

Mary Jo White's record scrutinized by critics and supporters

As she enters what could be her last year as chairwoman of the SEC, experts grade her performance

By Mark Schoeff Jr. Investment News *October 4, 2015 - 12:01 am EST*

As she enters what could be her last year as chairwoman of the Securities and Exchange Commission, Mary Jo White has drawn both criticism and praise. But one thing her detractors and supporters agree on is that she has one of the toughest jobs in Washington.

“You get it from all sides, when you're sitting in Mary Jo's seat,” said David Tittsworth, counsel at Ropes & Gray and former president and chief executive of the Investment Adviser Association. “It's a brutal job. She will be criticized no matter what she does on any issue. It's a no-win proposition at some point.”

Since she took over the agency in April 2013, the former federal prosecutor has had to write dozens of rules mandated by the Dodd-Frank financial reform law, respond to market disruptions, beg for appropriations from a stingy Congress, fend off attacks from the political left for being too close to Wall Street and steer a commission that is more politically divided than ever before.

Ms. White is seen as a smart, tough leader but one who has failed to bend the agency to her will or put her signature on the vast bureaucracy with more than 4,000 employees. Based on several interviews with securities lawyers, former agency officials and consumer advocates, Ms. White's grade, on a curve, comes out to a “B.”

Once the U.S. attorney for the Southern District of New York, where she jailed terrorists and Wall Street crooks, Ms. White has put an emphasis on the SEC's

enforcement activities. She gets credit for instituting a new policy of forcing firms to admit wrongdoing in certain cases, a shift from a previous agency practice of letting them settle without admitting or denying culpability. Since the new practice was implemented in June 2013, the SEC has obtained admissions of guilt in 31 cases. They have come from 16 individuals and 30 firms.

But critics say that the agency is not forcing admissions of guilt often enough and enforcement statistics have been fudged.

For example, Ms. White was the target of scathing attack in June by Sen. Elizabeth Warren, D-Mass., who asserted that Ms. White had forced admissions of guilt in too few cases and too often gave waivers to companies that violated securities laws, among other charges. A year after the policy was implemented records showed that in 520 cases, the SEC required admissions of guilt in only 19 cases — less than 4%, Ms. Warren said.

“You have now been SEC chair for over two years, and to date, your leadership of the commission has been extremely disappointing,” the senator wrote in a June 2 letter to Ms. White. “You have not been the strong leader that many hoped for — and that you promised to be.”

The agency has always trumpeted its enforcement statistics. During her tenure, it has brought more than 1,800 enforcement cases, including a record 755 in fiscal 2014 that produced a record \$4.1 billion in penalties and disgorgements.

But a recent study by Urska Velikonja, an associate professor of law at Emory University, asserts that the SEC “double and triple counts many of its cases and overstates the fines it orders. Enforcement has remained steady since 2002, and shifted ... towards easier-to-prosecute strict-liability violations.”

The SEC disputes the study's findings and stresses that enforcement penalties rose from \$101 million in 2002 to \$1.37 billion in 2014.

“We have consistently and transparently reported our enforcement numbers for years, but as we have emphasized, first and foremost is the quality of our cases, which span the securities industry, include first-of-their-kind actions, aggressive use of industry and other types of bars and demonstrate successful pursuit of wrongdoers,” Andrew Ceresney, director of the SEC Enforcement Division, said in a statement.

Individual assessments range widely. One of her biggest fans is someone who knows firsthand what's it's like to run the agency.

Harvey Pitt, SEC chairman from 2001-03, said that Ms. White has given enforcement activity “a new, shall we say, 'oomph,' which is a very specific legal term.”

But an investor advocate said that the SEC under Ms. White has lagged in looking out for clients of investment advisers and brokers.

“It's hard to point to much that really prioritizes retail investor protection,” said Barbara Roper, director of investor protection at the Consumer Federation of America.

But Elisse Walter, who was an SEC commissioner under Ms. White's predecessor, Mary Schapiro, and chairman for a four-month period, said that everything the SEC does touches in part on investor protection. For instance, a rule not seen as directly relating to investors — the agency's mandating of technological standards for markets — can ensure markets work better for investors.

