took 6 years, but the agencies, including the SEC, finally proposed a rule last April. But the rule has not been finalized yet.

Given your stated desire to increase individual accountability, can you assure me that you will direct the SEC to prioritize working with other agencies to complete this rule within 6 months after you're sworn in?

A.1. Rulemaking, both mandatory and discretionary, is a critical function of the SEC. I believe it should, among other things, reflect the Commission's tri-partite mandate, include effective economic analysis, seek clarity over complexity wherever practicable, reflect input from a diverse array of affected parties and market participants and proceed as efficiently as practicable. If confirmed, I look forward to engaging with my fellow Commissioners and the staff regarding these issues and working to carry out the statutorily mandated rulemakings in accordance with applicable law and on a basis that is timely and feasible.

Q.2. Near the beginning of her tenure as SEC Chair, Chair White announced that the SEC would seek more admissions of fault in its settlement agreements, rather than allowing settling parties to "neither admit nor deny" liability.

Do you share her position that the Commission should seek more admissions of fault in its settlement agreements?

A.2. I agree that pursuing admissions from defendants in enforcement proceedings in appropriate circumstances should be a key consideration for the Commission. As I stated at my nomination hearing, I strongly believe in the deterrent effect of enforcement proceedings that include individual accountability. However, I also recognize the SEC's interest in, where appropriate, avoiding drawn-out proceedings that strain the resources of the Enforcement Division staff and lengthen the time it would take for resolution, including for investors to receive restitution. I believe each matter should be decided based on its own facts and circumstances, including analysis of whether the added deterrent effect of securing admissions will be offset by other relevant factors. If I am confirmed, I look forward to developing my views on this issue further in consultation with my fellow Commissioners and the staff, including in the Enforcement Division.

Q.3. If you are confirmed, can you provide me an annual update on the number of settlement agreements the SEC entered into that year, the number if those agreements that included an admission of fault, and a copy of all non-confidential settlement agreements that included an admission of fault?

A.3. Enforcement actions are intended to have a deterrent effect. One aspect of deterrence is ensuring that market participants are aware of the Commission's actions with respect to enforcement. If confirmed, I would look forward to working with Congress, my fellow Commissioners, and SEC staff to ensure that information regarding the Commission's enforcement proceedings and settlements is compiled and publicized on a basis that should have such a deterrent effect and facilitates analysis. At the same time, I would not discount the deterrent effect of publicity surrounding the initiation of enforcement proceedings brought by the Commission, whatever settlements or conclusions are reached.

Q.4. Mutual funds are sold to individual investors using a "pay to play" business model in which broker-dealers and other intermediaries are compensated to sell certain funds to their customers, despite the merits of investing in these funds.

Large brokerage firms use this model to take advantage of individual mutual fund investors by charging them many different types of fees for selling mutual fund shares and keeping track of those shares in an investor's account. Rule 12b-1 fees, account maintenance charges, and revenue-sharing payments are extracting billions of dollars each year out of the pockets of the 96 million individual investors who rely on mutual funds for their savings goals. These fees are in addition to sales commissions imposed on the purchase or redemption of mutual fund shares.

If confirmed to lead the SEC, what will you direct the Commission to do to address excessive brokerage fees and better protect individual investors?

Would you support an SEC rule that requires broker-dealers who provide personalized investment advice of any type to register as investment advisers and follow a fiduciary standard of care (instead of a suitability standard of care)?

A.4. Based on my experience, I believe that as a general matter it is important that our regulations be reasonably designed to ensure that Main Street investors making an investment decision are well informed. If confirmed, I would expect to approach regulation in this area with that perspective. It would be premature for me to take a position on a particular rule without fully exploring the issue with the Commissioners and the SEC staff. If confirmed, I look forward to working with my fellow Commissioners and the SEC staff, and consulting with market participants and other interested parties, to ensure that the interests of Main Street investors are protected, including with respect to whether the Commission should proceed with rulemaking and, if so, in what manner those investors' interests might most effectively be served.

Q.5. One of the fees being charged in the broker-dealer "pay to play" model is called "revenue-sharing." These are payments being made by mutual fund management companies to broker-dealers and other intermediaries based on the amount of fund shares that

are being sold to investors. These payments are not disclosed properly to mutual fund investors because the payments are not being made directly from fund assets.

If confirmed, are you prepared to either (1) limit these payments, or (2) require more specific disclosure of the amount of these payments and their potential impact on mutual fund performance?

A.5. I have not yet had an opportunity to engage with the Commissioners or the staff regarding this issue. If confirmed, I would be interested in working with my fellow Commissioners and the staff, including the Division of Investment Management, to understand current practices in this area and consider the adequacy of existing disclosure rules in this area.

Q.6. A number of fees being charged by large broker-dealers are for investor services already required to be performed under existing SEC and FINRA rules. These services include providing account statements to customers, internally tracking individual investment positions, and sending transaction confirmations and tax statements to customers. Mutual funds are the only issuer of securities required to pay these servicing fees, as issuers of equities, bonds, and exchanged-traded funds (ETFs) do not pay any distribution or recordkeeping fees. Outside of the mutual fund industry, brokers and other intermediaries are compensated directly by their customers through commissions, account charges, and advisory fees.

If confirmed, what will you do to correct this inequitable treatment, so that mutual fund investors are only subject to the same fee structures as equity, bond, and ETF investors?

A.6. If confirmed, I would seek to gather more information from the SEC staff, including from the Division of Investment Management, regarding these issues, including the comparability of services provided and expenses incurred in various circumstances. If appropriate, I would also look forward to engaging with my fellow Commissioners and the SEC staff regarding any potential reforms with respect to this issue.

Q.7. In July of 2016, the Treasury Department issued final regulations requiring country-by-country reporting of profits, losses, income taxes paid, accumulated earnings and total number of employees of multinational enterprises with over $850 million in revenue. Review of these country-by-country reports would allow investors to assess the risk of foreign tax liability applied to accumulated earnings held overseas by a multinational enterprise.

Do you believe investors should have access to the country-by-country reports of multinational enterprises that file such reports with the IRS?

If confirmed, will you require companies that file country-by-country reports to the IRS to also disclose such reports to their investors?

On April 12, 2016, the European Commission proposed a new directive requiring public, country-by-country reporting of annual profits and taxes by EU and non-EU multinationals. Do you believe the SEC should impose a lower standard of investor protection than the European Commission?

A.7. As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure. If confirmed, I will want to

study this issue with my fellow Commissioners and the SEC staff. This will include exploring the potential impacts of any such proposal and whether such a proposal would further the SEC's tripartite mission, including, but not limited to, investor protection.

Q.8. Stock buybacks can be used to increase a company's earnings per share (EPS) even in years where net income has gone down. Because many companies use EPS to determine a CEO's compensation, executives have an added incentive to use stock buybacks to increase EPS in years where underlying earnings are flat or negative.

Should companies be able to inflate earnings per share through the use of stock buybacks?

Should companies be able to game performance pay metrics through the use of stock buybacks?

Should companies be required to calculate and disclose any increases in EPS that are attributable to stock buybacks?

If confirmed, what will you do to prevent executives from using stock-buybacks to manipulate performance pay compensation metrics?

A.8. I am aware of various important policy concerns that have arisen in the context of stock buybacks, including market-related and investor protection issues such as manipulation and insider trading. I also recognize that, depending on the circumstances, businesses may determine that returning capital to investors, including Main Street investors, in an appropriate and efficient manner is in the best interests of shareholders. If confirmed, I intend to engage with my fellow Commissioners and the SEC staff regarding these issues.

Q.9. Investors should be able identify companies that invest in the U.S. economy and American workers. If confirmed, will you require companies to annually disclose how many manufacturing properties a company has opened or closed, whether those properties were in the United States, and the number of jobs lost or created as a result?

A.9. I am aware of various important policy concerns that have arisen in the context of manufacturing and job creation (or loss), including market-related and investor protection issues as well as other issues which extend beyond the scope of the SEC's authority and mandate. If confirmed, I intend to consult with the staff and my fellow Commissioners regarding these market-related and investor protection issues, including disclosure.

