CHANGES AT SEC WON'T AFFECT TRUMP AGENDA

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In early July, Michael Piwowar left the Securities and Exchange Commission ("SEC") after serving as Commissioner since 2013, including a four-month stint as acting Chair in 2017. Nominated to take his place is Elad Roisman, another Republican who is currently chief counsel to the Senate Banking Committee. Also stepping down this year, perhaps as early as the end of summer, is Democrat SEC Commissioner Kara Stein. While these changes will no doubt alter the dynamic at the SEC, they will not change the balance of power at the Commission, which has been bringing fewer enforcement actions since President Trump took office.

The President, subject to Senate approval, appoints all five Commissioners: two Democrats, two Republicans and the Chair, typically of the President's own party. Since the Chair is both the SEC's chief executive and the tie-breaking vote, the party that controls the White House also controls the SEC's agenda and direction. The Commissioners' terms last five years and are staggered, with one Commissioner's term ending each June 5, although, as with Stein whose term ended last June, Commissioners may continue to serve an additional 18 months if they are not replaced before then or resign sooner.

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Piwowar's departure will leave the Commission temporarily deadlocked, with two Republican Commissioners, Chair Jay Clayton and Hester Peirce, and two Democrat Commissioners, Robert Jackson and Stein. At the time of publication, no date has been set for Roisman's hearing and some believe the Senate is waiting for a Democratic nominee to replace Stein to tee up both nominees for Senate confirmation at the same time, as was done with Peirce and Jackson in 2017.

The Chair's and Commissioners' ideology can be readily seen in the issues that the SEC does and does not address. For example, former Commissioner Piwowar suggested last July that the SEC might be willing to consider allowing companies going public to include bylaw provisions requiring mandatory arbitration of securities claims. Also, Commissioners are now able to appoint the agency's Administrative Law Judges under the Supreme Court's recent decision in *Lucia Cos. Inc. v. Securities and Exchange Commission*, Case No., 17-130. Importantly, the Chair and Commissioners decide how the SEC should wield its enforcement powers.

Since President Trump took office, there has been a marked decline in the number of SEC enforcement actions. Though the SEC Division of Enforcement manual states its "mission is to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions," the number of SEC enforcement actions against public companies and their subsidiaries declined by 67% for the first half of FY 2018 compared to the first half of FY 2017, dropping from 45 actions to 15 actions in 2018, according to a recent Cornerstone Report, in collaboration with NYU Pollack Center for Law & Business. The mid-year number of actions for 2018 is also significantly below the average and median number of actions, 29 and 26, respectively, during mid-year FY 2010-2017. The number of cases naming individual defendants during this period also declined, while the size of monetary settlements decreased dramatically. For mid-FY 2018, the average monetary settlement was $4.3 million, versus the next lowest semi-annual average of $13.3 million in mid FY 2015.

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This shift in enforcement activities suggests that Wall Street's top cop is less focused on rooting out corporate fraud, which does not bode well for investors. As Lynn Turner, former Chief Accountant for the SEC, said when asked about these statistics: "History has taught us the lesson that during periods of lax law enforcement, the result is typically bad. Investors must be cognizant of this because the protection they otherwise expect from the SEC won't exist." In this environment of diminished SEC enforcement of the federal securities laws, the role of private actions against publicly held companies becomes even more critical to achieve accountability, recoup damages and effect positive corporate change.

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