



Occupy the SEC

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February 1, 2013

Hon. Tim Johnson, Chairman
Hon. Mike Crapo, Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
Washington, DC 20510

Re: Nomination Hearing of Mary Jo White for the Post of SEC Chair

Dear Chairman Johnson and Ranking Member Crapo:

The Securities and Exchange Commission (“Commission”) is a crucial agency, and the present is a crucial time in its history. The agency’s new Chair will arrive in the midst of significant regulatory and enforcement efforts that are ongoing at the Commission. Occupy the SEC¹ exhorts the Senate to only confirm a candidate who can vigorously discharge the position’s responsibilities in an effective manner, free from the taint of undue industry influence.

As a preliminary matter, we recognize that President Obama’s nominee, Mary Jo White, is an attorney with a distinguished record of prosecution. Ms. White’s early track record of successful prosecutions of terrorists, organized crime figures and others suggests an encouraging commitment to enforcement of the law.

That said, Ms. White’s more recent work as a white-collar defense attorney is troubling, particularly her extensive experience defending many of the very executives and institutions that she would now be tasked with regulating. White’s career also exemplifies the revolving door between government and industry that has done so much to undermine Americans’ confidence in our regulatory institutions.

Given these concerns, Occupy the SEC recommends that the Committee submit the following questions to Ms. White as part of her nomination hearing:

¹ Occupy the SEC (www.occupythesec.org) is a working group within the New York-based Occupy Wall Street (“OWS”) protest movement. This letter represents the opinion of the group’s members, and does not represent the viewpoints of OWS as a whole.

1. In 2008, the nominee argued against politically motivated prosecutions of senior bank executives, saying that “[p]eople doing their job in good faith should not find themselves under massive investigation.”² That statement is jarring given the fact that no senior bank executives have been prosecuted in the wake of the financial crisis. How does Ms. White propose to differentiate between “good faith” and prosecutable misconduct? Federal district court Judge Jed Rakoff pointed out in a recent interview that prosecutors’ have exhibited a reluctance to utilize the standard of ‘reckless disregard’ in bringing criminal actions against defendants in the financial services industry.³ What is the nominee’s opinion of this approach?
2. The nominee has been identified as a central figure in the Commission’s decision to drop an investigation of John Mack in a case involving allegations of insider trading by hedge fund Pequot Capital Management. According to the Senate’s investigative report into the Pequot matter, Ms. White broke with protocol by addressing her response to requests for information regarding Mr. Mack to the then-Director of Enforcement, Linda Thomsen, instead of the SEC investigator requesting the information, and also forwarded the results of her own investigation to the Director rather than to the investigator.⁴ The Senate report singles out Ms. White’s behavior for comment, noting that, “[b]y allowing the perception that ‘going over the head’ of SEC staff attorneys yields results, the SEC undermines public confidence [in] the integrity of its investigations and exacerbates the problems associated with ‘regulatory capture.’”⁵

Both the Senate report and subsequent reporting on the case⁶ have surfaced several troubling developments, each of which raises questions we would like Ms. White to address. For instance, the Senate report takes notice of the SEC’s decision to reverse course on deposing Mr. Mack shortly after Ms. White’s involvement became known. Significantly, the Senate report also identifies Peter Berger as the supervisor partially responsible for firing the first-level investigator who had insisted on deposing Mr. Mack. Mr. Berger only later acknowledged being in job discussions with Ms. White’s firm, Debevoise & Plimpton, at the time of the investigation into Mack, and did not recuse himself from the case until several months into the investigation.

We agree strongly with the authors of the Senate report that the behavior of Ms. White and her firm undermined the public’s confidence in the integrity of the SEC as an impartial regulator, and are left with several questions for the nominee:

² David Glovin & Patricia Hurtado, *Lewis Lawyer Mary Jo White Brings Credibility to Defense of CEO*, Bloomberg, Oct. 2, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a42j525ELQK4>.

³ David A. Kaplan, *Jed Rakoff: The Judge Who Rules on Business*, CNN Money, Jan. 24, 2013, <http://management.fortune.cnn.com/2013/01/24/judge-jed-rakoff/>.

⁴ Staff of Senate Comm. On Finance, 110th Cong., *The Firing of an SEC Attorney and the Investigation of Pequot Capital Management* 37 (Comm. Print 2007).

⁵ *Id.*

⁶ Matt Taibbi, *Why Isn’t Wall Street in Jail?*, Rolling Stone, Feb. 16, 2011, available at <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216>.

- Was Ms. White aware of the employment discussions between Debevoise & Plimpton and Mr. Berger during her work vetting Mr. Mack for Morgan Stanley? If so, what was her role in those discussions?
 - If not, how does she explain the appearance of impropriety stemming from the behavior of Mr. Berger and her former firm?
 - Why did Ms. White break with protocol to deal directly with Director Thomsen in this case? In Ms. White's estimation, how important was this to the SEC's decision to downplay the potential charges against Mr. Mack?
 - What specific measures will Ms. White take to ensure that "going over the head" of SEC staff attorneys" for the benefit of powerful and well-connected industry figures will no longer be tolerated at the SEC?
3. What are Ms. White's top regulatory objectives for the SEC? What are her top enforcement priorities? How does she plan to balance regulation and enforcement?
 4. How does Ms. White intend to address the SEC's priorities given its budgetary constraints?
 5. Like many, we have been alarmed by the delays and inter-agency squabbling that have marked the process of rule-making required by the Dodd-Frank Act, and particularly by the exceedingly slow implementation of the Volcker Rule. What does Ms. White propose to do to move this process forward? How does she propose to make the inter-agency rule coordination process a public one, and to limit the ability of the banking industry to capitalize on these delays by participating in the process behind closed doors?
 6. The last defense attorney with high-profile Wall Street clients chosen to head the SEC was Harvey Pitt, whose tenure was seen by many as a period of lax enforcement.⁷ What is Ms. White's assessment of Mr. Pitt's work as SEC Chair? How will her tenure differ from his?
 7. Mr. Pitt also notably recused himself from many cases brought before the Commission that involved his prior clients. In light of this history and the Obama administration's ethics pledge⁸ that Ms. White would be required to take, can she produce a list of companies the investigations of which would lead to her recusal? Moreover, how does she plan to participate in matters not covered by the ethics pledge that nevertheless relate to or stem from her prior employer or clients? In a similar vein, how does Ms. White plan to approach cases implicating clients of her husband in his capacity as a partner of law firm Cravath, Swain & Moore?

⁷ See, e.g., Staff of Senate Comm. on Gov't Aff., 107th Cong., Financial Oversight of Enron: The SEC and Private Sector Watchdogs 24 (Comm. Print 2002) ("Enron's case suggests that the SEC's largely passive interaction with companies (particularly large companies) likely led it to miss warning signs of corporate misconduct.").

⁸ Exec. Order No. 13,490, 3 C.F.R. 13,490 (2009) (prohibiting participation in "any particular matter involving specific parties that is directly and substantially related to [her] former employer or former clients, including regulations and contracts" for a two-year period from the date of appointment.).

8. One of the major pieces of potential regulation being considered by the Commission is a measure to require that public companies provide uniform disclosure of political contributions. Like many, we view such a rule as a necessary investor safeguard in the wake of the *Citizens United* ruling. Does Ms. White view enacting such a measure as a priority for the SEC?

Thank you for focusing your attention to this important matter of public concern.

Sincerely,

/s/

Occupy the SEC

Anchard Scott
Eric Taylor
Akshat Tewary
Josh Snodgrass
et al

cc: Members of the Committee