Q.10. I was critical of former SEC Chair White for the high number of Well-Known Seasoned Issuer (WKSI) waivers that were granted by the SEC under her tenure. These waivers allowed numerous companies that violated securities laws—sometimes multiple times—to take advantage of special regulatory privileges. Under Chair White's watch (as of March 2015), institutions that sought WKSI waivers received them in the majority of cases, and SEC returned to a decade-old policy that allowed institutions found guilty of criminal misconduct to receive these waivers.

Are you concerned with the ease with which institutions received WKSI waivers under Chair White's watch?

A.10. I have a great deal of respect for Chair White. I was not privy to the Commission's discussions regarding this issue. Consequently, it would not be appropriate for me to comment on the Commission's decisions.

Q.11. WKSI waivers may only be granted "upon a showing of good cause." What criteria do you believe should be considered in this determination?

A.11. I have not yet had the opportunity to engage with the Commissioners and the SEC staff regarding the issue of waivers. But, I will commit to exploring this issue if I am confirmed. As a general matter, I believe that the question of whether a waiver is appropriate in a particular situation would be dependent on the facts and circumstances of that situation, including, without limitation, the relationship between the misconduct and the activity targeted by the disqualification, other aspects of the settlement and the matter more generally, the recommendation of the relevant SEC staff and whether a waiver would be consistent with the Commission's tri-partite mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.

Q.12. Will you continue SEC policies that allow companies that have been found to be guilty of criminal violations to receive WKSI waivers?

A.12. I have not yet had the opportunity to engage with the Commissioners and the SEC staff regarding the issue of waivers, including in the context of a criminal conviction. But, I will commit to exploring this issue if I am confirmed.

Q.13. Do you believe institutions that have repeatedly violated SEC rules should remain eligible to receive WKSI waivers?

A.13. I have not yet had the opportunity to engage with the Commissioners and the SEC staff regarding the issue of waivers, including in this context, but will commit to exploring this issue if confirmed.

Q.14. At your nomination hearing, you acknowledged that you would have to recuse yourself for 2 years from any matter involving a former client of your or any matter in which your former law firm, Sullivan & Cromwell, represented a party. Given your extensive client list and Sullivan & Cromwell's active SEC practice, it is likely that you will have to recuse yourself from a number of matters. Unfortunately, there appears to be no public record of SEC Commissioner recusals.

Will you commit to publicly and promptly disclosing your recusals so that this Committee and the public can assess how your recusals are affecting the functioning of the SEC?

A.14. The final votes of SEC Commissioners on the Commission's decisions, orders, rules and similar actions generally are available publicly on the Commission's website at *https://www.sec.gov/about/commission-votes.shtml.* This disclosure includes whether a Commissioner did not participate in that vote. If confirmed, I would expect this approach to continue and will commit to exploring whether additional disclosure is appropriate.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR DONNELLY FROM JAY CLAYTON

Q.1. *Stock Buybacks:* Mr. Clayton, in 1982, the SEC provided a ″safe harbor″ from market manipulation liability to corporations on certain stock buybacks. Since then, SEC oversight of stock buybacks has been lax.

Do you believe the SEC should take another look at Rule 10b-18? Do you believe the SEC should step up its oversight of the buybacks?

Former Chair White publicly stated last year that the SEC was looking into when and how often companies should tell investors about share purchases. She was presumably referring to the SEC's "concept release" to solicit the public's views on financial disclosure requirements in Regulation S-K. Currently, corporations only have to report stock repurchases quarterly. Requiring immediate or daily disclosure would be a step in the right direction.

Do you believe more transparency and disclosure is needed in the area of stock buybacks? Can you commit to looking at this as the SEC continues its review?

A.1. With respect to both of these questions, I am aware of various important policy concerns that have arisen in the context of stock buybacks, including market-related and investor protection issues such as stock price manipulation and insider trading. I also recognize that, depending on the circumstances, businesses may determine that returning capital to investors, including Main Street investors, in an appropriate and efficient manner is in the best interests of shareholders.

If confirmed, I intend to engage with my fellow Commissioners and the SEC staff regarding these issues.

Q.2. *Outsourcing:* Mr. Clayton, as the SEC continues reviewing financial disclosure requirements under Regulation S-K, I hope you will consider whether corporations should disclose country-by-country employment data. This would help investors determine which companies employ American workers and better understand where outsourcing and offshoring has occurred.

Are you willing to consider a country-by-country employment disclosure as part of the SEC's broader review?

A.2. If confirmed, I would want to study the issue of disclosure of country-by-country employment data with my fellow Commissioners and the SEC staff.

As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure requirements. As a general matter, the question of whether a particular disclosure would be material to an investment decision can be complex and often depends on the individual facts and circumstances of an issuer. This likely would be true for disclosures of employment data beyond that currently required under existing rules. Before taking a position on a particular proposal related to this disclosure issue, I would want to explore the potential impacts of any such proposal and whether such a proposal would further the SEC's tri-partite mission, including, but not limited to, investor protection.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR SCHATZ FROM JAY CLAYTON

Q.1. *Prioritizing Finalizing Remaining Dodd-Frank Rules:* There are 20 regulations mandated by Dodd-Frank that the SEC has not yet drafted or finalized—that is more than 20 percent of those required by law. It is now 7 years since Dodd-Frank became law. Acting Chair Michael Piwowar has publicly stated that the SEC will halt all work on Dodd-Frank related rules. At the hearing, you stated: "rulemaking should go forward with respect to rules required under a statute," thereby acknowledging that the SEC should finalize any rule required by law. You were uncertain, however, as to why certain rules required under Dodd-Frank have languished for the past seven years. As chair of the SEC, you would be in a position to fulfill the mandate of the law and bring this delay to an end.

As chair, will you prioritize finalizing rules required under Dodd-Frank?

A.1. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law and that such rulemakings should be pursued on a basis that is timely and feasible. The rulemaking process is important, and in many cases demands significant resources. The Commission's resources are limited and, accordingly, the overall approach to rulemaking should reflect the Commission's mandate and be the product of consultation among the Commissioners, the staff and, in the case of multi-agency rulemaking, other authorities, being mindful of the obligation to proceed with mandatory rulemaking at a reasonable pace and also being responsive to market developments. Rulemaking, both mandatory and discretionary, is a critical function of the SEC. I believe it should, among other things, reflect the Commission's tri-partite mandate, include effective economic analysis, seek clarity over complexity wherever practicable, reflect input from a diverse array of affected parties and market participants and proceed as efficiently as practicable.

If confirmed, I look forward to engaging with my fellow Commissioners and the staff regarding these issues and working to carry out rulemakings efficiently and effectively.

Q.2. *High Frequency Trading:* By some estimates, high frequency trading accounts for half of all trading volume. The strategy for high frequency trading is to make a tiny profit on a high volume of trades by exploiting small differences in a stock or derivative's price. Some high frequency trading practices are troubling because they look similar to illegal front-running and spoofing activities. These predatory forms of high frequency trading harms retail investors and pensioners.

What will you do as chair to protect investors from abusive high frequency trading?

A.2. I am aware that issues related to high frequency trading, and equity market structure more generally, have generated significant interest and divergent views. Certain trading practices have faced questions as to whether they may work against the interests of certain types of investors and issuers. I am generally aware of the work and recommendations to date of the Equity Market Structure

Advisory Committee, including proposed steps to gather more information about the effects of our current approach to regulation such as the maker-taker pilot. I am also generally aware that the Commission has initiatives underway—and has worked with other federal financial regulatory agencies—to capitalize on the regulatory data that is available and to ensure that it has sufficient information to facilitate its analysis of market structure and market function. [1]

If confirmed, I look forward to working with my fellow Commissioners and the SEC staff to explore these issues, including the important market-related and investor protection issues related to high frequency trading that you cite.

Q.3. *SEC Conflict Mineral Rule:* In our one-on-one meeting, we talked about rules and regulations that you think burden capital formation and you highlighted your disagreement with the SEC rule requiring disclosure of the use of conflict minerals in a public company's supply chain. The SEC issued this rule because Section 1502 of Dodd-Frank required it. While this rule was repealed through the Congressional Review Act, the SEC still has an obligation to fulfill the requirements of Section 1502 of Dodd-Frank. This would place you in a position of having to develop a new rule to implement a provision of the law you personally do not agree with.

