Trump's SEC may take aim at corporate disclosure

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Donald Trump will have a unique opportunity to reshape the agenda of the Securities and Exchange Commission, and the next president's picks may use their new power to take aim at corporate disclosure.

Trump will have the opportunity not just to pick a new chairman but two commissioners (though one will have to be a Democrat) on the five-person panel.

Several media reports now point to Debra Wong Yang, a former federal prosecutor in California and now a partner at law firm Gibson, Dunn & Crutcher, as Trump's top pick to run the Securities and Exchange Commission. Thaya Brook Knight, the Cato Institute's associate director of financial regulation studies told MarketWatch, "Typically presidents select only the chair when they first take office. If Yang is indeed the new SEC chairman, I would expect to see a continued focus on enforcement, given her background as a prosecutor."
A former judge and federal prosecutor in California, Yang now represents white-collar defendants. At Gibson Dunn, Yang was part of a team of lawyers that cleared New Jersey Governor Chris Christie of wrongdoing over the lane-closing scandal.

Republicans have consistently complained about the SEC's supposedly growing corporate disclosure requirements. Andrew Green, a managing director at the Center for American Progress, told MarketWatch, "All signs point to a Trump SEC that will kowtow to the demands of the hard-core deregulation crowd."

The Trump version of disclosure effectiveness will be "like the original 'disclosure overload' approach but on steroids: less corporate disclosure and accountability plus gutted disclosure requirements and lackadaisical enforcement," said Green. Green added that's an extremely troubling outlook at a time when, he says, long-term investors are demanding a stronger SEC approach to climate change, tax payments, worker training and other clearly material information.

Annette Nazareth, herself a former commissioner and now the leader of law firm Davis Polk's trading and markets practice, said that it will be hard for either party to argue with more effective disclosure, particularly through better use of technology. She noted that using technology more effectively was also an interest of current commissioner Kara Stein, a Democrat.

Keir Gumbs, a former SEC attorney now with Covington and Burling, says disclosure reform moves to the top of the list in the new administration.

However, Dodd-Frank rules related to executive compensation such as the clawback rule and incentive bonus controls for banks are not yet final. “Those rules are likely to be moved to the end of the SEC’s priority list, and in all likelihood watered down if not eliminated entirely.” said Gumbs.

Republicans are looking at gutting if not axing entirely the Dodd-Frank bank reform law.

One SEC activity Republicans have been very vocal about is the remaining Dodd-Frank rule-making. In mid-November Republicans on the House Financial Services Committee insisted that departing chairwoman Mary Jo White promise she would halt any remaining rule making. In mid-December Senate Republicans asked, too.
Nazareth says White was anxious to at least finish Dodd-Frank mandated rulemaking on securities-based swaps before she left office.

“It looks like time is running out,” said Nazareth. “These are Dodd-Frank mandates, however, so I expect they will be passed as soon as possible, maybe even in an interim session with Michael Piwowar acting as interim chairman and Kara Stein as the only other member.”

Knight says House Republicans will, on their own initiative, revive all or parts of the Financial Choice Act put forward by Rep. Hensarling earlier this year, and similar bills that take aim at many of the Dodd-Frank mandates that already have approved SEC rules. The Choice Act also includes significant changes for the CFPB.

“They’re doing it,” says Knight, “because they have majorities in both houses, and it’s unlikely Trump will veto it.”

The SEC’s focus on equity markets structure may suffer, however, unless the agency’s new members including the Chairman, have better than average familiarity with the issues, said Nazareth. “It’s such a complex subject, with many different opinions on how to address the concerns. If the new chair is not comfortable with these topics, this area could languish.”

Nazareth also thinks the SEC is on “strong footing” to pursue pending insider trading actions and look for more after the recent Supreme Court decision in the Salman case affirmed that giving confidential information to a friend or relative that trades on it is still a crime, even when the tipper doesn’t get any economic benefit.

Gumbs believes the so-called broken windows enforcement approach of Mary Jo White is unlikely to continue — that’s when several small violations are strenuously prosecuted to discourage more serious criminal activity —and enforcement practices will likely shift. It’s likely there will be fewer corporate penalties, more waivers (or at least less of a fight over waivers) and a shift in priority to filing charges against individuals at companies, said Gumbs. He also thinks insider trading will still be an enforcement focus, although it will be “light touch”.

“Cybersecurity should be a non-partisan concern,” added Vince Martinez, a former SEC attorney who now counsels financial institutions on cyber security preparedness at K&L Gates. “Because threats will persist and grow, it is likely that the new administration will continue to prioritize this issue with respect to both the financial markets and critical infrastructure risks,” said Martinez.

Foreign Corrupt Practice Act enforcement will continue to be a strong emphasis for the SEC. On Wednesday the SEC fined Braskem, a Brazilian firm, $967million for conspiracy to violate the FCPA . It was the agency’s third largest FCPA penalty, according to a spokesman and part of the largest joint global FCPA enforcement action ever.
On the other hand, these experts believe hedge funds and private firms will likely see less enforcement action while broker-dealers and investment advisors will see the same or more.

If the Congressional Republicans decide to demonstrate that less regulation should translate into a smaller budget for the SEC, Nazareth says crackdowns on microcap “pump and dump” market manipulation and Ponzi schemes may bear the brunt. “These cases are contentious and messy and don’t bring the bang for the buck that a high-profile corporate case does, says Nazareth.

It’s not as clear what the future of the recent crackdowns on municipal bond issuers and underwriters may be. “The SEC does so much less with fixed income markets than equity markets, even though just a little focus could bring such big benefits by comparison,” says Nazareth.

Finally, Trump’s repeated criticisms of China over trade “could lead a Trump SEC to escalate some of the long lingering issues related to Chinese companies listed in the U.S. and U.S. companies doing significant business in China,” says Paul Gillis , a PhD and CPA and a professor of practice at Peking University’s Guanghua School of Management .

Private Chinese companies started pursuing reverse mergers in 2010 to gain access to U.S. capital markets more quickly and cheaply than via an initial public offering. A number of them were the target of short sellers and changed auditors more than once. More than 50 U.S.-listed Chinese companies were either delisted or halted from trading in 2011 and 2012 based on claims of fraud and other violations of U.S. securities laws.

“The SEC could revive its enforcement against Chinese reverse mergers and their auditors in the U.S. and in China, and in particular the ongoing obstruction of inspections of China-based auditors of U.S.-listed firms by the PCAOB,” said Gillis. SEC enforcement could focus on microcap frauds, financial accounting and disclosure fraud, and paying bribes to Chinese officials, and disproportionately zero in on China-related companies and their auditors to placate Trump’s desire to punish China, according to Gillis.