

Countering an Administration 'Hell-Bent on Attacking Investor Rights'

Also, CFPB's new examination pledge; banking agencies ready to adopt capital rule

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[Note to readers: *Capitol Account* will be off next week for Thanksgiving. We'll return on Dec. 1.]

Friday Q and A: Under Chairman **Paul Atkins**, the SEC has been aggressively pursuing corporate governance reforms that could fundamentally alter the balance power between public companies and their investors. Despite the broad reach of the initiatives, which take aim at shareholder proposals, securities class action lawsuits and financial reporting requirements, they haven't provoked much of an outcry.

In recent weeks, however, that's been changing. This week, we sat down with one of the leaders of the growing and increasingly vocal opposition movement. **Laura Posner** is a partner in the securities litigation and investor protection practice at Cohen Milstein Sellers & Toll, one of the largest plaintiffs law firms in the country. She's also a former state securities regulator.

Unsurprisingly, Posner has strong opinions about what's going on at the SEC during what she calls "the most anti-investor administration" ever. Read on for her take on the commission's recently adopted policy statement that frees up companies to use mandatory arbitration clauses, as well as its controversial decision this week to largely stop reviewing shareholder resolutions this proxy season. She also discusses the benefits of class actions – even for the firms being sued. And corporate leaders, she

argues, are also worried about Atkins' efforts. What follows is our (lightly edited and condensed) conversation.



Laura Posner

Capitol Account: What's your background?

Laura Posner: I have been doing securities litigation and investor protection work my entire career. I've been at a number of private firms, but also was appointed by the New Jersey attorney general to be the [state] securities regulator for three years, between 2014 and 2017.

CA: What's your broad take on the revamp of corporate governance that's taking place at the SEC?

LP: It's fair to say that this has been the most anti-investor administration that certainly I've seen in my lifetime, and I think it's probably fair to say ever. We're seeing that materialize in a lot of different ways.

CA: That's quite a statement. Why hasn't there been more of an uproar?

LP: There are dozens of public pension funds and a multitude of investor advocacy organizations...that are quite attuned to what's going on right now...They are extremely concerned about the various edicts that are coming out.

CA: What about individual investors? These are somewhat arcane issues.

LP: You are correct that the average retail investor is certainly not understanding or really even aware of a lot of these things. Some of the topics have broken through in the public press, like, for example, [Donald] Trump's desire, and what sounds like Chair Atkins' desire, to move from quarterly reporting to semi-annual reporting. But some of these other things...it's taking a little bit longer to break through.

CA: Is part of the reason that many of these changes are being conveyed in guidance policy statements or even speeches?

LP: I think that's very intentional because the SEC knows that if they actually issue rules, they have to open them up to public comment. And the overwhelming majority of comments are going to be negative. Not just from investors, by the way, [but] from corporations, from [directors and officers] insurers, from underwriters and accountants. There are a lot of folks who would view these proposals as really problematic.

CA: What do you think of Atkins' contention that this effort is necessary to spur IPOs and make being a public company 'cool again'?

LP: These changes are going to have the exact opposite reaction. I think you're less likely to see IPOs. You're going to see less investment in U.S.-based companies. People want to be able to vindicate their rights. They want to be able to get timely information to make smart investment decisions. And if we're no longer having those rights available to us, or that information available to us in a disclosure-based regime, why invest in a U.S. company?

CA: The most controversial of these reforms might be the commission's new policy statement that assures companies going public that they can include a mandatory arbitration clause in their bylaws. At least for now, though, the impact seems pretty limited. Do you agree?

LP: How big a deal it is depends on how many issuers take advantage of it.

CA: Will they?

LP: Companies don't think these provisions are in their best interest. And when you think about the practical side of things, that's self-evident.

CA: What's the advantage for a corporation to face a class action in federal court as opposed to a private arbitration?

LP: More than 50 percent of securities cases are dismissed at the motion to dismiss stage. That is higher than any other kind of claim you could possibly bring in the United States. They also get the benefit under the [law] of no discovery obligations until a motion to dismiss is decided against them. You don't get those benefits if you are in front of an unsophisticated arbitrator.

CA: Would there be fewer claims though?

LP: [Institutional] investors have fiduciary obligations to their members. They are going to have to bring arbitrations. We're not talking about one litigation or five litigations or 10 litigations. We are talking, in certain circumstances, likely hundred of separate arbitrations. The defendants in these cases are the CEO, the CFO – the senior executives are the witnesses. So you're going to have your CEO deposed 200 times? That is not a manageable way to conduct business.

CA: Why are class actions good for investors?

LP: They benefit from not having to be an active participant [in the litigation]. The vast bulk of investors are absent class members who get to recover as part of any settlement or judgment without having to do anything. Part of the problem of arbitration is that all of those pension funds, all of those investors who don't bring litigation...they're going to have to file in arbitration.

CA: And if they don't?

LP: They are going to lose out on the money that they would otherwise obtain through the class process.