How will you square your personal views with the legal requirements of your position as SEC chair?

A.3. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law and that such rulemakings should be pursued on a basis that is timely and feasible and that reflects the SEC's mission. At the hearing, and in my meetings with Senators, I discussed both the importance of each aspect of the SEC's tri-partite mission in rulemaking and the importance of consensus in the operation of the Commission. In this regard, if confirmed, it will be my duty to uphold the law. I commit to do so, and I recognize that there are different approaches to pursuing the SEC's mission. In this regard, on matters where views diverge, compromise may be in the best interests of the SEC's mission. If confirmed, I expect there will be circumstances where I will support, and vote in favor of, a particular approach to a rule or other issue that, while furthering the objectives of the Commission, would not be the approach I would take if I were acting alone.

Q.4. Will you commit to upholding the law, even if you personally disagree?

A.4. Yes.

Q.5. Will you commit to carrying out the mandate of Section 1503 of Dodd-Frank?

A.5. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law and that such rulemakings should be pursued on a basis that is timely and feasible and that reflects the SEC's mission. I understand that the

[1] See, e.g., Joint Staff Report: The U.S. Treasury Market on October 15, 2014 (July 13, 2015), available at *https://www.sec.gov/reportspubs/special-studies/treasury-market-volatility-10-14-2014-joint-report.pdf.*

SEC has adopted rules as required under Section 1503 of Dodd-Frank, and I intend to support the enforcement of rules that are in effect.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR VAN HOLLEN FROM JAY CLAYTON

Q.1. *Disclosure of Political Spending:* During last Thursday's hearing you said that touchstone for shareholder information is materiality. What information would you consider to be material to shareholders? Materiality is defined as relevant information to investors. With that in mind, can you explain why a disclosure regulation that has received the most investor (institutional, retail, and pension) support (tenfold times any other proposed rulemaking in agency history) could ever be deemed immaterial? Do you believe reputational risk is material information that shareholders and investors should know about? Please describe how political spending could become a reputational risk? Do you support requiring companies to disclose their political spending to shareholders (please explain your answer)?

A.1. I am aware that issues related to corporate disclosure of political spending have generated significant interest and divergent views. As I stated at the hearing, I believe that materiality is the touchstone with respect to disclosure.

I understand that through shareholder engagement, a number of companies have elected to provide information regarding their political spending activities. In addition, under the SEC's shareholder proposal rule, Rule 14a-8, investors can submit proposals to be included in a company's proxy materials that would require specific disclosure of items regardless of whether they meet the materiality threshold. Publicly available data indicates that shareholder support for political spending and lobbying disclosure proposals under Rule 14a-8 has averaged close to but less than 25 percent in recent years.

With regard to your questions on reputational risk, as a general matter reputational risk can arise out of a range of activities. There have been a number of circumstances in which issuers have determined that potential reputational risks arising out of certain aspects of their business could be material and have disclosed those risks accordingly.

If confirmed, I would expect to engage with the staff, my fellow Commissioners, and market participants to further consider this issue.

Q.2. *Fiduciary Duty:* The Dodd-Frank Act mandated that the SEC study whether there are regulatory gaps in the protection of retail investors relating to standards of care for broker-dealers and investment advisers. The Act also authorized the SEC to set a uniform standard. In 2011, the SEC released a study recommending that the Commission "establishing a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers." Two previous chairs of the SEC had expressed their agreement with the findings and recommendations of the study. Will you move forward with a uniform fiduciary duty rule under Section 913?

A.2. I believe that investor protection, particularly protection of Main Street investors, is a critical element of the SEC's tri-partite mission. Based on my experience, I believe that as a general matter it is important that our regulations are designed to ensure that Main Street investors making an investment decision are well informed. I understand the current debate regarding the legal formulation of the duty owed to these investors, including key issues raised by the related fiduciary rule issued by the Department of Labor, such as potential divergence of regulatory standards across account types, potential uncertainty in application, the effects of compliance costs, coordination among regulatory agencies, potential limitations on investor choice and investment opportunities, and, importantly, ensuring investor protection.

If confirmed, I look forward to working with my fellow Commissioners and the SEC staff, and consulting with market participants, to determine whether the Commission should proceed with rulemaking and, if so, in what manner and, in any event, with an eye toward clarity and consistency and with the objective that the interests of Main Street investors are protected, including that they have access to appropriate investment opportunities.

Q.3. *Working With State Securities Authorities:* In February, the North American Securities Administrators Association and the SEC signed a memorandum of understanding (MOU) regarding information sharing. The goal of the MOU was to improve better information sharing between the SEC and State regulators. Under the (MOU), Federal and State securities regulators will be better able to monitor the effects of the new rules and also guard against fraud. If confirmed, will you prioritize the timely sharing between the SEC and the State securities regulators as outlined in the MOU? If so how? If confirmed, how do you plan to facilitate strengthened cooperation and information between Federal and State securities regulators?

A.3. As I stated at the hearing, if confirmed, I look forward to working with State securities regulators and other regulators with jurisdiction over the securities markets. If confirmed, I also look forward to learning more about the MOU regarding information sharing and engaging with my fellow Commissioners, staff from the Office of Compliance Inspections and Examinations, the Enforcement Division and other areas of the Commission, and State securities regulators, to discuss ways to encourage efficient and effective coordination and cooperation. In such discussions, I would be mindful to identify areas where coordination can eliminate unnecessary duplication, address areas in need of additional resources (including in response to changes in the marketplace), and, in so doing, enhance investor protection.

Q.4. *State Securities Anti-Fraud Authority:* In your testimony you stated that you are "100 percent committed to rooting out any fraud and shady practices in our financial system." As you know State securities regulators are on the front lines when it comes to policing for violations of securities laws. According to the North American Securities Administrators Association, in 2015 State securities regulators conducted 4,487 investigations of alleged violations of State securities laws and took 2,074 enforcement actions.

Can you please share your perspective on the role of States in protecting investors from fraud? If confirmed, how do you plan to work with State securities regulators on enforcement?

A.4. I believe that States, and in particular State securities regulators, play an important role in protecting investors from fraud. I have seen firsthand the benefits and effectiveness of State–Federal cooperation in enforcement matters, and have experience working with State regulators. As I stated at the hearing, if confirmed, I am very interested in working with State securities regulators. If confirmed, I look forward to including State securities regulators in discussions with the SEC staff regarding steps that can be taken to encourage efficient and effective oversight and enforcement.

In this regard, I believe that continued coordination and cooperation with State securities regulators will enhance the Commission's ability to deter and detect fraud and ensure that individuals who break the law are held accountable. Also, if confirmed, in such future discussions, among other things, I would be interested in hearing ideas for more effectively identifying and sanctioning fraudulent promoters of local, nontransparent investment opportunities that have some of the hallmarks of "penny stock" schemes, who in my experience often are recidivists.

Q.5. *Independence:* Congress established the Securities and Exchange Commission in 1934 as an independent agency in response to the stock market crash of 1929. What is your definition of an independent agency? If confirmed, how do you plan to maintain the SEC's independence?

A.5. From my perspective, an independent agency is one that, like the SEC, is empowered to pursue its mission in accordance with its statutory mandate without undue influence or control from outside sources. I believe that such independence is fundamental to the tripartite mission of the SEC and that focus on that mission will facilitate the preservation of the Commission's independence. If confirmed, I will be mindful of protecting the Commission's independence in all areas. If confirmed, I look forward to engaging with my fellow Commissioners regarding this issue and believe that focusing collectively and consensually on the SEC's core mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation will promote that effort.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM JAY CLAYTON

Q.1. The *Wall Street Journal* reported that after Mr. Trump was elected, you "dashed off an email [to a longtime client] explaining how Government could promote growth by easing what [you] considered unnecessary regulations on raising capital."[1] This email was reportedly shared with Trump advisers, and you were henceforth nominated to lead the SEC. Can you provide a copy of this email to the Committee?

