



---

**Portfolio Media, Inc.** | 111 West 19th Street, 5th floor | New York, NY 10011 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

---

## Clayton Shifts SEC Focus To Retail Investors In First Year

By **Dunstan Priol**

Law360 (May 4, 2018, 4:47 PM EDT) -- U.S. Securities and Exchange Commission Chairman Jay Clayton's clear initiative to protect retail investors since taking the helm of the Wall Street regulator one year ago this week is widely viewed as a positive shift in direction, but has also raised concerns the agency may lose focus on potential misconduct by big financial institutions given its limited resources.

Clayton's most high-profile initiatives have included the introduction of a **sweeping proposal to clarify** so-called best interest standards for broker-dealers, **numerous crackdowns** on possibly fraudulent cryptocurrency offerings, and **easing the path** for companies to take their shares public, each of which he's filtered through the prism of protecting mom-and-pop investors.

Clayton, a political independent and former partner at Sullivan & Cromwell LLP, has shifted "the tone" of the SEC, legal experts say, offering a "consistent" message and "practical" solutions designed to protect investors while also softening some regulations to make it easier for U.S. companies to raise money through initial public offerings.

"The SEC clearly is delivering an investor-protection-first message with a focus of fostering and promoting the historically embraced American culture of entrepreneurship," said Jacob Frenkel of Dickinson Wright PLLC. "All of the initiatives are consistent with a professional sensitivity to ever-evolving capital markets and priorities."

But the agency can only cover so much ground, said Andrew Friedman, a white collar defense attorney with Shulman Rogers Gandal Pordy & Ecker PA. "There are rules and regulations that the larger firms that are more institutional can violate, and if the SEC is not looking at that very hard, then it potentially creates an environment where that kind of activity can grow," Friedman said.

The SEC did not respond to a request for comment for this story.

Here are areas where Clayton is directing the agency's resources.

### Focus on Retail Investors

Whether it's the approval of a long-awaited proposal designed to ensure broker-dealers keep their clients' best interests at the forefront or the announcement of an enforcement action against a seemingly fraudulent cryptocurrency offering, Clayton rarely misses an opportunity to explain how a move will benefit retail investors. That mandate and an array of varied initiatives represents a potential shift away from his predecessor, Mary Jo White, whose so-called broken-windows strategy implied a more focused attention on law and order.

A **pair of studies** released last year suggested such a shift.

In fiscal 2017, which ended on Sept. 30, the SEC brought 612 primary and follow-on enforcement actions, down from 743 actions the previous year, according to data compiled by Urska Velikonja, a professor at Georgetown University Law Center. And enforcement actions against public companies fell about one-third to 62 in fiscal 2017 from 92 the previous year, according to a study by the New York University Pollack Center for Law & Business and Cornerstone Research.

"It definitely reflects a shift in priorities," said Ron Colombo, a professor at Hofstra University's Maurice A. Deane School of Law.

But the SEC's resources are limited, Colombo added. "If it had unlimited resources, that would be one thing," he said. "But given its limited resources, it's really got to make some value judgments on what it thinks is the best use of its time and efforts."

Barbara Roper, the director of investor protection at the Consumer Federation of America, welcomed the shift toward investor protection, saying dramatic changes over the past four decades in how Americans invest warranted a new approach by the SEC.

"We believe the agency needed to go in that direction because this is how Americans now save and invest for retirement, and the assumptions on which our laws and our regulations in the securities markets are based don't really take into account the lack of financial sophistication of many of the market participants," she said.

But Friedman said potentially troublesome practices, such as high-speed trading or big firms short-selling ahead of new issues, might be overlooked as the SEC focuses elsewhere.

### **Broker-Dealer Best-Interest Standard**

In April, the SEC unveiled a years-in-the-making proposal designed to hold brokers to a higher standard of care if they are giving advice to retail investors. On a 4-1 vote, the commission approved a trio of proposals led by a plan to require brokers to act in their clients', not their own, best interests when recommending investments.

The proposal has draw criticism, particular by investor

## **The SEC's Revolving Door**

The SEC chairman has been an effective recruiter, drawing talent from BigLaw and elsewhere to help him run the agency. The following attorneys left law firms to join the senior ranks of the SEC under Jay Clayton. Two hailed from Clayton's own former firm, Sullivan & Cromwell LLP.



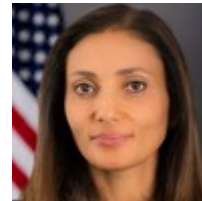
### **William Hinman**

*Director of the Division of Corporation Finance*  
Came from Simpson Thacher & Bartlett LLP, where he was a retired partner



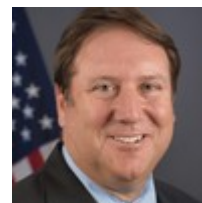
### **Steven Peikin**

*Co-director of the SEC Enforcement Division*  
Came from Sullivan & Cromwell



### **Dalia Blass**

*Director of the Division of Investment Management*  
Came from Ropes & Gray LLP



### **Robert Stebbins**

*General counsel*  
Came from Willkie Farr & Gallagher LLP

### **Marc Berger**

*Director of the New York regional office*  
Came from Ropes & Gray

advocates such as Roper at the CFA, that its wording is too vague, but Kevin L. Walsh of Groom Law Group noted that the SEC specified that in order to meet the best interest standard, brokers need to meet three separate obligations: provide clear disclosures, exercise due care and address conflicts of interest.

