



SEC Enforcement: Back to Basics



February 10, 2025

SEC Enforcement: Back to Basics

“The SEC’s enforcement program serves a critical function in ensuring proper compliance with the U.S. securities laws. Throughout its history, the SEC has protected investors and the general public from a wide array of fraudulent conduct.” – Paul Atkins, Presidential Nominee, Chair, S.E.C.[1]

There has been a lot of speculation among industry-insiders as to how the change of administrations in Washington DC will affect the focus of the Division of Enforcement of the U.S. Securities and Exchange Commission (“SEC”). While conventional wisdom has long held that, from a regulatory perspective, Republican administrations are less active than Democratic administrations, several factors point toward an enforcement division that will return its focus to fraud in the coming years.

Financial Reporting – Material Errors are Increasing

The beginning of this century

saw a slew of major corporate accounting and financial reporting scandals including Enron, Worldcom, and Fannie Mae. In reaction to these, Congress passed the Sarbanes-Oxley Act of 2002 which, among other things, granted significantly enhanced enforcement powers to the SEC.

According to annual studies published by Audit Analytics, financial statement restatements[2] by U.S. public companies hit an all-time high in 2006, and subsequently experienced a precipitous drop-off during the next 15 years, with restatements in 2020 representing a greater than 90% decrease from 2006

levels. However, since 2020 representing a greater than 90% decrease from 2006 levels. However, since 2020, restatements have begun to increase. The Financial Times recently reported that through the 10-months ended October 2024, restatements were up yet again, from 122 in 2023 to 140 in 2024,[3] representing a 15% increase in the comparative year-over-year 10-month periods.

Consistent with the trend in restatements, The D&O Diary reported that in 2024 federal securities class action lawsuit filings increased for the second straight year, reaching the highest level since 2020.[4]



SEC Enforcement: Back to Basics



February 10, 2025

SEC Enforcement: Back to Basics

Financial statement restatements can be very harmful to shareholders, often resulting in a drop in stock price, the incurrence of significant costs related to investigation, litigation and fines, significant disruption to management, and reputational harm. While we are still a far cry from the all-time highs experienced in 2006, the trend of increasing restatements is something that should draw the attention of the SEC, if it hasn't already.

Change in Enforcement Priorities

Gary Gensler became Chair of the SEC in April 2021 and served in that role until the end of President Biden's term. President Trump nominated Paul Atkins to succeed him.

Under Gensler, the SEC focused much of its enforcement efforts on areas that are likely to receive much less attention under an Atkins-led SEC. If such a shift occurs, it will free up substantial resources to focus on more traditional areas, including financial reporting and disclosure issues.

Crypto

Upon arriving at the SEC in 2021, Gensler continued the efforts of his predecessor, Jay Clayton, taking action against participants in the Crypto industry for violating securities laws. In a November 2024 speech, Mr. Gensler stated that these actions "...represented generally between five-and-seven percent of our overall enforcement efforts." [5]

The SEC's enforcement efforts faced harsh criticism from the crypto community, with industry leaders claiming that the SEC was overstepping and performing "regulation through enforcement." Criticism aside, the SEC has had tremendous success in its endeavors to date, prevailing in court on most of the crypto-related actions it has brought.

It is widely expected though, that an Atkins-led SEC will significantly curtail the SEC's crypto enforcement program. Upon nominating him as Chairman, President Trump stated "(h)e... recognizes that digital assets and other innovations are crucial to making America greater than ever before." In an article posted on X.com shortly after Atkins'



SEC Enforcement: Back to Basics



February 10, 2025

SEC Enforcement: Back to Basics

nomination, SEC veteran John Reed Stark predicted “(m)uch to my own personal dismay, the public’s voice has been heard, and the SEC’s crypto-enforcement program should (and will) rightfully come to a halt.”[6]

ESG

The beginning of this decade saw the SEC firmly embrace ESG enforcement, with the creation of the Climate and ESG Task Force in March 2021. With a staff of 22, the task force was established to “proactively identify misconduct” related to ESG. [7]

Shortly following the creation of the task force, in March 2022 the SEC released its Climate-Related Disclosure Rule. This proposed rule was the subject of intense

criticism and debate. Two years later, in March 2024, the SEC released a final version, only to stay the rule the following month pending judicial review.