[1] Michaels, Dave. "Trump's Man for the SEC: Time To Ease Regulation". *Wall Street Journal*, February 19, 2017. Available at: *https://www.wsj.com/articles/trumps-man-for-the-sec-time-to-ease-regulation-1487505602.*

A.1. My communication was related to a Sullivan & Cromwell LLP memorandum authored by some of my colleagues, "2016 U.S. Presidential and Congressional Elections—Preliminary Observations and Potential Implications for Financial Services Legislation and Regulation", with my commentary regarding areas of the memo on which to focus. It would not be appropriate for me to provide or discuss client communications. Based on my recollection, the discussions I participated in with members of the Trump transition team in advance of my nomination regarding capital formation and related SEC regulation were consistent with the views I have expressed at the hearing on March 23rd, in my individual meetings with Senators and in these responses, including, without limitation, that: (1) U.S. public capital markets appear to be less attractive today to both U.S. and non-U.S. companies than they were 20 years ago. This may be hindering capital formation in the public markets and reducing investor choice, and may be adversely affecting the competitive position of the U.S. vis-a-vis other countries. This also may be limiting investor opportunities, particularly, on a relative basis, for Main Street investors and, if Main Street investors increasingly turn to private investments, may adversely affect investor protection. (2) The costs and risks of being a public company compared to remaining a private company are viewed as significant by the owners and management of well-run private companies and, in addition to out-of-pocket costs, include regulatory and enforcement risks and other considerations that are not easily quantifiable such as the pressure of quarterly earnings disclosures and potentially costly procedural hurdles that do not appear to foster investor protection. (3) There is a perception that considerations beyond investor protection have motivated certain public company securities regulation, and that such regulation has not always focused on investor protection, capital formation and the fair and efficient operation of our markets. There is a similar perception regarding the risk of enforcement actions against public companies and related penalties, including, without limitation, aspects of FCPA enforcement actions and whistleblower rules, and that they may unduly harm shareholders who ultimately bear the costs. (4) The JOBS Act has been viewed positively as a general matter, including from the perspective of reducing the burdens of becoming a public company without lessening investor protection. (5) There are various other significant factors driving the result that public capital markets are relatively less attractive to private and non-U.S. companies than in the past, including that private capital markets have become much deeper and more efficient and compete effectively with public markets for well-run companies. (6) Although many high-quality companies continue to enter the public markets and there are many others who aspire to do so, it is important to consider these dynamics and anticipated future developments when reviewing regulation and future policy initiatives focused on capital formation. I also participated in discussion with the members of the Trump transition team regarding other matters, including, without limitation, regulation of small- and medium-sized banks, market liquidity, including possible effects of the Volcker Rule, regulation of smaller, private funds, and cybersecurity.

Q.2. You have previously written that "the growing gulf between our most and least fortunate" is one of the most pressing issues of our time.[2] How will you address this issue if confirmed to lead the SEC?

A.2. If confirmed, one of the ways I will address this issue is by working to increase the ability of Main Street Americans to participate in investment opportunities, including through our public markets. As I mentioned at my nomination hearing, a large number of companies, including many of our country's most innovative and high-profile growth companies, have chosen to remain privately held. Although the growth and success of many of these companies is driven by American consumers, most Americans are unable to invest, or to invest as efficiently, in these private companies during their growth stages, and therefore may be missing out on the investment growth that they themselves are helping to create.

I believe that all Americans should have a reasonable opportunity to invest in America's growth. If we are able to encourage more companies to enter our public markets, we will be able to provide more investors with the opportunity to invest efficiently in America's growth. I also am open to exploring other avenues to achieve this objective and, if confirmed, look forward to discussing this issue with the staff and my fellow Commissioners and this Committee.

Q.3. As I asked you doing your hearing, in a speech made just before he left the Department of Justice, former Attorney General Holder described current law, saying, "the buck still stops nowhere. Responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution's culture."[3]

Yes or no, do you agree with former Attorney General Holder?

If so, why?

If not, why not?

Does Congress need to change any statutes to ensure that law enforcement can hold individual executives accountable for misconduct?

A.3. As I stated at my nomination hearing, I strongly believe in the deterrent effect of individual accountability. If confirmed as Chair, I will work with my fellow Commissioners and the Enforcement Division staff to enforce the law as it is written. I also am interested in hearing from the Enforcement Division staff, my fellow Commissioners, and other interested parties regarding steps that can be taken, consistent with the current law and the Commission's mandate, to enhance our ability to ensure that individuals who break the law are held accountable.

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[2] Clayton, Jay, David N. Lawrence, Stephen Labaton, Matthew Lawrence, and Carl J. Schramm. "USA 10-K: Why America Needs an Annual Report". July 3, 2012. Available at: *http://knowledge.wharton.upenn.edu/article/usa-10-k-why-america-needs-an-annual-report/*.

[3] Attorney General Holder Remarks on Financial Fraud Prosecutions at New York University School of Law. New York City, NY. September 17, 2014. Available at: *https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law*; an additional explanation of the Attorney General's proposal can be found here: *https://www.law360.com/articles/582045/doj-proposal-shows-focus-on-individuals-in-corporate-crime.*

Q.4. As I mentioned during your hearing, former Attorney General Holder suggested, before he left the Department of Justice, that Congress change the law to provide for "strict liability" for financial services executives.[4] To summarize, he recommended applying the "responsible corporate officer doctrine" that currently applies under the Food, Drug and Cosmetic Act to the financial services sector. As I said during the hearing, former Attorney General Holder stated his belief that executives should be criminally and civilly liable for misconduct that occurs under their watch, whether or not they had intent or knowledge of wrongdoing. I found your answer to my question on this topic during the hearing to be unclear. As such, can you clarify your thoughts on former Attorney General Holder's proposal?

A.4. The SEC does not have the authority to charge individuals or firms with criminal offenses. If Congress changes the civil liability standard, and if confirmed as Chair, I will work with my fellow Commissioners and the Division of Enforcement to enforce the law. However, with respect to the outlined proposal, I believe that imposing civil liability and/or penalties on a person without regard to his or her mental state could have far-reaching and unpredictable effects.

Q.5. President Trump has stated his desire to deport as many as eight million people residing in the U.S., most of whom are working.[5] These workers tend to be concentrated in certain geographies and industries.

Could the deportation of as many as eight million workers pose a material risk to investors in certain companies?

If so, which sectors may face such material risks?

If not, why not?

As the President's policy of mass deportation continues, if confirmed, how will you ensure that companies are appropriately disclosing the potential risks posed to their investors due to disruptions in their labor force?

A.5. In my experience, company management and individual investors generally are in the best position to assess the effects and materiality of Government policies and actions. It would not be appropriate for me to offer an opinion on any specific company or situation, including the hypothetical description above.

Q.6. When I discussed with you at the hearing your thoughts on mandatory pre-dispute arbitration clauses and the SEC's ability to study and limit their use per Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, you indicated that it was something you "don't know a great deal about" but that you'd "work with the staff to learn more about it." Will you commit to directing the SEC staff to study the use of mandatory pre-dispute arbitration clauses by SEC-regulated firms to determine if there exists evidence of harm to investors?

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[4] Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law. September 17, 2014. Available at: *https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.*

[5] Bennet, Brian. "Not Just 'Bad Hombres': Trump Is Targeting Up to 8 Million People for Deportation". *LA Times*, February 4, 2017. Available at: *http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html.*

A.6. If confirmed, I look forward to learning more about the use and effects of these clauses, including through consulting with the SEC staff regarding their work to date.

Q.7. In response to my questions at your hearing, you indicated an openness to "having a dialogue with the SEC Ethics Officer and the people at the SEC who have experience" with the laws and policies around recusals, specifically as it relates to transparency around when you have recused yourself from a matter receiving a vote before the SEC. Can you please provide me with more information on the feasibility of, and your willingness to, provide information to the public about instances when you've recused yourself, once a matter before the SEC is settled and your public reporting would no longer trigger the release of market-moving or sensitive non-public information?

A.7. The final votes of SEC Commissioners on the Commission's decisions, orders, rules, and similar actions generally are available publicly on the Commission's website at *https://www.sec.gov/about/commission-votes.shtml.* This disclosure includes whether a Commissioner did not participate in that vote. If confirmed, I would expect this approach to continue and will commit to exploring whether additional disclosure is appropriate.

