Committee on Banking, Housing, and Urban Affairs
Nomination of Mr. Jay Clayton
March 23, 2017

Questions for the Nomination of Mr. Jay Clayton to be a Member of the Securities and Exchange Commission, from Ranking Member Sherrod Brown:

Question 1.

Chair White expanded SEC policy to seek admissions from defendants in enforcement proceedings. Under her leadership, she required enforcement staff to seek admissions in a larger universe of cases.

In your view, did Chair White's admissions policy go far enough? What changes would you need to make in order for the SEC to start seeking admissions from all, or more, defendants in enforcement actions?

I have a great deal of respect for Chair White, and, accordingly, if confirmed, I will be mindful of her comments regarding the SEC, particularly in the enforcement area. I also agree that pursuing admissions from defendants in enforcement proceedings should be a key consideration for the Commission. As I stated at my nomination hearing, I strongly believe in the deterrent effect of enforcement proceedings that include individual accountability. However, I also understand the SEC's interest in avoiding, where appropriate, drawn-out proceedings that strain the staff's resources and lengthen the time it would take for resolution, including for investors to receive restitution. I believe each matter should be decided based on its own facts and circumstances, including analysis of whether the added deterrent effect of securing admissions will be offset by other relevant factors. It would be premature for me to make a general policy recommendation in this regard without the benefit of consulting with the staff and my fellow Commissioners.

Question 2.

In 2009, under Chair Schapiro, the SEC's Enforcement Division was empowered to pursue investigations without a Commission vote. Chair White expanded some of those powers. In February, however, Acting Chair Piwowar withdrew those powers authority from senior Enforcement Division staff.

Do you commit to restoring those powers to the senior enforcement staff, or even expanding them? If not, how does limiting the authority of the enforcement staff help you attract the best prosecutors?

During your confirmation hearing, you stated "I have zero tolerance for bad actors. I'm not only saying that here, I will say it to the enforcement staff at the SEC."

Do you believe the Enforcement Division will be able to achieve a "zero tolerance" policy if investigatory powers continue to be limited?

In my view, a key element of effective management is empowerment. I believe most people do their best work if they have clarity on their objectives and sufficient autonomy and support to pursue them. I also believe effective empowerment and functioning of the

Enforcement Division are very important to the fair and efficient functioning of our markets and the protection of investors. I am also mindful that even the commencement of an investigation can have significant adverse impacts on respondents, particularly public companies and their shareholders. If confirmed, I am committed to consulting with my fellow Commissioners and the senior members of the Enforcement Division staff on organizational matters, including the appropriate and most effective delegation of authority within the Enforcement Division, including subpoena authority, and I will work to promote the effectiveness of the Division and its personnel.

Question 3.

On January 17, 2017, two days before she left the Commission, Mary Jo White gave a speech titled "The SEC after the Financial Crisis: Protecting Investors, Preserving Markets."[1] In that speech, former Chair White expressed serious concern that the SEC's independence was being compromised.

She said:

> "In short, the environment necessary for independent agencies to be able to do the jobs you all want us to do is not getting better. Indeed, recent trends have even raised the question of whether or not the independence of the SEC can be preserved at all."

Does her opinion concern you?

I have great respect for Chair White. Independence is fundamental to the tri-partite mission of the SEC. If confirmed, I will be mindful of protecting the Commission's independence, and I believe that focusing on its core tri-partite mission should facilitate that objective.

In that speech, Chair White also cited a bill[2] that passed the House of Representatives this January that imposes additional cost-benefit analysis on the SEC.

In your practice you have read the very detailed, often hundreds of pages long rules issued in recent years by the SEC that contain extensive economic analysis. In what ways have you found them to be deficient?

I believe economic analysis – including assessing the expected relevant costs as well as the relevant benefits of a proposed regulation – is an integral part of the rulemaking process. In my experience, in most cases, the initial analysis is reasonably designed, but history has shown that, over time, rules can have wide-ranging effects, and that those effects can be under- or over-estimated at the time a rule is initially adopted, or even missed entirely.

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[1] https://www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html

[2] SEC Regulatory Accountability Act, H.R. 78, *available at* https://www.congress.gov/115/bills/hr78/BILLS-115hr78eh.pdf.

History also has shown that recurring costs, including compliance costs, often grow faster than expected, including because yesterday's "state of the art" becomes today's expectation. As the market changes, which it inevitably does, the divergence between expectations and reality can grow over time; accordingly, a rule that may have seemed reasonable from an economic perspective at the time it was adopted may later be viewed differently. For this reason, I believe retrospective review can be appropriate and important, and certain rules may merit re-evaluation over time.

