

WILLIAMS & JENSEN, PLLC

CONGRESSIONAL HEARING REPORT

DATE OF HEARING: March 15, 2016
SUBJECT: “Pending Nominations”
COMMITTEE: Senate Banking
STAFF MEMBER COVERING HEARING: Rebecca Konst

Members Present

Republicans: Chairman Richard Shelby (AL); Senator Dean Heller (NV); Senator Tim Scott (SC); Senator Tom Cotton (AR); Senator Mike Rounds (SD)

Democrats: Ranking Member Sherrod Brown (OH); Senator Jack Reed (RI); Senator Charles Schumer (NY); Senator Robert Menendez (NJ); Senator Jeff Merkley (OR); Senator Elizabeth Warren (MA); Senator Joe Donnelly (IN)

Witness

[Mr. Matthew Rhett Jeppson](#), to be Director of the United States Mint
[Ms. Lisa M. Fairfax](#), to be a Member of the Securities and Exchange Commission
[Ms. Hester Maria Peirce](#), to be a Member of the Securities and Exchange Commission

Overview

On March 15, the Senate Banking Committee held a [hearing](#) on the nominations of Lisa Fairfax to be a Commissioner of the Securities and Exchange Commission (SEC), Hester Peirce to be a Commissioner of the SEC, and Matthew Jeppson to be Director of the U.S. Mint.

Topics discussed in the hearing included: (1) Regulatory Review/ Economic Analysis; (2) SEC Enforcement; (3) Nomination; (4) Mint Production; (5) Dodd-Frank Act Rulemaking; (6) Settlements; (7) Corporate Governance; (8) Risk Management; (9) Mint Staffing; (10) Experience; (11) Data Driven Rulemakings; (12) Fiduciary Duty; (13) Corporate Political Spending; (14) FINRA; (15) Stock Buybacks; (16) Regulatory Reform; (17) Diversity; (18) PCAOB; and (19) Volcker Rule.

Member Statements

Chairman Richard Shelby (R-AL) in a [statement](#) noted that this panel of nominees, if confirmed, will have important responsibilities for the manufacturing and distribution of currency, as well as for overseeing the nation’s capital markets. **Shelby** stated last week the Committee voted to report out Adam Szubin to be the Under Secretary of Terrorism and Crimes at the Treasury Department. He noted there are nineteen nominations and seven privileged nominations pending before the Committee. He noted a markup has been scheduled for April 7 to consider several nominees, possibly those before the Committee today. He explained he has excluded today’s nominations from the notice for the April 7 markup at the request of the Ranking Member. **Shelby** noted he will not be considering the Federal Reserve nominations until a Vice Chairman for Supervision is nominated

as required by the Dodd-Frank Act (DFA). He stated this position should have been filled long ago and the President should fulfill the law.

Ranking Member Sherrod Brown (D-OH) in a [statement](#) explained that government is only as good as the people who are entrusted with positions of leadership. He expressed frustration with this Committee's failure to act on many nominees for whom they are responsible. He noted the Committee has received 19 nominations over the past 15 months and acted on only one, and that one nomination vote was only days ago. **Brown** stated no other Senate Committee failed to act on a nominee last year. He suggested this failure to act is not normal practice. He noted minority's website includes [spreadsheets](#) of the actions of the committee and the Senate on nominees over the past 15 years. **Brown** explained the lowest share of nominees reported by the Committee was 81 percent in part because 3 nominees arrived in late November of that particular year. He stated the Committee's record to date is 26 percent. He noted the lowest rate of confirmation of nominees was 80 percent, yet this Committee's current record is zero. **Brown** urged the Committee to make progress on all nominees pending before the Committee, not just the nominees who are before the Committee today, but those who have been in limbo for 200, 400 or even 900 days. He acknowledged there are disagreements with President Obama's policies; however, he noted President Obama was elected twice and has the right to put well-qualified people in executive positions to carry out his policies and to enforce the law. **Brown** suggested it would be a mistake to adopt a wholesale policy of holding staff hostage for supporting the views of their boss.