Q.8. If confirmed, if you seek to undo, limit, or otherwise adjust rules established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 during your tenure, will you adhere to the same cost-benefit and/or economic analysis requirements that the SEC abided by as they established these rules in the first place?

A.8. Any rulemaking proceeding will be subject to the economic analysis required by law.

Q.9. Please indicate the specific steps you plan to take to increase employment diversity and inclusion at the SEC, if confirmed. Please include specific benchmarks for increasing diversity and inclusion, with specific deadlines by which you hope to reach those benchmarks.

A.9. I have personally seen the benefits that diversity has brought to my current firm and to many of our clients, and I believe diversity has significant value. I have read the most recent Annual Report to Congress by the SEC's Office of Minority and Women Inclusion (OMWI) and am generally familiar with its statistical measures and its principal conclusions. It would be premature for me to consider specific objectives without first consulting with the OMWI and my fellow Commissioners. However, if confirmed, I look forward to working to continue to promote diversity at the SEC.

Q.10. During her tenure, Chair White lamented the low level of board diversity in the U.S.—noting that women comprise only 20 percent of Fortune 500 directors and racial/ethnic minority director representation has stagnated at 15 percent. As such, Chair White directed SEC staff to begin preparing a recommendation to the

Commission on how to improve corporate disclosures on board diversity. What do you plan to do to complete this work?[6]

A.10. I believe diversity has value, including at public companies and their boards. I have witnessed this first hand and I know that many experienced investors share this view. If confirmed, I will work with my fellow Commissioners, the staff (including the OMWI), and the SEC's Advisory Committee on Small and Emerging Companies (ACSEC) to monitor this issue.

Q.11. Under Chair White, the SEC redirected resources away from broker-dealer examinations to help cover the gap in adviser exams because Congress failed to fully fund this program. Nevertheless, because of dramatic growth in the industry, the SEC's efforts have resulted in examinations for just 10 percent of all advisers.[7]

Is a 10 percent exam record per year sufficient to adequately protect investors?

What is your plan to increase investment adviser annual exams, if confirmed?

A.11. I recognize this is an issue identified by Chair White and others as requiring attention. I believe that this is an important resource identification and allocation exercise and that an effective examination strategy will require an efficient use of resources and effective coordination with others, including the self-regulatory organizations (SROs).

If confirmed, I look forward to working with OCIE staff, my fellow Commissioners, the SROs, State regulators and others on this issue.

Q.12. Some observers would like to point to the Sarbanes-Oxley Act of 2002 or other regulations for why there has been a drop in public companies since the mid-1990s. As a mergers and acquisitions (M&A) lawyer, I'm sure you recognize that a flood of private capital has caused M&A activity to increase substantially. On top of that, Congress has passed a number of reforms like the JOBS Act of 2012 that actually encourage companies to stay private for longer.

Please discuss the relative importance of (a) regulations, including the Sarbanes-Oxley Act of 2002 or the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010; (b) M&A activity; and (c) the easing of rules facilitating private capital formation in explaining the trajectory of U.S. IPOs in the last 15 years.

A.12. In my experience, a number of factors may discourage a private company from becoming a public company, including but not limited to various immediate one-time costs and ongoing incremental costs and risks compared with remaining a private company. These costs may vary from company to company depending on the facts and circumstances, including, for example, the industries in which they operate, whether they have international operations, and whether they have multiple reporting segments.

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[6] White, Mary Jo. "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP and Sustainability." June 27, 2016. Available at: *https://www.sec.gov/news/speech/chair-white-icgn-speech.html.*

[7] FY2017 Congressional Budget Justification for the Securities and Exchange Commission. Available at: *https://www.sec.gov/about/reports/secfy17congbudgjust.pdf.*

With respect to whether M&A activity has had a negative effect on IPOs, it is not clear to me that there is a correlation between M&A activity and IPOs.

It is my understanding that the cited JOBS Act reforms were principally driven by the desire to allow private companies that may have been constrained in (1) capital raisings, (2) the ability to allow for employee equity participation or (3) other areas related to share ownership, to expand their shareholder base. In my experience, the JOBS Act expansion has facilitated these objectives but at this time I cannot state its significance in the decision of whether or not to become a public company.

Q.13. The Investor Advisory Committee (IAC) created under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 has made numerous recommendations to the SEC, nearly all of which have been unanimous. And yet most did not receive a formal response from the SEC as required by law. If confirmed, will you pledge to formally respond to all IAC recommendations, in a matter transparent and accessible to the public, within 60 days of them being published?

A.13. I have reviewed the IAC membership and believe the IAC is composed of an impressive group of people who have significant and diverse experience in our markets. I have also reviewed a number of the IAC's recommendations on the SEC's website. Many of these recommendations are the subject of, or relate to, recent or current rulemakings.

If confirmed, I look forward to working with the staff and my fellow Commissioners to continue to engage with market participants, including the IAC, as part of the rulemaking process.

Q.14. As SEC Chairman, you will receive many requests to meet and to speak at conferences. Will you commit to engage with individuals and groups representing the interests of investors, particularly retail investors, at least as frequently as you engage with individuals and groups representing the interests of SEC-regulated entities?

A.14. As I stated at my nomination hearing, I strongly believe that it is important to engage with market participants of all types. Receiving information about what participants in our capital markets—including, importantly, Main Street investors—think about issues before the SEC, and the functioning of our markets more generally, is an important part of the job, and I look forward to engaging with those participants if confirmed. I also expect to engage with Main Street investors through the IAC as well as engaging with those in the investment management industry.

Q.15. You have been employed for most of your career at a white shoe law firm. You have no personal public service experience and have never litigated a case on behalf of taxpayers. But you will have the chance to select a Director of Enforcement. Will you commit to selecting someone that has public service experience as a prosecutor?

A.15. I regard this position as possibly the most important appointment of the Chair and recognize that the position requires a highly skilled and qualified individual who will instill confidence in the

Division. I do not believe it is appropriate to have a "litmus test" for any particular role at the Commission. Employing individuals with a broad range of experience is important to further the SEC's mission, including at the Enforcement Division, and prior service as a prosecutor or within the Enforcement Division will be a very important consideration.

Q.16. Please discuss your view on the role of proxy advisory firms in supporting pension funds and other institutional investors in carrying out their fiduciary duty to vote proxies. Specifically, do you believe that further Federal regulation of proxy advisory firms is needed? Please discuss your view of the effectiveness of SEC Staff Legal Bulletin No. 20 from 2014 in providing guidance about investment advisers' responsibilities in voting client proxies and retaining proxy advisory firms.

A.16. I believe that this is an evolving industry that has seen change, including in response to staff guidance to various participants as well as industry commentary. I believe the area requires continued scrutiny, including in light of the importance and influence of these firms. I understand that, following the release of the 2014 staff guidance, the SEC's Office of Compliance Inspections and Examinations listed as a priority the examination of certain proxy advisory firms with respect to their process for making voting recommendations and how they address potential conflicts of interest. If confirmed, I look forward to studying these and other issues, including the results of OCIE's examinations, and discussing them with the staff and my fellow Commissioners.

RESPONSES TO WRITTEN QUESTIONS OF SENATORS HEITKAMP AND HELLER FROM JAY CLAYTON

Q.1. We appreciate your commitment to lowering any unnecessary regulatory burdens on small companies looking to innovate and growth their businesses. Last year we passed legislation that establishes on Office of Small Business Advocate at the SEC. The purpose of the bill is to provide small businesses with a stronger voice when it comes to SEC rules. Given the rapid technological changes occurring in the area of small business capital formation, we believe having an independent voice with practical small business experience at the SEC is an essential element to helping small businesses effectively access public and private markets.

Under the provisions of our legislation, the Commission is required to appoint someone with extensive small business experience to serve as the SEC's Small Business Advocate. It would also require the Commission to appoint at least 10 individuals from across the country to serve on a new Small Business Capital Formation Advisory Committee, which would meet periodically and be required to report back to the Commission what they're seeing in terms of on the ground innovations and challenges small businesses face with attaining access to capital.

If confirmed, do we have your commitment to move within a reasonable time frame to set up the new office and appoint a Small Business Advocate?