Question 4.

During the financial crisis, you saw first-hand banks that were on the verge of collapse or that that failed.

Did the incentive system lead to excessive risk-taking? Have we learned any lessons from those excesses? What would have happened if the Treasury and Federal Reserve were not able to step in either with the TARP program or federal backstops? Where can the SEC do more to improve financial stability and support the other financial regulators?

I believe a number of factors contributed to the financial crisis, some of which were also hallmarks of past crises such as new, more risky forms of credit that, in the end, had various unforeseen detrimental effects on our market, including driving a bubble in asset prices. I also agree that misguided incentive compensation programs can contribute to excessive risk taking. We should remain mindful of those and other factors as we monitor our capital markets. I cannot speculate on what would have happened if the Treasury and Federal Reserve had acted differently.

The SEC has an important role in safeguarding the stability of our securities and capital markets and coordinating with other financial regulators, including, without limitation, in monitoring the compliance of broker-dealers with capital and other requirements. Another more general way the SEC can do this is through effective pursuit of its tri-partite mission, including promoting fair and efficient markets that are well understood by market participants and others who depend on those markets.

Question 5.

In 2009, the SEC amended Item 407 of Regulation S-K to require companies to disclose in proxy statements whether a nominating committee considers diversity in identifying nominees for the company's board of directors and, if it is considered, how it is considered. The rule also requires that if the company has a policy with regard to the consideration of diversity in identifying director nominees, how that policy is implemented and how its effectiveness is assessed.

In 2015, several leading public fund administrators submitted a petition for rulemaking that would require new disclosures related to nominees for board seats in order to provide investors with the information they need to make informed voting decisions. In a July 2016 speech, former Chair White recognized the importance of diversity on corporate boards and the interest

investors have in diversity disclosure about board members and nominees.[3] She further added that the SEC's 2009 rule change had resulted in vague reporting and investors were not satisfied with the disclosures.[4] Accordingly, she directed SEC staff to review the rule and prepare a recommendation to propose an amended rule to require companies to include more meaningful board diversity disclosure on their board members and nominees.[5]

In February 2017, the SEC's Advisory Committee on Small and Emerging Companies (ACSEC) submitted the following recommendation regarding corporate board diversity disclosure to the Commission:

> The Commission amend Item 407(c)(2) of Regulation S-K to require issuers to describe, in addition to their policy with respect to diversity, if any, the extent to which their boards are diverse. While, generally, the definition of diversity should be up to each issuer, issuers should include disclosure regarding race, gender, and ethnicity of each member/nominee as self-identified by the individual.[6]

If confirmed, will you continue former Chair White's efforts to enhance diversity disclosure for board nominees and work to advance rulemaking based on the recommendation from the ACSEC?

I believe diversity has value, including at public companies and their boards. I have witnessed this first hand and I know that many experienced investors share this view. I understand that there has been meaningful and ongoing engagement on this issue between companies and their shareholders, including institutional investors, and that disclosure practices are evolving as a result. If confirmed, I will work with my fellow Commissioners, the staff (including the Office of Minority and Women Inclusion) and the ACSEC to monitor this issue and compliance with Item 407 of Regulation S-K.

Question 6.

In February 2016, a group of Chinese investors led by the Chongqing Casin Enterprise Group announced its intention to acquire the Chicago Stock Exchange (CHX).

If confirmed, will you commit to review the CHX acquisition for compliance with SEC rules and requirements, in particular with respect to limits applicable to beneficial ownership and voting rights?

It would not be appropriate for me to comment on a specific pending proposal. If confirmed, one of my goals will be to hold non-U.S. acquirers to the same standards as U.S. acquirers, including disclosure standards. If confirmed, I will work with the staff and my

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[3] https://www.sec.gov/news/speech/chair-white-icgn-speech.html

[4] *Id.*

[5] *Id.*

[6] https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-021617-coporate-board-diversity.pdf

fellow Commissioners to review this and any other proposal for consistency with the standards set forth in our securities laws.

Question 7.

During your confirmation hearing you stated, "[w]e have to have reduce the burdens of becoming a public company, so that it's more attractive." Additionally, you stated, "[f]or a variety of reasons, including very robust private capital markets, but also the costs of going public, the choice to go public here is a very hard one." Please detail the "variety of reasons" other than costs or regulations that you believe discourage companies from going public and describe whether those factors will have less impact if costs or regulations are reduced.