“The notion that Mary Jo has not done enough on investor protection is laughable,” Ms. Walter said.

Stung by the criticism from Ms. Warren, the SEC has stepped up its effort to tell its own story. The agency recently posted on its website a nine-page outline covering Ms. White's tenure entitled “SEC Accomplishments: April 2013-August 2015.”

It lists 20 rules that have been adopted on her watch and another 14 that have been proposed. Among those finalized include measures that overhaul money market funds, ease capital-raising rules for small companies, allow public advertising of unregistered securities, strengthen broker-dealer custody and reform credit-rating agencies and the asset-backed securities market.

Niels Holch, founder of the Coalition of Mutual Fund Investors, praises Ms. White for addressing many issues at once in a “workmanlike way” rather than taking them one at a time.

For instance, as the SEC plows through 94 mandated Dodd-Frank rules — completing 62 so far, according to an analysis by Davis Polk & Wardwell — it also recently proposed a series of rules designed to increase transparency and liquidity for asset managers.

“It takes longer to get things done, but if you look at her entire record, she's accomplished a lot,” Mr. Holch said.

But it is work that's been left undone that sometimes draws the most criticism.

Before the SEC finalized a rule in the fall of 2013 that allowed public advertising of unregistered securities offerings, the SEC Investor Advisory Committee recommended it also pass related investor protections. Instead, those were offered in a separate rule that was proposed but has not been revisited.

“It's sitting on the sidelines, right where we said it would be,” Ms. Roper said.

The SEC also continues to deliberate, without noticeable progress, on a rule that would raise investment advice standards for brokers by requiring all retail advice be in the best interests of the client.

The Dodd-Frank law gave the SEC the authority to promulgate a so-called uniform fiduciary duty rule. In the five years since the measure was enacted, the SEC has been overtaken on the topic by the Labor Department, which in April proposed a similar standard for advice involving 401(k) and individual retirement accounts.

The SEC stalling on fiduciary duty started long before Ms. White took the reins. She spent months learning the nuances of the issue and did not reveal her own support for such a rule until March, after the DOL had acted.

On fiduciary duty, Ms. White failed to get the agency to catch up, according to Mercer Bullard, a professor of law at the University of Mississippi and founder of Fund Democracy.

“You cannot become a master of every detail before you make a decision,” Mr. Bullard said. “She, like her predecessor [Ms. Schapiro], ignored the DOL's inexorable march to proposing a fiduciary duty for broker-dealers under [federal retirement law]. It's too late; the horse is way too far out of the barn.”

Fiduciary duty is one of many issues that splits the commission. The two Republican members, Daniel Gallagher Jr., who left the agency Oct. 2, and Michael Piwovar, have expressed opposition to such a rule. One Democratic commissioner, Luis Aguilar, is in favor and the other, Kara Stein, has not expressed a definitive position.

Mr. Bullard said that Ms. White gives too much deference to reaching consensus.

“She could adopt a rule very quickly with the other two Democrats,” Mr. Bullard said. “She doesn't want to make unpopular decisions. If it's controversial, I don't think anything will happen.”

Since the passage of Dodd-Frank, congressional partisanship increasingly has been focused on the SEC. Ms. Stein and Mr. Piwovar are both former aides to the Senate Banking Committee who brought an understanding of Capitol Hill policy and politics to the agency.

“She meets with all the commissioners regularly; that's important,” said a former agency official who asked not to be identified in order to speak freely about its inner workings. “She got dealt a pretty tough hand. She's managed it as well as she can.”

Ms. White's failure to control internal political forces diminishes the regulator, according to Scott Kimpel, a partner at Hunton & Williams.

“When you have four commissioners going their own way and airing grievances in public, it suggests she's lost some control over the agency's agenda and some control over the decorum that has historically prevailed,” said Mr. Kimpel, who served as a counsel for former SEC member Troy Paredes. “It erodes the legitimacy of the agency.”

The SEC soon will have to acclimate to two new commissioners. Mr. Gallagher has already departed and Mr. Aguilar is headed out the door. Their replacements could deepen the political divisions that Ms. White must bridge.

“Every time one commissioner changes, the character of the commission changes,” Ms. Walter said. “It's hard to know what the impact will be.”