If confirmed, will you work to ensure that the Commission appoints individuals to the new Small Business Capital Formation

Advisory Committee who understand the challenges startups face in areas outside of the coasts, like Nevada and North Dakota?

A.1. As I stated at the hearing, I believe the availability of capital for small business is very important both locally and more broadly. I understand that the SEC is already taking steps to "stand up" the new Office of the Advocate for Small Business Capital Formation and to begin the search for the new Advocate.[1] If confirmed, I look forward to working with the staff and my fellow Commissioners to continue this effort, and to explore ways in which we can promote capital formation for small- to mid-sized businesses and help them access and navigate both our public and private capital markets. I also recognize the need for diverse representation on the Small Business Capital Formation Advisory Committee by individuals who understand the challenges faced by small businesses in areas such as Nevada and North Dakota.

RESPONSES TO WRITTEN QUESTIONS OF SENATORS HEITKAMP, TESTER, AND DONNELLY FROM JAY CLAYTON

Q.1. Fiduciary Rule: Mr. Clayton, Dodd-Frank specifically gave the SEC the authority under Section 913 to study the standards of care between broker-dealers and investment advisors. Dodd-Frank also gave the SEC the authority to promulgate a best-interest standard after the study was complete, should there be any gaps in the current structure.

Due to the SEC's inability to promulgate a rule, the Department of Labor was able to write a rule, which is facing a significant amount of uncertainty as of this moment. We strongly support the SEC promulgating a best-interest standard and at the very least have encouraged DOL and the SEC to ensure that any rules are harmonized.

Do you support the SEC moving forward with a fiduciary standard for investment advisors and broker-dealers and will you help move efforts forward to ensure that any rules are harmonized?

Do you believe the SEC should create a best-interest standard for all brokerage accounts, not just retirement accounts?

A.1. I am aware that this issue has generated significant interest. I believe investor protection, particularly protection of Main Street investors, is a critical element of the SEC's tri-partite mission. Based on my experience, I believe that as a general matter it is important that our regulations are designed to ensure that Main Street investors making an investment decision are well informed. If confirmed, I look forward to working with my fellow Commissioners and the SEC staff, and consulting with market participants, to determine whether the Commission should move forward and, if so, in what manner, always keeping in mind the interests of Main Street investors.

I also recognize the importance of coordination and discussion with other agencies and stakeholders generally and with respect to these issues in particular. If confirmed, I would encourage the SEC staff to pursue such coordination and discussion.

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[1] Opening Remarks of SEC Acting Chairman Michael Piwowar before the SEC Advisory Committee on Small and Emerging Companies (Feb. 15, 2017), available at *https://www.sec.gov/news/statement/piwowar-opening-remarks-acsec-021517.html.*

Q.2. We seek clarification regarding your position on the SEC's duty to implement statutorily required rules, specifically those rules required under the Dodd Frank Act. Your testimony before our Committee was unclear as to your intent to dutifully carry out the statutory mandates set forth in Dodd Frank. Please clarify your position on the following questions:

Does the SEC have the authority to refuse to implement a rule required by law?

Do you intend to fully implement all statutorily mandated rules under Dodd Frank, in a reasonable timeframe?

Do you believe that excessive delays in promulgating rules, or reviewing rules, is tantamount to the SEC refusing to implement the law?

A.2. I believe that the SEC is required to implement rulemakings required by statute in accordance with applicable law, and, if confirmed, I look forward to so carrying out statutorily mandated rulemakings on a basis that is timely and feasible.

The rulemaking process is complicated. In many cases, the process of promulgating proposed rules, soliciting public comments, and issuing final rules can take time. If confirmed, I look forward to working with the staff and my fellow Commissioners to carry out rulemakings in an appropriate and feasible timeframe.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

SEC SETTLEMENT ORDER FOR TRUMP HOTELS & CASINO RESORTS, INC., DATED JANUARY 16, 2002

U.S. Securities and Exchange Commission

United States of America
Before the
Securities and Exchange Commission

Securities Exchange Act of 1934
Release No. 45287 / January 16, 2002

Accounting and Auditing Enforcement
Release No. 1499 / January 16, 2002

Administrative Proceeding
File No. 3-10680

In the Matter of TRUMP HOTELS & CASINO RESORTS, INC. Respondent.	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND ISSUING CEASE-AND-DESIST ORDER ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Trump Hotels & Casino Resorts, Inc. ("THCR" or "the Company") be, and hereby are, instituted.

II.

In anticipation of the institution of these cease-and-desist proceedings, THCR has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or in which the Commission is a party, and without admitting or denying the findings set forth herein, except that THCR admits the jurisdiction of the Commission over it and over the subject matter of these proceedings, THCR, by its Offer of Settlement, consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Issuing Cease-and-Desist Order ("Order").

III.

On the basis of this Order and the Offer, the Commission makes the following findings:

Summary

A. On October 25, 1999, THCR issued a press release announcing its results for the third quarter of 1999 (the "Earnings Release" or the "Release"). To announce those results, the Release used a net income figure that differed from net income calculated in conformity with generally accepted accounting principles ("GAAP"). Using that non-GAAP figure, the Release touted THCR's purportedly positive operating results for the quarter and stated that the Company had beaten analysts' earnings expectations.

B. The Earnings Release was materially misleading because it created the false and misleading impression that the Company had exceeded earnings expectations primarily through operational improvements, when in fact it had not. The Release expressly stated that the net income figure excluded a one-time charge. The statement that this one-time charge was excluded implied that no other significant one-time items were included in THCR's stated net income. Contrary to that implication, however, the stated net income included an undisclosed one-time gain of $17.2 million.

C. The misleading impression created by the reference to the single one-time charge and the undisclosed inclusion of the one-time gain was reinforced by the comparison of the stated earnings-per-share figure with analysts' earnings estimates and by statements in the Release that the Company had been successful in improving its operating performance. In fact, without the one-time gain, the Company's revenues and net income would have decreased from the prior year and the Company would have failed to meet analysts' expectations. The undisclosed one-time gain was thus material, because it represented the difference between positive trends in revenues and earnings and negative trends in revenues and earnings, and the difference between exceeding analysts' expectations and falling short of them.

D. By knowingly or recklessly issuing a materially misleading press release, THCR violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Settling Respondent

E. THCR is a publicly-held Delaware corporation. Through various subsidiaries, it owns and operates the Trump Taj Mahal Casino Resort (the "Taj Mahal") located in Atlantic City, New Jersey, as well as other casino resorts. THCR and its subsidiaries file reports, including their financial statements, on a consolidated basis. The Company's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded on the New York Stock Exchange. The Company's executive offices are in New York City, and its business and financial operations are centered in Atlantic City.

Facts

The All Star Gain

F. In September 1999, Taj Mahal Associates ("Taj Associates"), a THCR subsidiary, took over the All Star Café located in the Taj Mahal Casino from Planet Hollywood International, Inc. On September 15, 1999, Taj Associates, Planet Hollywood, and the All Star Café, Inc. reached an

agreement pursuant to which, effective September 24, 1999, the All Star Café's lease of space at the Taj Mahal would be terminated and All Star would be relieved of its rental obligations to THCR. In return, Taj Associates would receive the All Star Café's leasehold improvements, alterations, and certain personal property. Because the Taj Mahal was going to continue to use the space as a restaurant, the Company's outside auditor advised that Taj Associates should record as operating income the fair market value of the leasehold improvements, alterations and personal property reverting to Taj Associates. Based on this advice and on an independent appraisal, and in conformity with GAAP, Taj Associates (and, on a consolidated basis, THCR) recorded $17.2 million, the estimated fair market value of these assets, as a component of operating income for the third quarter of 1999.