Witness Testimony

Mr. Matthew Rhett Jeppson, to be Director of the United States Mint, stated since January he has served as Deputy Director of the U.S. Mint. He explained he has worked at the Veterans Administration and the Small Business Administration. He stated the modern U.S. Mint is a "lean and vibrant" agency. **Jeppson** stated in 2016 cash remains the most common means for commerce. He pledged to uphold the trust placed in him by Congress and the President.

Ms. Lisa M. Fairfax, to be a Member of the Securities and Exchange Commission, expressed her deep belief in robust markets and the SEC's three part mission. She stated over the last fifteen years she has taught corporation and securities law. She stated her research and work has taught her the importance of engaging diverse viewpoints when tackling problems. **Fairfax** stated the SEC's work must ensure that investors are protected at all times and have confidence in the markets. She explained the SEC has a responsibility to maintain orderly, fair, and efficient markets and there needs to be penalties for those who abuse them.

Ms. Hester Maria Peirce, to be a Member of the Securities and Exchange Commission, stated her desire to serve the SEC comes from a belief that vibrant capital markets should serve investors. She noted she served at the SEC and on the Senate Banking Committee staff. **Peirce** stated she has learned a lot from her time at the Mercatus Center and as a member of the Investor Advisory Committee.

Question and Answer

Regulatory Review/ Economic Analysis

Chairman Richard Shelby (R-AL) stated the U.S. capital markets are the envy of the world and to ensure that remains the case everything should be done to reduce regulatory burdens. He stated

regulators should review regulations and streamline where necessary. He asked how important regulatory reviews are and whether economic analysis is necessary. **Hester Peirce (to be a Member of the SEC)** stated economic analysis is an important tool. She stated regulators can use it to look at problems and anticipate unintended consequences. She noted the importance of setting out metrics to see if the regulation is successful. She stated it is always important to see if rules are working as intended. She noted the need to review the equity market structure to see it is working properly. **Lisa Fairfax (to be a Member of the SEC)** stated economic analysis is very important. She stated regulators need to make sure they understand the costs and benefits. **Fairfax** agreed about the importance of retrospective review as well. She noted things change in the regulatory environment and sometimes rules will create unintended consequences.

Senator Dean Heller (R-NV) asked about a regulation where the costs could outweigh the benefits. **Peirce** stated many DFA regulations raise questions about that. She noted concern over the Conflict Minerals rule and the fact that it is outside the SEC's expertise. She stated there have been concerns raised that the costs far outweigh the benefits. **Fairfax** stated cost-benefit analysis is extremely important. She stated she cannot pinpoint an exact regulation because she has not heard all of the information about the regulations.

Senator Jack Reed (D-RI) asked whether the SEC has the authority to gather the costs of regulations from companies. **Peirce** stated the Paperwork Reduction Act limits the ability of the SEC to go to more than nine companies. She noted the SEC gets around that by asking for comments with data. She stated any cost-benefit analysis has to have assumptions and the SEC needs to lay out where assumptions are made. **Reed** stated some could withhold data until after the rule is promulgated. He stated they need to be careful when pursuing this approach. He noted the challenge of quantifying social benefit.

SEC Enforcement

Chairman Richard Shelby (R-AL) stated enforcing the law is important to maintain investor confidence. He stated while the SEC does not have criminal authority it does have civil authority. He asked about the SEC's enforcement program. **Peirce** stated the SEC's enforcement program is an important part of what the SEC does. She stated most companies want to comply but the enforcement program is necessary for those who do not. She stated the SEC has a tremendous staff of enforcement attorneys and their role is to pursue wrongdoers. She stated it is usually easier to go after corporations rather than individuals. However, she stated it is important to press forward and charge individuals. **Fairfax** stated enforcement is a priority. She stated accountability for individuals and corporations is very important.