In my experience, a number of factors may discourage a private company from becoming a public company, including but not limited to various immediate one-time costs and ongoing incremental costs compared with remaining a private company. We should examine whether these costs can be addressed so that more companies choose to go public without lessening, and with an eye toward enhancing, investor protection. Audited financial statements form a key basis of our disclosure regime and, along with clear disclosure of the issuer's business and financial condition, are a fundamental and important aspect of our investor protection framework. In addition to the cost of preparing such financial statements and important financial and business disclosures, today, companies that transition to public status must also establish and maintain a system of reporting and compliance controls and procedures, and comply with various additional ongoing disclosure, compliance and other requirements that comparable, well-run private companies may determine are not in the best interests of shareholders. Other significant incremental costs typically include those relating to the retention of internal and outside professionals and advisors, including auditors, accountants, attorneys, investor relations personnel and others. Companies preparing to go public also often need to retain additional experienced executives and board members and, relatedly, secure substantially increased insurance coverage.

In my experience, certain companies view the operational and other pressures inherent in quarterly earnings as costly, including because they detract from long-term planning and strategic initiatives. In addition, companies considering going public must consider, and in my experience put substantial weight on, the greater risk and potential costs, including the diversion of management attention, associated with the risk of public and private litigation and regulatory proceedings.

Many of these costs go beyond out-of-pocket costs and the direct costs of regulation and are more "fixed" than variable and, as a result, may in some circumstances, have a greater effect on smaller and medium-sized companies as compared with "large cap" companies.

I believe we should be examining this situation with an eye toward identifying less burdensome means to achieving effective regulation of newly public companies. We should

encourage well-run companies to participate in our public capital markets, while always being mindful of investor protection.

The JOBS Act amended the Securities Act of 1933 to facilitate initial public offerings (IPOs) and the Securities Exchange Act of 1934 to expand the number of security holders a private company may have without registering with the SEC. Previously, companies would consider an IPO as they approached the old limit of 500 investors – notably Google in 2004 and Facebook in 2012. To what extent did the JOBS Act's expansion of the allowable number of security holders at private companies negatively impact the number of IPOs?

The JOBS Act did expand the allowable number of security holders at private companies. However, at this time I cannot state for certain its significance in the decision of whether or not to become a public company.

Question 8.

Which specific regulations do you believe are hindering IPOs? How may they be revised in ways that do not weaken investor protection?

I believe the disclosure-based regulatory framework governing our public markets and companies has been and remains very important – for example, I believe in the value of well-prepared SEC registration statements and Exchange Act reports. In connection with efforts to encourage more well-run companies to access the public capital markets, as an example, an avenue I would consider exploring is comparing the reporting and control environments at respected private companies with public company requirements and practices. If confirmed, I look forward to working with my fellow Commissioners and the staff, and consulting with market participants, regarding such an exercise or other means through which we can identify measures that will facilitate access to our public markets while maintaining or enhancing protections for investors.

Question 9.

If regulations are rolled back in the hopes of promoting more IPOs, what are the measures by which you would determine or define success? Specifically, is success achieved by increasing the number of IPOs in a year? What if IPOs increase, but more companies delist anyway, resulting in a decrease in the aggregate number of listed companies?

The focus on increasing the attractiveness of our public capital markets is driven by the three-part mandate of the Commission. I believe our public equity markets have, over time, proven to be an efficient and fair means for investors, particularly Main Street investors, to participate in the growth of the American economy. Success should be defined by whether the Commission is addressing its mandate, including whether Main Street investors have efficient means to participate in investment opportunities with appropriate investor protection.

I also am very open to exploring other avenues to achieve this objective and, if confirmed, look forward to discussing this issue with the staff and my fellow Commissioners and this Committee.

Question 10.

According to a recent report by Credit Suisse, concurrent with the decline in IPOs since the peak in 1996, there has been substantial increase in the volume of mergers and acquisitions (M&A) activity and the assets managed by venture capital funds (nearly 7x higher) and buyout funds (over 10x higher). If IPOs increase, do you expect a commensurate decrease in M&A activity or the size of venture capital and buyout funds? If so, are IPOs preferred to M&A activity or private fund investments? If not, what would prevent such a decrease?

