

## Changes To Expect From SEC Under Trump Nominee

By **Haima Marlier, Michael Birnbaum and Nicole Serfoss** (December 17, 2024, 4:03 PM EST)

President-elect Donald Trump's nomination of Paul Atkins for U.S. Securities and Exchange Commission chair will likely lead to significant changes in the SEC Division of Enforcement's priorities, signaling a return to bread-and-butter securities enforcement.

Under President Joe Biden, SEC Chair Gary Gensler pursued a broad and aggressive enforcement agenda, with critics contending that the SEC pursued regulation through enforcement in areas like cryptocurrencies and digital assets, environmental, social and governance, artificial intelligence, and cybersecurity.

In contrast, Atkins, who served as a Republican-appointed SEC commissioner from 2002 to 2008, is known for his pro-business stance.

During his tenure at the SEC, Atkins advocated for clarity in how the Division of Enforcement calculated civil penalties, favored market transparency and judgment over extensive regulation, and hailed enforcement actions that protected retail investors.

After leaving the SEC in 2008, Atkins founded a financial services consulting firm, which serves banks, investment firms and the digital assets industry.

In addition to Atkins' nomination, dissents from Republican Commissioners Hester Peirce and Mark Uyeda over the last few years offer additional clues to how the SEC's enforcement and regulatory philosophy will change. Both commissioners served as counsel to Atkins during his tenure as a commissioner and have been vocal critics of the approach taken by the Gensler-led commission.

Should Atkins be confirmed, we expect changes from the SEC to include the following.

### **Cryptocurrencies and Digital Assets**

On the rulemaking side, we expect an Atkins-led SEC to propose new regulations applicable to cryptocurrencies and other digital assets, work with the Republican-led Congress on digital asset legislation, and potentially cede enforcement territory to the U.S. Commodity Futures Trading Commission.

Under Gensler, the SEC used long-standing securities laws — primarily the Securities Act — to sue many



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crypto companies and exchanges for conducting unregistered securities offerings absent allegations of fraud or harm.

Notable cases include the 2023 case of SEC v. Ripple Labs Inc. in the U.S. District Court for the Southern District of New York [1] and the June case of SEC v. Consensus Software Inc., in the U.S. District Court for the Eastern District of New York.[2] In these cases, the SEC has claimed that cryptocurrency "tokens" offered, exchanged and/or sold by the charged companies constituted unregistered securities under the Securities Act. Peirce and Uyeda have been publicly critical of this enforcement approach, arguing that a new regulatory framework is needed for the digital asset and the fintech space.

Although new administrations have not traditionally dismissed existing litigation voluntarily, we expect the SEC to bring fewer enforcement actions concerning digital assets and to seek off-ramps for the more controversial cases currently being litigated. These changes should not be mistaken for an abandonment of crypto-related cases entirely; we expect the SEC to continue to pursue securities fraud cases involving digital assets, although simply playing a role in cryptocurrency transactions absent fraudulent conduct is less likely to attract the SEC's attention.

A move away from regulation by enforcement toward the promulgation of new digital asset regulations could cause the SEC to face its own challenges, given recent U.S. Supreme Court precedent.

Following the Supreme Court's June decision in *Loper Bright Enterprises v. Raimondo*,[3] federal court judges can no longer defer to the SEC's interpretations of its regulations, including those concerning any new digital asset rules, and must analyze agency regulations independently.

And the Supreme Court's decision in July in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*[4] will mean that any SEC, CFTC or other agency rulemaking concerning digital assets may be susceptible to legal challenges for the long term. Under that decision, plaintiffs can challenge federal agency actions that have allegedly harmed them within six years of the harm, even if those regulations were promulgated decades before.

## **ESG**

The SEC's quiet disbandment[5] of its ESG task force may have already signaled a shift in the SEC's approach to ESG-related cases. We expect that shift to continue such that the SEC will not focus its enforcement efforts on environmental, social and governance disclosures alone, absent indicia of fraud, wrongdoing and harm.

This stands in contrast to the SEC's recent nonfraud ESG action against Keurig Dr Pepper Inc.

In September, the SEC brought a settled administrative proceeding against Keurig Dr Pepper, alleging that the company made inaccurate statements in its SEC filings by claiming that single-use K-cups could be "effectively recycled." Specifically, the agency took issue with Keurig Dr Pepper's failure to mention that two major American recycling companies had expressed concerns about accepting single-use K-cups into their facilities.