The Earnings Release

G. On October 25, 1999, THCR issued the Earnings Release, publicly announcing its results for the third quarter of 1999. The Release, and the accompanying financial data, defined net income, or net profit, for the quarter as income before a one-time Trump World's Fair closing charge of $81.4 million. Using this "*pro forma*" net income,[1] the Release announced that the Company's quarterly earnings exceeded analysts' expectations, stating:

> Net income increased to $14.0 million, or $0.63 per share, before a one-time Trump World's Fair charge, compared to $5.3 million or $ 0.24 per share in 1998. THCR's earnings per share of $0.63 exceeded First Call estimates of $0.54.[2]

H. The Release fostered the false and misleading impression that the positive results and improvement from third-quarter 1998 announced by the Company were primarily the result of operational improvements. In the Release, THCR's chief executive officer ("CEO") was quoted as saying:

> Our focus in 1999 was three-fold: first, to increase our operating margins at each operating entity; second, to decrease our marketing costs; and third, to increase our cash sales from our non-casino operations. We have succeeded in achieving positive results in each of the three categories. The third quarter and nine month results for the company indicate that we have successfully instituted the programs that we focused on during 1999.

I. The Release failed to disclose, however, that the Company's *pro forma* net income for the quarter included the one-time gain resulting from the All Star Café lease termination. Accordingly, it failed to disclose the impact of that $17.2 million one-time gain upon the Company's $14 million *pro forma* net income or upon any of the other figures cited in the Release. Not only was there no mention of the one-time gain in the text of the Release, but the financial data included in the Release gave no indication of it, because, as discussed below, all revenue items were reflected in a single line item.

J. In fact, quarterly *pro forma* results that excluded the one-time gain as well as the one-time charge would have reflected a decline in revenues and net income and would have failed to meet analysts' expectations. The table below illustrates the impact of the one-time gain on the trends reported in the Earnings Release:

	3rd Q 1998	3rd Q 1999 Per Release	3rd Q 1999 Excluding One-Time Gain
(In thousands)			
Revenues	$397,387	$403,072	$385,872
Net Income	$5,312	$13,958	$3,048
EPS	$0.24	$0.63	$0.14

K. The Earnings Release was misleading. The Release used *pro forma* numbers that implied that all significant one-time items had been excluded, when they had not. The Release compared the *pro forma* EPS to analysts' expectations for quarterly EPS, which are generally and were in this case calculated on the basis of continuing business operations, thus reinforcing the false implication that all one-time items had been excluded. Moreover, the Release highlighted improvements in the Company's operations, i.e., the Company's increased operating margins, decreased marketing costs, and increasedcash sales from non-casino operations.[3] By making these representations about THCR's quarterly performance, without disclosing the existence or impact of the one-time gain, the Release created the false and misleading impression that the Company's third-quarter results had improved over the results for third-quarter 1998 and had exceeded analysts' expectations primarily because management had been effective in improving the Company's operating performance.[4]

Preparation of the Earnings Release

L. Historically, THCR announced its quarterly results in an earnings release that included financial data presented in a format similar to that of a Form 10-Q or Form 10-K financial statement. Among other things, financial data in these earlier earnings releases itemized revenues (on a Company-wide basis and also by property) by "Casino," "Rooms," "Food & Beverage," and "Other." In the third quarter of 1999, however, at the direction of the Company's CEO, and following similar models used by some of THCR's competitors, the Company adopted a less detailed, or "streamlined," format for the financial data contained in its earnings releases. Unlike the more detailed format used in earlier quarters, the new, streamlined format did not break out revenue items, but instead disclosed revenue as a single line item for each casino. Thus, the streamlined format did not break out "other revenue," the line-item classification in which the $17 million one-time All Star Café gain would have been reported under the old format.

M. The Earnings Release was prepared by the Company's corporate treasurer ("Treasurer") and its chief financial officer ("CFO"), under the supervision of the CEO, who approved the contents of the Release and made the decision to issue it. The contract of the CEO expired in June 2000 and was not renewed; he is no longer associated with the Company. [5]

N. When the Release was issued, THCR knew that the estimated fair market value of the All Star Café lease termination would be recorded as part of operating income for third-quarter 1999and that the estimated fair market value of the transaction was $17.2 million. The Company also knew that the Earnings Release used a *pro forma* net income figure that expressly

excluded the $81.4 million one-time charge but did not disclose the existence or impact of the $17.2 million one-time gain.

Publication of the Earnings Release and the Aftermath

O. At 10:00 a.m. on October 25, 1999, the day the Earnings Release was issued, THCR held a conference call with analysts. During the call, the CEO told the analysts that increasing non-casino sales at the Taj Mahal had been a priority over the past year, and cited the Taj Mahal's third-quarter revenues as evidence that the emphasis had paid off. The CEO did not say that the Taj Mahal's non-casino revenue had increased primarily because of the All Star Café transaction.[6]

P. Immediately after the issuance of the Earnings Release and the conference call, analysts began asking questions about the details of the Company's increase in revenues. Within hours of the conference call, THCR's CFO spoke to several analysts who called with questions about specific aspects of Company's third-quarter results, and he provided them with information about the All Star Café gain. Over the next few days, additional analysts raised questions about the quarterly results, and the lack of detail in the Earnings Release. As a result, the Company's CFO and Treasurer attempted to speak to every analyst who had been on the conference call to explain the All Star Café transaction. In addition, the Company decided to accelerate the filing of its 10-Q for the quarter, which would contain a description of the one-time gain.

Q. After learning about the one-time gain, certain analysts informed their clients of its impact. One analyst at Bear, Stearns & Co. notified his clients on October 27, 1999 that the increased third-quarter EPS resulted from the inclusion in revenue of the one-time All Star Café gain. On October 28th, analysts at Deutsche Banc Alex Brown issued a report on the effect of the one-time gain, which was disseminated to subscribers to Deutsche Banc research over the First Call Research Network. The Deutsche Banc analysts reported that Company management had disclosed that day that roughly $0.47 of the $0.63 third-quarter *pro forma* EPS the Company had previously reported "were not operating EPS but were actually the result of an accounting gain." The analysts determined that after backing out the one-time $17 million gain, THCR's net revenues would have fallen 2.7 %, rather than rising 1.5 % as they did when the one-time gain was included. The Deutsche Banc report also explained that, without the one-time gain, the Company experienced negative trends in Company-wide cash flows and margins, as well as in Taj Associates' revenues from operations, rather than the positive trends indicated by the Earnings Release. Adjusting for the impact of the one-time gain, the Deutsche Banc analysts loweredtheir 1999 EPS estimate from -$1.17, contained in their initial report on THCR's third-quarter results, to -$1.64.[7]

R. On October 25th, the day the Earnings Release was issued, the price of the Company's stock rose 7.8 % (from $ 4 to $ 4.3125), on volume approximately five times the previous day's volume. On October 28th, the day of the second Deutsche Banc analysts' report, the stock price fell approximately 6%, on volume approximately four times the previous day's volume.[8]

S. On November 4, 1999, THCR filed its quarterly report on Form 10-Q. The 10-Q disclosed the existence and amount of the one-time gain in a footnote

to the financial statements.

THCR Violated Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

T. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder make it unlawful, in connection with the purchase or sale of securities, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

U. To violate Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, a misrepresentation or omission must be material, meaning that a reasonable investor would have considered the misrepresented or omitted fact important when deciding whether to buy, sell or hold the securities in question. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S. Ct. 978, 983 (1988). To constitute a violation, the material misstatement or omission must be made with scienter. *Aaron v. SEC,* 446 U.S. 680, 701-02, 100 S. Ct. 1945, 1958 (1980). Scienter can be shown by knowledge of the misrepresentation and, in the Second Circuit, by reckless disregard for the truth or falsity of a representation. *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 575 (2d Cir. 1982), *cert. denied*, 459 U.S. 838 (1982). Recklessness is defined as "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Rolf v.Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *see also SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998) (applying *Rolf* recklessness standard).

V. Thus, an issuer that knowingly or recklessly makes false or misleading statements in public announcements to investors, including press releases and other public statements, violates Section 10(b) and Rule 10b-5. *See SEC v. Koenig*, 469 F.2d 198 (2d Cir. 1972); *SEC v. Great American Industries, Inc.*, 407 F.2d 453 (2d Cir. 1967), *cert. denied*, 395 U.S. 920 (1969). *See also SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 861-63 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). In *Public Statements by Corporate Representatives*, Securities Act Rel. No. 6504 (January 1984), the Commission reminded registrants that Section 10(b) and Rule 10b-5 apply to all public statements by persons speaking on behalf of a public company. The Commission also made clear that public announcements and press releases constitute public statements. *Id. See also In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153 (2d Cir. 1998) (advertisements by issuer can be "in connection with" the purchase or sale of securities); *Sunbeam Corporation*, Exchange Act Rel. No. 44305 (May 15, 2001)(issuer violated Section 10(b) and Rule 10b-5 when it disseminated materially false and misleading press releases).