Nomination

Chairman Richard Shelby (R-AL) asked whether the nominees were asked to support initiatives in order to be nominated. **Peirce** stated she was only asked to fulfil the mandate of the SEC. **Fairfax** stated she was not asked that question.

Mint Production

Chairman Richard Shelby (R-AL) asked how the Mint's production needs to shift given online and card payments. **Matthew Jeppson (to be Director of the U.S. Mint)** stated since 2009 there

has been an increased use of coins. He noted the decrease in collectable coins but that has increased some in recent months.

Dodd-Frank Act Rulemakings

Ranking Member Sherrod Brown (D-OH) noted the rules needed to complete implementation of the DFA. He asked whether the nominees are committed to prompt completion the DFA rulemakings. **Peirce** stated she is committed to working on carrying out the DFA agenda. However, she noted the SEC Chair controls the agenda. **Fairfax** stated completing the DFA agenda is important.

Senator Elizabeth Warren (D-MA) stated the job of an SEC Commissioner is to be a watch dog. She noted under the DFA the SEC was directed to write dozens of new rules. She noted Peirce's criticism of the DFA including the Volcker Rule. **Warren** noted Peirce has stated the SEC's mandates need to be "trimmed" and called several mandates "pointless." **Warren** stated Peirce seems to be calling for less regulation and oversight of big banks. She asked whether Peirce should be put in charge of enforcing rules which she feels are "pointless." **Peirce** stated those comments were written in the context of an academic researcher attempting to propose a structure which would work better. She noted she was a regulator for eight years and that her time on the Senate Banking staff taught her the importance of regulators following what Congress directs. She noted as a regulator she does have a responsibility to point out issues.

Senator Elizabeth Warren (D-MA) stated an SEC Commissioner has a lot of tools to "water down" Congressional mandates. She stated there is not a lot Congress can do to stop that once Peirce is confirmed. She noted following a Court ruling that the SEC needs to comply with Congressional mandates, Peirce tweeted that the SEC should simply not act. **Warren** asked if an SEC rule does not fit into Peirce's view would she do everything in her power to not implement it. **Peirce** stated sometime delay is necessary to best implement rules. She stated that if confirmed, her goal would be to find the most effective way to implement the congressional mandates. **Warren** stated there is a big difference between disagreeing about the law and refusing to implement that law. She raised concerns over Peirce's nomination.

Senator Jeff Merkley (D-OR) noted concern over the DFA rules not being finalized. He noted the conflict of interest provision in the DFA. He asked whether it is appropriate the SEC has failed to address this conflict of interest. **Fairfax** stated it is important to enact the mandates under the SEC. She agreed that the SEC needs to follow the law and work to comply with the time commitments under the law. **Peirce** stated the SEC should comply with the law. She stated the SEC agrees that this is a miss but she noted the competition for rulemaking resources. She added that the SEC must adhere to the Administrative Procedure Act, which can take time.

Settlements

Ranking Member Sherrod Brown (D-OH) stated the SEC's enforcement record shows the vast majority of cases are settled, many with repeat offenders. He asked how settlements with admissions of guilt can be achieved. **Peirce** stated settlements without "admit or deny" has become the norm. She stated a settlement is stronger if there is an admission of wrongdoing. She noted those might be more costly. However, she stated it may be worth taking the extra resources to get an admission of wrongdoing.

Corporate Governance

Ranking Member Sherrod Brown (D-OH) asked what elements of corporate governance promotes better actions. **Fairfax** stated those at the top need to be able to listen to an array of objectives. She stated there needs to be a commitment to a particular responsibility.

Senator Jack Reed (D-RI) noted the importance of shareholder protection. He noted a number of issues arising such as cybersecurity, climate change, political spending. He asked for a top objective with respect to investor/shareholder protection. **Fairfax** stated investor protection is extremely important and a critical aspect of the SEC's mission. She stated everything the SEC does should relate to investor protection. She stated investors cannot be protected if there are not fair, orderly and efficient markets. She noted issues related to corporate disclosure are very important. **Fairfax** noted the importance of investors receiving proper information, adding that corporate governance issues are important. **Peirce** stated investor protection is important across the board. She noted positive changes should be seen from the disclosure effectiveness review. She noted a proposal from the Investor Advisory Committee which should be considered.