There are a variety of factors that drive M&A activity, both in the public and private markets, and private investment activity. It is not clear to me that there is a correlation between IPOs and M&A activity and I cannot predict the effect that an increase in IPOs would have on public M&A activity or the size of venture capital and buyout funds.

Question 11.

Among the significant differences between public and private companies are required disclosures by public companies and transferable shares that generally confer voting rights and allow input on governance matters. If the burdens of being a public company, including these, are to be reduced to encourage more IPOs, please explain how limiting either or both of these elements would be positive for transparency or shareholder rights.

I believe the disclosure-based regulatory framework governing our public markets and companies has been and remains very important and, in this regard, I believe transparency and shareholder rights have substantial value. I believe that any efforts to make our public markets more attractive to companies should take into account these fundamental principles, recognizing that many factors drive decisions around governance structures.

Question 12.

In February, I joined the other Democratic Members of the Senate Finance Committee in a letter to Chairman Hatch requesting that then Department of Health and Human Services Secretary nominee Tom Price provide accurate and complete responses regarding his answers to questions about privileged and discounted access to a private placement of stock by an Australian biomedical company. In addition, other Members of Congress questioned the numerous stock transactions by Mr. Price while he was Chairman of the House Budget Committee and a member of the House Ways & Means Subcommittee on Health. Mr. Price's financial disclosures show that he engaged in transactions involving the stock of 40 different companies in the health care sector. Given his prior positions, Mr. Price potentially had access to information that could impact the companies he invested in and that was not available to the public. Please confirm that the Division of Enforcement staff will have your full support to consider the issues raised by Mr.

Price's investments and the applicability of the STOCK Act and that all appropriate regulatory actions will be pursued.

As I noted at my nomination hearing, matters such as these are highly dependent on the facts and circumstances and it would not be appropriate for me to comment on any specific matter at this time. As a general matter, however, if confirmed, I will actively support the staff in investigating violations of the securities laws and pursuing enforcement actions and can assure you that no individual will be above the securities laws.

Question 13.

At your confirmation hearing, you agreed to provide the names of current Trump Administration officials, or its transition team, that you communicated with prior to being selected by the President as his nominee, and if you know whether any of those individuals have businesses regulated by the SEC. Accordingly, please provide that information for the record.

Based on my recollection, I communicated on a substantive basis with the following current Trump Administration officials or former transition team members prior to being selected by the President as his nominee to Chair the Commission: President Donald J. Trump, Reince Priebus, Stephen Bannon, Ambassador Martin Silverstein, Ira Greenstein, Darren Blanton, Peter Thiel, and Rebekah Mercer. While I have not specifically looked into it, I believe it is fair to presume that one or more of these individuals may be affiliated with one or more public companies or other companies that are regulated by the SEC. Also, on January 4th, after my nomination had been publicly announced, I met with Carl Icahn. On December 24th, following press reports of my meeting with then President-elect Trump earlier in the week, Mr. Icahn's office contacted me to request a meeting on a to-be-determined date. That meeting was not set until several days after I received word that I would be nominated.

Question 14.

Please describe examples of steps you plan to take to improve investor protection. How will an Ohioan saving for retirement or to send her kids to college know you are working to protect her?

Investor protection, particularly the protection of Main Street investors, is a critical element of the SEC's tri-partite mission, and it is very important to me. If confirmed, I intend to make this aspect of the SEC's mandate clear both in word and deed. I will make it clear that protection of Main Street investors is a touchstone for our rulemaking, enforcement, and other related activities.

Question 15.

The Foreign Corrupt Practices Act (FCPA) forbids U.S. companies and their subsidiaries from paying foreign government officials to obtain or retain business. What is your specific plan for enforcement of the FCPA?

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Bribery and corruption have no place in society. Moreover, they often go hand-in-hand with many other societal ills, including inequality and poverty, and have anti-competitive effects, including disadvantaging honest businesses. Accordingly, combating corruption is an important governmental mission.

U.S. authorities, including the SEC, other financial regulators, and law enforcement agencies, both at home and abroad, play an important role in combating government corruption. I believe the FCPA can be a powerful and effective means to effect this objective. I also believe that international anti-corruption efforts are much more effective at combating corruption if non-U.S. authorities are similarly committed and seek to coordinate. Fortunately, international enforcement efforts appear to be more prevalent than they were a decade ago. If confirmed, I look forward to working with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws. In particular, I believe that coordination with the Department of Justice is integral to effective enforcement of the FCPA.