W. The omission from the Earnings Release of the information that THCR's *pro forma* net income included a $17.2 million one-time gain was misleading, for several reasons.[9] Absent disclosure to the contrary, the use of *pro forma* numbers in an earnings release reasonably implies that any adjustments to GAAP numbers were made on a consistent basis and do not obscure a significant result or a trend reflected in the GAAP numbers. Here, THCR's express exclusion of a one-time charge reasonably implied that no

other significant one-time item was included in the *pro forma* net income figure. This implication was reinforced by the Company's assertions in the Release that its quarterly results had exceeded analysts' EPS expectations, which are generally, and were in this case, a measure of expected operating performance. Moreover, the misleading impression created by the use of the *pro forma* net income figure without disclosing the inclusion of the one-time gain was reinforced by the statements in the Release about improvements in the Company's operating performance, specifically, improvements in operating margins, marketing costs, and sales from non-casino operations.

X. In the context of the express exclusion from *pro forma* net income of the one-time charge, the comparison to analysts' earnings expectations, and the statements about the Company's operational improvements, the omission of information about the one-time gain was material, because the undisclosed one-time gain represented the difference between positive trends in revenues and earnings and negative trends in revenues and earnings, and the difference between exceeding analysts'expectations and falling short of them. Thus, the omission of information about the one-time gain obscured a negative trend and a failure to meet analysts' expectations, and therefore could reasonably have led analysts and investors to draw false conclusions about THCR's quarterly results.

Y. THCR, through the THCR officers involved in the drafting and issuance of the Earnings Release, knew that the estimated fair market value of the All Star Café lease termination was recorded as part of operating income for third-quarter 1999 and that the estimated fair market value of the transaction was $17.2 million. THCR knew that the Earnings Release used a *pro forma* net income figure that expressly excluded the one-time charge but did not disclose the existence or impact of the one-time gain. Accordingly, THCR knew or recklessly disregarded that the Earnings Release was materially misleading.

Z. While engaged in the conduct described above, THCR, directly and indirectly, used the means or instrumentalities of interstate commerce or the mails.

AA. Based on the foregoing, THCR violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by knowingly or recklessly issuing the Earnings Release.

IV.

In view of the foregoing, the Commission deems it appropriate to accept the Offer submitted by THCR and impose the cease-and-desist order specified in the Offer. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by THCR, and the limited duration of the violations.

V.

Accordingly, IT IS ORDERED, pursuant to Section 21C of the Exchange Act, that THCR cease and desist from committing or causing any violation, and any future violation, of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

By the Commission.

Jonathan G. Katz
Secretary

Endnotes

1 Although neither the text of the Release nor the accompanying financial data used the term "*pro forma*," the net income figure was *pro forma* in that it differed from net income calculated in conformity with GAAP by excluding the one-time charge. (Accordingly, the net income figure is hereafter referred to as "*pro forma* net income" and the earnings-per-share figure derived from the *pro forma* net income is referred to as "*pro forma* EPS.") The Release also used another *pro forma* figure, EBITDA, which it defined as earnings before interest, taxes, depreciation, amortization, corporate expenses and the $81.4 million Trump World's Fair closing charge.

2 The financial data contained in the Release also included figures for net income (loss) and earnings per share for the quarter that, in compliance with GAAP, included the World's Fair charge. Those figures were, respectively, a loss of $67.4 million and earnings per share of -$3.04.

3 Although the statements about increased operating margins, decreased marketing costs, and increased cash sales from non-casino operations were nominally true, in the context of the Earnings Release they were misleading, because, without the $17.2 million one-time gain, the increases in margins and cash from non-casino operations were negligible. Excluding the one-time gain, THCR's operating margins increased by 0.4% from third-quarter 1998 and its non-gaming revenue increased by $1.8 million, or approximately 2.25%. The Company's marketing costs (as represented by promotional allowances) decreased by approximately $549,000, or approximately 1%.

4 *See* note 7, *infra* (noting that the first research report by Deutsche Banc after the issuance of the Earnings Release had reported that the Company's $0.63 third-quarter EPS was driven by margin gains).

5 In addition, after the events at issue, the Company established a procedure by which earnings releases are reviewed by the Audit Committee before they are issued.

6 Without the $17.2 million one-time gain, non-casino sales at the Taj Mahal increased by only $300,000, or less than one percent, from third-quarter 1998 to third-quarter 1999.

7 The Deutsche Banc analysts first issued a report on THCR's third-quarter performance (also disseminated via First Call) on October 26th. The earlier report's headline announced that Trump Hotels had reported third-quarter operating EPS of $0.63, driven by margin gains. The analysts had also reported that net revenues were up 1.5%, despite a 1.3 % decline in gaming revenues at the Company's three Atlantic City properties. In the initial report, the analysts had said that the net revenue increase was the result of an increase in cash flow and profitability at the Atlantic City properties (including the Taj Mahal) and concluded that the increase in cash flow indicated that the Company's emphasis on cost reduction had been effective. As a result of the reported quarterly performance, in the initial report, the Deutsche Banc analysts had raised their 1999 EPS estimate.

[8] October 28th was also the date on which an article discussing the impact of the one-time gain and the Company's failure to disclose it in the Earnings Release appeared in the *Atlantic City Press*.

[9] As explained in note 1 above, the Earnings Release did not use the term *pro forma* but the figures in the Release were *pro forma* numbers in that they differed from numbers calculated in conformity with GAAP. Even if the Release had identified the numbers as *pro formas*, however, the Release would still have been misleading for the reasons discussed above. The presence or absence of the term *pro forma* is not, in and of itself, dispositive of the question of whether an earnings release or financial statement is misleading.

http://www.sec.gov/litigation/admin/34-45287.htm

CORRESPONDENCE FROM THE TRUMP ORGANIZATION TO THE HONORABLE HARVEY L. PITT, THE HONORABLE ISAAC C. HUNT, JR., AND THE HONORABLE LAURA S. UNGER, DATED DECEMBER 14, 2001

December 14, 2001

The Honorable Harvey L. Pitt
The Honorable Isaac C. Hunt, Jr.
The Honorable Laura S. Unger
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Dear Chairman Pitt, Commissioner Hunt and Commissioner Unger:

I would greatly appreciate your understanding with respect to the attached filing.

Over the last year, I have been working very diligently to bring this company back from a very difficult time, especially since the tragedy of September 11. I believe we have made very substantial progress toward this end but a 10b-5 proceeding will be a tremendous setback. Additionally, and as you are aware, the person responsible for this situation is no longer with the company.

I greatly appreciate your understanding of this matter.

Thank you.

Sincerely,

Donald J. Trump

THE TRUMP ORGANIZATION
725 FIFTH AVENUE · NEW YORK, N.Y. 10022 212 · 832 · 2000 FAX 212 · 935 · 0141

CORRESPONDENCE FROM THE TRUMP ORGANIZATION TO THE HONORABLE HARVEY L. PITT, DATED JANUARY 28, 2002

02/25/02 12:37 (b)(6),(b)(7)(C) DIR REG OFC OPS +++ NORTHEAST REGION 002/002

January 28, 2002

Mr. Harvey Pitt
Chairman
Securities & Exchange Commission
450 5th Street NW
Washington, D.C. 20549

Dear Harvey,

Thank you very much for the attention paid to the matter of Trump Hotels and Casino Resorts. I greatly appreciate the time you have taken to speak to me and also the professionalism and fairness shown by you and your representatives. We will work very hard to make sure that this situation does not occur again.

Sincerely,

Donald J. Trump

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SEC
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OFFICE OF THE CHAIRMAN

THE TRUMP ORGANIZATION
725 FIFTH AVENUE · NEW YORK, N.Y. 10022 212 · 832 · 2000 FAX 212 · 935 · 0141