This order drew a strong dissent[6] from Peirce, who accused the SEC of engaging in "pedantic parsing" of Keurig Dr Pepper's disclosure statements, emphasizing that the company had stated that the products "could" be "effectively recycled" not that they "would" be. Peirce further noted that the SEC rarely brought standalone Section 13(a) and Rule 13a-1 charges.

## **AI**

Under Gensler, the SEC brought traditional disclosure violations actions in the AI space. In March, for example, the SEC announced[7] regulatory action against two investment advisers: Delphia (USA) Inc. and Global Predications Inc. for "AI washing," or allegedly misleading investors by overhyping their use of AI in investment selection processes.

We expect the agency to continue to investigate disclosure violations with an AI connection, especially where there is obvious harm to retail investors.

Under the first Trump administration, then-SEC Chair Jay Clayton focused on harm to retail investors and pursued a record number of cases under the Investment Advisers Act of 1940 for conflicts of interest, undisclosed fees and other issues, and we expect a return to a focus on Advisers Act matters, including in the AI space.

## **Cybersecurity**

Using the Republican commissioners' dissent[8] in an October cyber SEC action as a guide, we expect that SEC enforcement will tread carefully in cyber-related matters in the absence of obvious fraud or wrongdoing.

Under Gensler, the SEC conducted an enforcement sweep[9] in the wake of the SolarWinds breach, suing companies and one individual with alleged violations.

The SEC obtained some high-profile settlements, including a \$2.125 million settlement in June[10] with R.R. Donnelley & Sons Co. for, among other violations, alleged failure to maintain effective cybersecurity controls over its information technology systems in supposed violation of Section 13(b)(2)(B) of the Exchange Act, which requires companies to maintain adequate systems of internal accounting controls.

But the SEC also suffered a critical defeat just weeks later when a federal judge rejected[11] certain claims against SolarWinds, including the agency's application of an internal accounting controls statute in the cyber context. The court dismissed the SEC's Section 13(b)(2)(B) internal accounting controls charge, stating that allegedly deficient cybersecurity controls did not fall within the Exchange Act's internal controls requirement to "accurately report, record and reconcile financial transactions and events."

The SEC's expansive interpretation of the statutory language to cover all internal systems used to protect a company's assets was found to be overly broad and not supported by the plain reading of the statute.

The agency also finalized cyber rules for public companies[12] and adopted cyber-related amendments to Regulation S-P[13] that apply to broker-dealers, investment companies, registered investment advisers and other financial institutions. SEC enforcement will likely hew to these new rules, rather than relying on aggressive new theories.

## **Controls Violations Less Out of Control?**

We expect that the new administration will bring an end to the controls-based enforcement actions that SEC enforcement pursued under both Clayton and Gensler.

Under the securities laws, public companies need to adopt and follow disclosure, accounting and other controls and procedures to ensure that material and other required information is disclosed to the market on a timely basis. The SEC used these laws to bring enforcement actions against numerous companies including Andeavor LLC for deficient insider trading controls,[14] R.R. Donnelley for deficient cybersecurity controls,[15] and Charter Communications Inc. for deficient controls in connection with stock buybacks.[16]

On the cyber front, the SEC's use of controls claims met with a roadblock[17] in the SolarWinds litigation, with a federal judge holding that the SEC did not adequately plead an accounting controls violation in the cyber context.

### **A Narrower Path to Civil Penalties for Public Companies**

Since at least Atkins' service as an SEC commissioner, he has questioned the purpose and effectiveness of imposing large penalties on public companies for misconduct by individuals.

Where shareholders do not benefit ultimately from corporate misconduct, the SEC under Atkins' leadership may be less likely to insist upon penalties from shareholders who neither played a role in, nor reaped rewards from, misconduct that in some cases predated those investors' time as shareholders.

While we do not expect an end to corporate penalties, we do predict a more exacting analysis of when such penalties are appropriate, leading to fewer, and perhaps smaller, awards.

### **Conclusion**

While we expect the SEC's enforcement priorities under Atkins' potential leadership to be different, his history as a commissioner and public remarks since indicate that the SEC will continue to have a robust enforcement program, likely focused on protecting retail investors and the stability of the capital markets.

Indeed, having stocked up on resources focused on cryptocurrencies during the Gensler administration, Atkins will have a significant number of investigative and trial attorneys free to train their sights on insider trading, market manipulation, offering frauds and other conventional cases that have not made as many headlines in recent years.

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