"It doesn't say this is what 'best interests' means, but it says if you want to meet our standard you should meet these three separate component parts," Walsh said.

Roper said Clayton deserves credit "for getting it out the door," something none of his predecessors were able to do after the initiative was included as part of the 2010 Dodd-Frank reform bill.

"Depending on how you interpret it, it has a lot of the key components that we think a good standard needs to have," Roper said. "The problem is that none of those terms are defined."

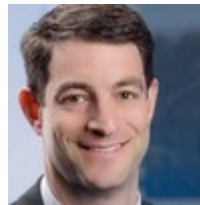
### ICO and Cryptocurrency Fraud

Since taking the helm last May, Clayton has taken particular aim at cryptocurrencies, releasing numerous warnings to investors through bulletins, public statements and a full-scale investigative report in July targeting issuers of so-called initial coin offerings.

Clayton has said repeatedly he believes most ICOs should be registered with the SEC and therefore must meet the SEC's disclosure regulations because they represent the sale of securities meant to create a profit for the purchaser. "You can call it a coin, but if it functions as a security it's a security," he **told members** of the Senate Banking Committee in February.

Friedman, of Shulman Rogers, said it remains to be seen how securities regulators will define digital coins and that Clayton may be "overreaching" by lumping most of them into a category that can be regulated by the SEC. "I think you have to analyze each entity on its own merits," he said.

Nevertheless, he said, Clayton's crackdown on questionable offerings was necessary because "the whole area of tokens and coins is ripe for fraud."



### Robert Evans III

*Chief of international corporate finance within the Division of Corporation Finance*  
Came from Shearman & Sterling LLP



### Jeffrey Dinwoodie

*Senior adviser to the SEC chairman*  
Came from Davis Polk & Wardwell LLP



### Sean Memon

*Deputy chief of staff*  
Came from Sullivan & Cromwell



Source: U.S. Securities and Exchange Commission

## The SEC's Revolving Door

The SEC chairman has been an effective recruiter, drawing talent from BigLaw and elsewhere to help him run the agency. The following attorneys left law firms to join the senior ranks of the SEC under Jay Clayton. Two hailed from Clayton's own former firm, Sullivan & Cromwell LLP.

Colombo said Clayton's emphasis on ICO fraud goes to the heart of the chairman's focus on retail investors. "These are phenomena that suck in and defraud the individual investor," he said.

### **Easing the IPO On-Ramp**

Another priority of Clayton's is easing the IPO "on-ramp." Clayton has repeatedly expressed concern about the widely reported reduction in IPOs in recent decades and said he wants to make public markets more attractive.

The idea of easing the path for U.S. companies to take their shares public didn't originate with Clayton, but Jeff Cohen of Linklaters LLP praised him as a "cheerleader" of IPO reform who has "taken it further and really done a good job."

For example, under Clayton the SEC in June expanded its program that allowed small companies to confidentially file early documents for IPOs, allowing all companies to file confidentially.

Cohen said the ability to file confidentially is a huge priority for companies because it allows them to keep a lot of sensitive information private while quietly gauging interest from investors in a potential IPO, and it reduces the risk of perceptions of a failed deal should the IPO have to be delayed.

The potential downside, Cohen said, is that investors won't get to study potential issuers as long as they once did.

"There was a risk that the reduction in the amount of time that the buy side would have with registration statement would be harmful to the IPO market," Cohen said. "But it seems to have turned out not to be the case and that the benefits for issuers of being able to wait until there's greater certainty of their being able to get the IPO done before they actually publicly file has been huge."

The CFA's Roper is wary, however. While agreeing that investors benefit from "healthy public markets," she said she's concerned that the SEC will ease regulations to make it easier for companies to go public at the expense of investor protections.



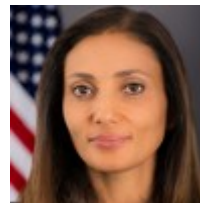
**William Hinman**

*Director of the Division of Corporation Finance*  
Came from Simpson Thacher & Bartlett LLP, where he was a retired partner



**Steven Peikin**

*Co-director of the SEC Enforcement Division*  
Came from Sullivan & Cromwell



**Dalia Blass**

*Director of the Division of Investment Management*  
Came from Ropes & Gray LLP



**Robert Stebbins**

"The cost of capital in this country is low relative to other markets precisely because the investor protections are stronger," Roper said. "And if you start dismantling that advantage of a listing in the U.S. markets, this lower cost of capital, you can do some really serious damage."

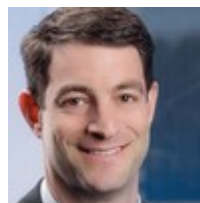
--Editing by Brian Baresch and Alanna Weissman.

---

All Content © 2003-2018, Portfolio Media, Inc.

*General counsel*

Came from Willkie Farr & Gallagher LLP



**Marc Berger**

*Director of the New York regional office*

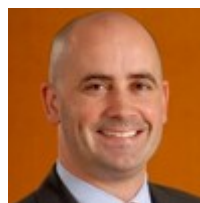
Came from Ropes & Gray



**Robert Evans III**

*Chief of international corporate finance within the Division of Corporation Finance*

Came from Shearman & Sterling LLP



**Jeffrey Dinwoodie**

*Senior adviser to the SEC chairman*

Came from Davis Polk & Wardwell LLP



**Sean Memon**

*Deputy chief of staff*

Came from Sullivan & Cromwell

Source: U.S. Securities and Exchange Commission