CA: There's also an argument that class actions serve as a complement to government enforcement. Was that your experience?

LP: As a former regulator, I really believe in the importance of regulators, both the SEC and state. They play a critical role. But in terms of actually providing financial recovery to investors, it's not even close. The overwhelming majority of successful securities cases, the SEC never brings [and] no state regulator brings. So absent a class action, those claims are not brought. Even when there is a pending SEC action or state action, the amount recovered by the private bar on behalf of investors is seven, 10, sometimes 20 times more. Even in the most egregious of frauds.

CA: Government overseers also have limited budgets.

LP: I saw that firsthand. There's no question that we did not have the resources necessary to police the markets by ourselves, and that the private bar played an absolutely crucial role in helping deter fraud and then recover money for investors.

CA: Why do you think the SEC's majority took this step? Republicans have long complained about the private bar bringing frivolous cases.

LP: That's a good question. You might have to ask them....We've recovered hundreds of billions of dollars for investors. These are not frivolous cases.

CA: What do you make of Atkins' efforts to discourage, or perhaps do away with, shareholder proposals?

LP: Like a lot of things with this administration, it seems to be a remedy in search of a problem. I don't think that companies are overwhelmed by shareholder proposals.

CA: How so?

LP: A lot of companies welcome – and find value in – hearing from their investors about ways in which they could properly manage or disclose things. Various funds have really made an effort behind the scenes to encourage companies to take certain actions. And companies [may say], 'We weren't focused on that issue, but you're right.' They affirmatively change their policies or their practices or their disclosures because they recognize these things are problematic.

CA: But many executives argue that a lot of resolutions, especially those focused on social issues, aren't central to running the business. They want to see limitations.

LP: The rules were amended during the last Trump administration for shareholder proposals, in terms of what percentage of ownership you have to have when you can re-up a proposal that doesn't get a certain percentage of the vote. I think those rule changes were sufficient to drive out any potential concern there is.

CA: Neither side has been thrilled with the SEC's opaque process for reviewing proposals. It allows companies that want to exclude a measure to ask for a 'no-action' letter that protects them from an enforcement action. What are your thoughts?

LP: There are modifications that could be made to the no-action process. It's not exactly clear how it operates, and what the impact of a no-action letter is outside of the company that is seeking...relief. But that is a regulatory efficiency question, versus should the SEC be in the business of commenting on these proposals. And I think certainly they should be. They're supposed to be assessing whether something is in

compliance with the law, whether it is good for the market, good for investors – or problematic. That is part of its obligation as a regulator.

CA: Separately, but related, the SEC just this week said that it won't weigh-in on shareholder proposals this proxy season. The announcement took many by surprise. This is the kind of shift that should be put forth in a rulemaking?

LP: At a minimum, they should be asking for comment...You're talking about radically changing how the SEC does business, and how companies do business.

CA: Generally speaking, corporations don't love this process. But they are familiar with it and it's cheaper than having to resolve these questions in court. How supportive do you think they are?

LP: If I were advising companies – and I actually do represent companies in a couple of cases – I would not be particularly thrilled about this...You want to know, is it okay for me to do this? Is this in compliance with the law? Not having that ability to [have a] dialogue with the SEC, I think is really problematic for a company, too.

CA: But why isn't the business community speaking out?

LP: I'm not sure I agree...There are a number of memorandums out there from big law firms talking about the problems with forced arbitration, for example. I have a lot of conversations with Big Law attorneys, talking about how they feel about these proposals and [asking], what are their clients saying? They pretty uniformly say they don't want this. I don't know that these entities are clamoring for this or happy about this. [If they were], I think we would see a lot more outspokenness in support of the changes.

CA: Investor advocates have started to mount a campaign against these initiatives, and recently more than 60 pension funds and state officials wrote to the SEC demanding to rescind the policy statement on mandatory arbitration. Is there more to come?

LP: There is a very active effort to tell folks [about what is happening]. I don't think we're going to convince Chair Atkins to do anything differently, although the letter go to him. But they're [also] public. You have \$8 trillion in [assets under manager telling the markets publicly, 'We don't want this.' It's everyone from the New York State Common Retirement Fund down to a small institution. It's organizations like [the Council of Institutional Investors] and [the International Corporate Governance Network] – all these entities that are umbrellas for lots of big money. That is going to be a big part of the pushback.

CA: How do you get companies involved?

LP: We have to educate issuers about the real risk of this. [Don't] discount how much investors care about these issues. They are pretty fired up, and really unhappy.

CA: As are the plaintiffs lawyers.

LP: I think something we can all agree on, on any side of the aisle, is that plaintiffs lawyers are very creative. And we don't give up...There hasn't been a company that's tried it yet with forced arbitration. If and when one does, it is going to be in for a lot of litigation and a lot of pushback. That will matter to companies. I think they will wait for that, and quickly realize this is not a path they want to go down.

CA: How about suing the SEC?

