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SEC Enforcement Approach May Hinge On Election Results.

The next appointed Securities and Exchange Commission is likely to be more polarizing, and the SEC's approach to enforcement will differ depending on who wins the presidential election.

Current SEC Chair Jay Clayton, widely considered a centrist and who is reportedly not interested in continuing in the role, will likely not be reappointed as both President Donald Trump and former Vice President Joe Biden are likely to pick chairs more aligned with their political parties. Importantly, the SEC chair historically does not view municipals as a main priority.

At the end of the day, Clayton was more of a centrist than a lot of other policy people Trump appointed, a securities lawyer said.

"So thematically, I would expect if anything he would have somebody be more right wing," he said. "Basically, although it hasn't really happened in the last 12 years, you might see the SEC chair be a little bit of a more polarized choice, reflecting the increasing polarization of so many of our institutions like the Supreme Court."

If Biden wins in November, there is a good possibility that he will have learned from the mistakes made by the Obama administration when he was vice president. One mistake was appointing too much of a centrist as SEC chair, the securities lawyer said.

Obama appointed Mary Schapiro, an independent, in January 2009, and she was the first woman to serve as the SEC's permanent chair. Under Schapiro, the lawyer said, the SEC failed to aggressively pursue bad actors, including in the municipal space.

The weakest part of Obama's presidency was how he had the ability to make lasting reform, but didn't because most of the people he chose for senior policy positions were anti-regulation and either moderate or right-leaning, the securities lawyer said.

"While you might not need additional regulation, you might need somebody who is leading the financial market who is a little more focused on bringing enforcement actions against the biggest players and the worst behavior," the securities lawyer said.

Mary Jo White, an independent, was nominated by Obama after Schapiro. White had a very strict "broken windows" approach to enforcement. Under her watch the SEC introduced the Municipalities Continuing Disclosure Initiative, which promised underwriters and issuers would receive lenient settlement terms if they self-reported instances over the last five years where issuers falsely stated in offering documents that they were in compliance with their continuing disclosure agreements.

Also under White's leadership, the Enforcement Division brought numerous muni enforcement cases including against the mayor of Harvey, Illinois.

Depending on Trump's pick, a Republican chair is likely to err on the side of guidance and amending rules before taking enforcement action. Under a Democratic chair, the SEC may be more willing to do rulemaking by enforcement, said Peter Chan, a partner at Baker & McKenzie and former SEC

enforcer.

“Saying that they will be more aggressive isn’t saying that they will be better or worse,” Chan said.

In fiscal year 2019, the SEC brought 516 standalone enforcement actions, up from 490 in FY 2018. In FY 2017, 446 enforcement actions were brought by the SEC and in FY 2016 there were 548 standalone enforcement actions, according to the SEC’s 2019 annual report.

Municipal issues will likely be a point of bipartisan consensus, such as timeliness of financial documents and pricing transparency in the secondary market. The SEC has long been focused on the timeliness of issuers’ financial reporting.

“The way they attack concerns, there may be some difference in approach, but the issues are shared in a bipartisan way,” Chan said.

Beyond the municipal bond market, the SEC will be more focused on differences in corporate disclosure, among other topics. The municipal market isn’t really the focus of an SEC chair.

“Because of that, if anything in the midst of severe disagreement on other issues, whether it’s a Republican or Democratic-appointed chairman, there will be a lot of institutional desire to address the public finance market where there are much less partisan disputes,” Chan said.

Chuck Samuels, counsel to the National Association of Health & Educational Facilities Finance Authorities, emphasized that municipal finance is not a significant sector for the SEC. It would be “pure chance” for the next SEC chair to have any experience in municipal finance, he said.

The Senate also has to affirm the next president’s pick. The Senate is currently majority Republican, but that could flip next year. If it does flip, Sens. Elizabeth Warren, D- Mass., or Sherrod Brown, D- Ohio could have an influence on who is next SEC chair.

“There will be a tug of war between the left-wing and the moderates in the Biden administration,” Samuels said.

By Sarah Wynn

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