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Dissent Among SEC's Commissioners Spikes

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Since chairman William Donaldson took the helm of the SEC in early 2003, dissent has been rapidly rising among the ranks of the five SEC commissioners.

In Donaldson's tenure as chairman, there have been 44 dissenting votes on issues ranging from the independent chairman rule to the rule that created the chief compliance officer role. That compares to just 14 dissenting votes cast during former chairman Harvey Pitt's tenure, which ran from August 2001 to February 2003.

Votes that generated the most controversy include the independent chair rule and Regulation NMS.

The independent chair rule requires the chairman of each mutual fund's board of directors, as well as 75% of those directors, to be independent. It passed last summer by a narrow 3-2 margin.

Reg NMS modernizes the U.S. equity markets by making changes to requirements involving order protection, intermarket access, sub-penny pricing and market data. It passed this year by a 3-2 vote.

Despite the lack of accord, the SEC hasn't been hamstrung in its ability to adopt new regulations or fill its enforcement role in the financial services industry.

"The SEC hasn't come to a stop because of the dissent," says Ben Haskin, an attorney with **Willkie, Farr & Gallagher**. "They're still able to function. Although it's unusual to have as much dissent as they have recently, and some decisions have been controversial, I don't think they've stopped operating. That's the real test — if they're having trouble coming to decisions."

Nevertheless, the conflicting views on the commission have meant that some new regs have been adopted with additional requirements and caveats.

For example, during deliberations about the proxy voting rule in 2003, Commissioner Cynthia Glassman raised concerns about the cost to the industry of complying with the rule. Although she did approve the rule, Glassman also requested that an impact study be conducted by SEC staff to identify any unintended consequences. That review will be conducted by the SEC by the end of this year.

In April, the SEC submitted a 78-page report ordered by Congress justifying the independent chair rule.

Along with Paul Atkins, the other commissioner who dissented on the rule, Glassman simultaneously sent her own letter to Congress stating that the report just rehashed the arguments the staff had made for the rule and didn't present any compelling new arguments for it.

Glassman has been the second highest caster of dissenting votes in Chairman Donaldson's commission, accounting for 12 of the 44. Atkins, the other Republican SEC commissioner aside from moderate Donaldson, cast the most with 26.

Atkins has also been very outspoken about troublesome SEC staff practices, reciting a litany of problems in recent speeches.

In an April address to the California '40 Acts Institute, Atkins criticized the staff for increasingly making policy decisions through no-action letters instead of more comprehensive rule-making.

No-action letters are responses that the SEC staff issues to industry members seeking assurance that the regulator will not pursue enforcement action on a certain issue. They are intended to specifically address only the topic raised by the registrant but are sometimes also relied upon by other firms in similar situations.

Atkins also took issue with staff accounting guidance, which he said often has all the trappings of rulemaking but doesn't go through the public notice and comment cycle.

He further stated that the Division of Enforcement's new risk-based examination methods have led to overly long investigations and duplicative document requests.

And he voiced concerns that the new CCO rule, which requires fund chief compliance officers to proactively monitor for regulatory compliance, may lead to the penalization of companies that do notify the SEC of problems.

His speeches earlier in the year presented similar criticisms.

However, **Dechert** partner Paul Huey-Burns notes that the SEC has been inordinately busy over the past several years implementing the Sarbanes-Oxley and fund industry reform rules. So much of the dissent can be chalked up to the frantic pace of activity.

"Whenever you have an agency being as aggressive as the SEC has, differing opinions are healthy," he says.

Huey-Burns also observes that almost all of the SEC's votes to date have been unanimous. Only proposals that have demonstrated a unique approach to dealing with certain issues, he says, have resulted in more back and forth between the commissioners.

The independent chair rule, for example, required a major change in the composition of boards of directors.

Of 2,843 votes under chairman Donaldson, more than 98% have been unanimous. Under former chairman Pitt, over 99% of 1,815 votes were.

Niels Holch, a partner at law firm **McGuinness & Holch**, says that other federal and even state agencies don't operate under a unanimous consent system, so it's unrealistic to expect that the SEC would.

"It appears that over time, the SEC has tried to get a consensus vote on a lot of issues, so there haven't been a lot of 3-2 votes," he says. "But if you look elsewhere in the government, like Congress, the Supreme Court and the Federal Communications Commission, having close votes is much more common."

"I don't know why we would hold the SEC to a different standard," says Holch.

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