LP: They're clearly trying to do this as a policy change to avoid an [Administrative Procedure Act] challenge right away. But once they allow an issuer to go public with such a provision, it's no longer a policy. There will be litigation against the SEC as well.

CA: That, of course, is a tactic that worked very well for companies and investment firms unhappy with Gary Gensler's regulatory agenda.

LP: We are well aware of the challenges that corporations have made against the SEC in the past – and have been active on that front, by the way, ourselves during Republican administrations. I just don't know that we've ever seen an administration this hell-bent on attacking investor rights.

CA: **Caroline Crenshaw**, the sole Democrat on the SEC, has offered strong dissents to some of these governance changes. She's on an expired term and will soon be gone, leaving the commission with no opposing voices. Does that hurt your cause?

LP: That absolutely will be a shame for investors. It will be, I think, a pox on the SEC for many years. Certainly not hearing dissenting voices, not having an active dialog is a disservice to the SEC. It's a disservice to investors, and it is no doubt going to lead to poor decision-making and poor rulemaking. That has been proven many, many times in all entities, whether it's government or a corporation. Not having dissenting opinions or differing opinions leads to bad results. The SEC is not immune from that.

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Humble Pie: The CFPB may be preparing to close down, but its leaders are still finding time to antagonize the agency's employees and supporters. The bureau today announced a new policy for its supervision division: all CFPB exams must now begin with staff reading aloud a "humility pledge."

“The upcoming supervision examination cycle is going to be fundamentally different from the prior ones under the former Director [Rohit] Chopra,” the [script](#) begins. It also promises the review will “not venture into areas outside the scope” or “ask for expansive data sets or other information which may seem unrelated.” Instead, the focus will be “on pattern and practice violations of law where there is tangible and identifiable consumer harm.” For good measure, examiners will also provide contact information for senior CFPB officials “if your experience with this round of examination is inconsistent with these principles.”

A press release explained that under Chopra, “this division was the weaponized arm of the CFPB.” It also singled out former director of supervision Lorelei Salas, branding her “a former Soros activist.” (The reference wasn’t explained, but she appears to have held a [fellowship](#) funded by the Open Society Foundation.)

“Where these exams were previously done with unnecessary personnel, outrageous travel expenses and with the thuggery pervasive in prior leadership, they will now be done respectfully, promptly, professionally and under budget,” the bureau asserted.

Left unsaid, of course, is that the CFPB has been doing little exam work this year because Acting Director Russell Vought put most of the supervisors on leave. And may completely stop operations next year given Vought’s contention that the agency will run out of money in early January. (In preparation for the shutdown, the bureau also this week formally notified Congress of the potential funding lapse and moved to transfer its pending enforcement actions and litigation to the Justice Department.)

One More Thing: The bizarre supervision announcement may not have even been the most unusual CFPB news this week. That award goes to the White House’s nomination of a marine ecologist PhD (and Vought OMB aide) to be the next director. The move, as the administration acknowledged, was a gambit that allows Vought more time to serve on an acting basis under the Federal Vacancies Reform Act. It’s an unprecedented action, at least according to one expert.

“I know of no example where an administration submitted a nomination solely for the purpose of extending the Vacancies Act’s clock,” says Stanford Law professor **Anne Joseph O’Connell**. Past presidents, she concedes, have made nominations knowing that an acting appointment would soon expire, “but they wanted those nominees to be confirmed as agency leaders.”

The Senate, if it didn’t want to be part of the ruse, could send the nomination back to the White House, O’Connell notes. A Banking Committee spokesman didn’t respond to a request for comment on the nomination.

Capital Moves: Regulators are set to finalize a rule next week that’s been high up on the list of priorities for big banks, dialing back the supplementary leverage ratio. The capital adjustment has been pushed by Treasury Secretary **Scott Bessent**, who sees it as a way to keep the largest lenders active in the market for U.S. government bonds.

Sources say they expect the final rule to track the proposal, without any major revisions. That means the minimum leverage ratio will be lowered at each firm’s holding company level as well as at their FDIC-insured bank subsidiaries. Officials have said the plan won’t lead to significantly lower capital in the system overall.

The final rule isn’t expected to exclude Treasury securities from the calculation of the ratio, as banks had preferred. Instead, it seeks to reduce each firm’s minimum required capital as a percentage of all assets, including Treasuries. The FDIC board will meet on Tuesday to vote, while the Fed and OCC are expected to adopt it separately.

The FDIC’s agenda also includes a capital proposal focused on smaller firms. The proposal is expected to loosen the so-called community bank leverage ratio, a simple but voluntary regime for local lenders. Regulators are hoping to entice more banks to adopt it.

Next Week:

- On Monday at 10:00 a.m. Acting FDIC Chairman **Travis Hill** presents the quarterly banking profile and holds a press conference.
- On Tuesday at 10:00 a.m., the FDIC board meets to vote on the enhanced supplementary leverage ratio rule and the community bank leverage ratio.