Senator Mike Rounds (R-SD) noted the amicus brief Fairfax signed in the Trinity Church case against Walmart. He asked whether it is reasonable to consider the sale of guns by Walmart as offensive. **Fairfax** stated signing that brief was not a signal about her position underlying that brief. She stated it was aimed about the larger corporate governance issue and shareholder proposals. She explained it is very important for boards to have the ability to determine the significant issues that impact the company's "bottom line." She stated in this case she was interested in the shareholder rights.

Senator Mike Rounds (R-SD) noted an amicus brief signed in the Hobby Lobby case. He stated that brief seemed in conflict with the Walmart case. He asked why it is appropriate for Walmart to control gun sales yet Hobby Lobby cannot control their religious beliefs. **Fairfax** stated in the Hobby Lobby case her concern was over the structure of the company. She stated there needs to be a separate entity from the family unit. She stated this was again a corporate governance issue.

Risk Management

Ranking Member Sherrod Brown (D-OH) noted documents were released about the financial crisis which showed lapses in monitoring risks. He asked whether improvements in risk management could have happened without change in law. **Peirce** stated a change in the structure was necessary. She stated the incentives from regulations were wrong leading up to the crisis. She stated changes were necessary but she noted concern that some of the changes will not lead to more personal responsibility but to outsourcing responsibility to regulators. She stated they need to ensure regulations are working and if not adjust them.

Mint Staffing

Ranking Member Sherrod Brown (D-OH) asked about skills gaps at the Mint and how they will address staffing and training challenges. **Jeppson** stated the Mint has an aging workforce. He noted the Mint has created a new training initiative as well as targeted outreach for recruiting.

Experience

Senator Dean Heller (R-NV) noted concern that private sector experience is being overlooked at the SEC. He asked what experience the nominees have with securities law. **Peirce** stated she worked at a law firm in DC which focused on securities law. She noted she worked at the SEC for eight years then on the Senate Banking Committee. **Fairfax** stated she worked at a law firm focused on corporate and securities work. She stated she has been teaching for over fifteen years in the corporate and securities area. She stated she has done work with FINRA and the ABA.

Senator Dean Heller (R-NV) asked whether either have specific expertise in the equity markets. **Fairfax** stated she has done research and taught about that market.

Senator Dean Heller (R-NV) asked about expertise in the fixed income market. **Peirce** stated she does not have specific experience in the fixed income market. She noted the SEC has expertise in that area and she will have an open door policy. She noted the need for the SEC to focus more on fixed income issues.

Data Driven Rulemakings

Senator Tim Scott (R-SC) asked for views on the use of data to review rules. **Peirce** stated it is important to gather proper data. She stated the SEC is improving their data sources. She stated the SEC needs to look at what data sources are already available to them. **Fairfax** stated it is important to have the rulemaking process driven by accurate data. She noted sometimes data can be incomplete. She stated she would look to fill gaps in that data if confirmed. However, she noted sometimes rulemakings have to move forward without gathering all the information because of timeliness.

Fiduciary Duty

Senator Tim Scott (R-SC) noted the importance to have worked in the securities field from an investor protection perspective. He noted the Department of Labor (DOL) fiduciary rule, suggesting the data should be looked at again. He stated the rule will make winners and losers of smaller investors. He asked whether the government should be picking winners and losers. **Peirce** noted concern over the DOL proposal. She stated the SEC's input was not considered. She stated regulators need to understand how the regulations will impact everyday people. She expressed concerns that an entire sector of the market will be "cut out." **Fairfax** stated protecting access to the markets and to advise is important. She stated the importance of considering investor impacts as well as transparency of conflicts of interest. **Scott** encouraged the nominees to "look deeply" in to this issue. He stated 97 House Democrats signed a letter expressing serious concerns over the DOL fiduciary rule.