In June 2022, Mr. Atkins, along with four other former SEC Commissioners, addressed the proposed climate rule in a letter to the agency. In the letter they stated that the proposal “oversteps the Commission’s congressionally delegated regulatory authority,” and that the “Commission’s rulemaking powers simply do not authorize it to require disclosure of the vast quantities of immaterial information.”[8]

Given the viewpoints expressed in the comment letter, and Mr. Atkins’ overall views on regulation,

it is expected that the SEC under his tenure will roll back its ESG enforcement efforts. In a statement about the nomination of Mr. Atkins, a pro-ESG non-profit named Unlocking America’s Future stated “(h)is leadership would put the current SEC climate risk disclosure rule in danger and surely put a stop to any progress on ESG.”[9]

Cybersecurity

Beginning in 2021, the SEC intensified its focus on cybersecurity by initiating an increasing number of enforcement actions related to disclosure deficiencies and failures to safeguard customer information. The SEC has also issued new disclosure rules requiring registrants to report a cyber incident within four days of its occurrence. These efforts



SEC Enforcement: Back to Basics



February 10, 2025

SEC Enforcement: Back to Basics

reflect the agency's aim to enhance transparency and investor protection in the face of escalating cyber threats.

A recent dissent by Commissioners Uyeda and Hester in a settled SEC cybersecurity case may offer insight into potential shifts in regulatory priorities under Mr. Atkins. The dissenting Commissioners criticized the majority for focusing on what they described as “immaterial, undisclosed details” in the company's cyber disclosures. They further argued that the SEC should view companies targeted by cyberattacks as “victims of a crime, rather than perpetrators of one.”^[10]

Paul Atkins – Is What's Past Prelude?

In 2008, Atkins co-authored a lengthy article in the *Fordham Journal of Corporate and Financial Law* addressing the history of the SEC's enforcement program and making recommendations for improvements. In the article, Atkins calls for a critical review of the enforcement program “given the importance of enforcement to the SEC's mission.”^[11]

While Atkins' suggestions focus on regulatory reform – calling for increased transparency and efficiency in the enforcement process – they are consistent with a vision of an enforcement program focused on investor harm and fraud.

For example, Atkins suggests minimizing the role of statistics in assessing

the performance of enforcement staff, arguing that heavy reliance on them incentivizes volume over quality, and disincentivizes taking on large complex investigations that can often take years to resolve.

And while Atkins has long been a critic of what he feels have been excessive corporate penalties – arguing that they harm shareholders who ultimately foot the bill – he just as staunchly believes that penalties and sanctions against individuals who have committed fraud be pursued aggressively. Atkins notes that such individual penalties serve both to punish the actor who committed the fraud (“Corporations do not act; individuals do.”), and to more effectively deter future would-be fraudsters.



February 10, 2025

SEC Enforcement: Back to Basics

While significant changes to the focus and direction of the SEC's Division of Enforcement seem almost inevitable under an Atkins-led SEC, those who harm investors – including those engaging in accounting and financial reporting fraud – are unlikely to see much of a reprieve in the coming years, and may in fact, find themselves in the crosshairs of a refocused SEC.





SEC Enforcement: Back to Basics



February 10, 2025

End notes

- [1] *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, Fordham Journal of Corporate and Financial Law, Paul S. Atkins and Bradley J. Bondi, 2008
- [2] For purposes of this article, “restatements” refer to the reissuance of previously filed financial statements to correct material errors and misstatements
- [3] Financial Times, December 9, 2024
- [4] The D&O Diary, *The Top 10 D&O Stories of 2024*, January 6, 2025
- [5] Speech by Gary Gensler to the Practising Law Institute, November 14, 2024
- [6] John Reed Stark, *12 Unprecedented SEC Reforms to Expect During the First 100 Days of SEC Chair Paul Atkins*, X.com, December 8, 2024
- [7] *SEC Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, March 4, 2021
- [8] *The Proposed SEC Climate Disclosure Rule: A Comment from Former SEC Chairmen and Commissioners*, Harvard Law School Forum on Corporate Governance, July 1, 2022
- [9] *STATEMENT: Nomination of Paul Atkins to Run SEC Puts ESG, Climate Disclosures, at Risk*, December 4, 2024
- [10] *Statement Regarding Administrative Proceedings Against SolarWinds Customers*, Commissioners Hester M. Pierce and Mark T. Uyeda, October 22, 2022
- [11] *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, Fordham Journal of Corporate and Financial Law, Paul S. Atkins and Bradley J. Bondi, 2008

Contact

Jeffrey Szafran
Partner
Forensics, Valuation & Litigation Support
E: jeffrey.szafran@dlallc.com