Corporate Political Spending

Senator Charles Schumer (D-NY) noted the need for the Committee to vote out more nominees. He stated six years ago the Supreme Court "ripped a hole" through campaign finance. He stated "dark money" has "rigged" the system. He stated Citizen's United has been poison for politics. He stated the SEC can help by preventing that "hole" from being "ripped" further. **Schumer** noted shareholders remain in the dark about money flowing to campaigns. **Schumer** asked whether shareholders have a right to know about corporate political spending and whether the SEC has a responsibility to require such disclosures. **Fairfax** stated there appears to be a budget bill which prevents rulemaking on this issue. She stated if that were removed, her role is to consider the

various perspectives before making a decision. **Fairfax** noted one argument some have expressed is that the political spending information is not material. **Peirce** stated right now Congress has determined that should not be a priority for the SEC. She stated if that were removed she would need to know the specifics of the proposal and discuss that with staff. **Schumer** stated he will submit the question for an answer in writing and is leaning to oppose the nominations if they do not provide better answers.

Senator Robert Menendez (D-NJ) stated corporate spending is a shareholder issue. He stated cleaning up campaign finance is incredibly important. He suggested the information is critical for the determination about where shareholders spend their money. He stated last year he reintroduced the Shareholder Protection Act ([S. 214](#)). He noted 97 Members of the House and Senate sent a letter to the SEC to move forward with preparing a regulation on campaign finance. He asked whether the nominees will help to develop such a rule. **Fairfax** stated Chair White will have to determine whether any steps can be put into motion. She stated she would need to receive all of the information about this issue before making a determination. She stated the devil will be in the details. **Menendez** stated there are 1.2 million comments on this rule which should not be rejected. **Peirce** stated the appropriations language is clear in terms of directing the SEC that this is not a priority. She stated if the Chair has a different view she would listen. **Menendez** noted reservations about these nominations given these responses.

Senator Jeff Merkley (D-OR) asked whether shareholders have a right to know how the company is spending their money on political activities. **Fairfax** stated the issue of disclosure around political expenditures is something investors are concerned about. **Merkley** asked whether this is stolen speech. **Peirce** stated a corporation can spend money without checking with shareholders every time. She stated the rules in terms of disclosure apply to this as well. She stated the SEC's role is to get information to investors so they can invest and that is how she would look at this issue.

Senator Elizabeth Warren (D-MA) suggested Peirce has made conflicting statements about disclosure. **Peirce** stated the presentation of disclosures and balance of disclosures are important. **Warren** asked why information should be cut out if investors feel it is important. **Peirce** stated the Disclosure Effectiveness Review is to look at what information investors actually need.

Senator Elizabeth Warren (D-MA) stated investors like getting disclosure. She asked whether Peirce would oppose eliminating any disclosure the investor community would like to keep. **Peirce** stated which community expressed the opinion is important. She stated the disclosure is intended to provide reasonable investor information needed to make decisions.

Senator Elizabeth Warren (D-MA) asked whether Peirce would support political campaign disclosure if the investors deem it important. **Peirce** stated corporations are supposed to provide material information. She stated if a particular disclosure requirement comes up she would review the letters submitted.

FINRA

Senator Tom Cotton (R-AR) asked about FINRA. He noted last year Peirce wrote an article about FINRA, claiming they are not accountable. **Peirce** stated FINRA's structure has changed. She noted concerns over the board not being made up of industry members. She raised concern over FINRA's

accountability. She stated she would like to have discussions about “shoring up” the SEC’s oversight of FINRA.

Senator Tom Cotton (R-AR) asked the impacts for the markets if FINRA operates with minimal oversight. **Peirce** stated the impact is not creating the regulation of broker-dealers that is needed. She stated there is no ability for someone to hold FINRA accountable. She stated she would like to talk to those monitoring FINRA to see if there is more the SEC can do.

Senator Tom Cotton (R-AR) noted consolidation within the markets. He stated rising compliance costs are a factor. He asked whether Peirce agrees and asked what that means for investors. **Peirce** stated small financial firms are feeling the “press” of regulation. She stated in the municipal space there are fewer options, which is a concern.

Senator Tom Cotton (R-AR) asked whether FINRA needs to either be folded into the SEC or returned to a full SRO. **Peirce** stated there are multiple options, including folding FINRA into the SEC, competing SROs, or putting in more accountability mechanisms. She stated she has not determined the “right answer”, but she would like to discuss this with the staff overseeing FINRA.

Stock Buybacks

Senator Joe Donnelly (D-IN) stated 21,000 workers in Indiana were recently fired from a company so that the jobs could be sent to Mexico. He noted the CEO walked away with a “golden parachute” of over \$90 million. He asked whether the SEC should allow this type of thing. **Peirce** stated she cannot speak to the specifics of this case. She stated the SEC has rules related to stock buybacks. She stated she would have to know all the facts before making a decision in this case. She stated this is an area that would warrant a look by the SEC because stock buybacks are on the rise. **Donnelly** asked whether this is destructive. He asked where the workers fall in the eyes of the SEC. **Peirce** stated the SEC’s mandate is to investor protection not employee protection. However, she stated companies need to treat workers well. **Fairfax** stated corporations and boards owe a duty to the entire corporate enterprise. She stated share buy backs are up and she is interested in looking at this issue closer.

Regulatory Reform

Ranking Member Sherrod Brown (D-OH) asked what reforms the nominees would suggest if they could go back to 2009 and have a blank slate. **Peirce** stated the key theme would be to restore responsibility for mistakes to those who make them. She stated higher capital requirements would also be a solution. In securities, she stated some disclosure reforms are necessary. **Brown** asked whether capital requirements need to be tiered. **Peirce** stated simple capital ratios are appropriate but she has not investigated whether tiering is necessary. She stated well capitalized, well managed banks do not fail. **Fairfax** stated reforms to the banking sector were important, especially capital management and liquidity. She noted the importance of appropriate incentives. She stated transparency is critical. **Fairfax** noted the importance of interconnectedness.

Diversity

Ranking Member Sherrod Brown (D-OH) noted the misrepresentation of women and minorities. He asked whether regulations requiring diversity are needed. **Peirce** stated the SEC should take advantage of the diversity in the U.S. She noted the SEC has created an Office of

Women and Minority Inclusion. **Fairfax** noted the importance of inclusion. She stated she would work to ensure the SEC would be a leader in diversity.

PCAOB

Senator Elizabeth Warren (D-MA) stated after the Enron fraud, the Congress created the Public Company Accounting Oversight Board (PCAOB) to oversee accounting firms. She noted the SEC oversees the PCAOB. She stated the term of the current Chairman expired and the SEC will consider the vacancy once the vacant SEC Commissioner positions are filled. She asked whether Fairfax would oppose a PCAOB Chairman that does not meet legal requirements laid out in statute. **Fairfax** stated if someone is not qualified for the position then it is her obligation to not confirm them. **Peirce** stated if that issue comes up she will follow the law.

Volcker Rule

Senator Jeff Merkley (D-OR) stated it has been three years since the Volcker Rule was finalized and the rule went into effect last year. He stated there is a boundary to distinguish between market making and proprietary trading. He asked whether the nominees will strive to make that boundary clear. **Fairfax** stated to enforce the law one needs to understand what it applies to. She stated she would work with staff to be clear on that line between market making and proprietary trading.

Senator Jeff Merkley (D-OR) asked whether Peirce supports a clear boundary. **Peirce** stated it is important to write clear rules which enable people to comply with the rule. She stated she would welcome working on making this boundary clearer.