

# SEC Whistleblower Program: What to Expect Under the Trump Administration

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February 3, 2025

The Trump administration administration will likely impact the SEC whistleblower program in terms of a change in its enforcement priorities, as well as the amounts of financial bounties paid, but will not, in our opinion, threaten its existence given bi-partisan support or alter its core functions.

By way of background, the SEC whistleblower program pays monetary awards to eligible individuals who come forward with high-quality original information that leads to a commission enforcement action in which over \$1 million in sanctions is ordered. The range of an award to the whistleblower is between 10% and 30% of the money collected.

## A Change in SEC Enforcement Priorities

President Donald Trump's nomination of Paul Atkins to lead the SEC will likely result in major changes to the SEC's Enforcement Division's priorities. Whereas those priorities under former SEC Chair Gary Gensler focused on cryptocurrency registration, environmental and governance disclosures and a rule making by enforcement approach, Atkins, if confirmed, will likely revert to a more basic, retail investor protection approach to the enforcement of the federal securities laws.

Atkins, a Republican SEC commissioner who served on the commission from 2002 to 2008, is widely regarded as pro-business and, in particular, an advocate for crypto adoption. His tenure was characterized by a focus on the protection of mom-and-pop investors, a disdain for heavy-handed regulation and clarity on the process by which the Enforcement Division calculated its civil penalties. Tellingly, after leaving the SEC, he started a consulting firm, which provided advice to, among others, the digital assets industry.



Courtesy photos

**Scott Silver, left, of Silver Law Group, and David R. Chase, right, of the law firm of David R. Chase.**

## Crypto

Assuming Atkins is confirmed, we anticipate a sea change in the SEC's approach to cryptocurrency and digital assets generally, both in rulemaking as well as in enforcement.

As to rulemaking, an SEC headed by Atkins is expected to craft new crypto rules and regulations in conjunction with a Republican-controlled Congress to provide market clarity and to facilitate the raise of capital.

In terms of enforcement, the possibilities vary from the SEC completely relinquishing its crypto enforcement powers to the U.S. Commodity Futures Trading Commission's jurisdiction, to ceasing enforcement of pure crypto registration cases against issuers and exchange platforms (i.e., those solely alleging the sale of unregistered securities, but not fraudulent conduct), assuming it retains its crypto enforcement authority.

## A Return to a Focus on Protecting Retail Investors From Fraudulent Conduct

Under Gensler, the SEC's Enforcement Priorities were expansive and, in many respects, treaded new ground in its emphasis on requiring corporate disclosures on such matters as cybersecurity breaches, environmental policies and internal governance. In addition to the prioritization of these areas of corporate disclosure, the Gensler-led Enforcement Division allocated a significant amount of otherwise limited investigative and litigation resources pursuing cases involving crypto and digital assets, as well as securities registration enforcement actions (in particular dealer cases), many of which did not involve allegations of either fraudulent conduct or investor loss. This is bound to change under an Atkins-led commission.

While we expect the SEC to continue to pursue securities fraud where it finds it (even in crypto cases where investor funds are in jeopardy), there will likely be a keener focus on protecting Main Street—the mom and pop investors who risk the loss of their hard-earned retirement savings from old-school securities frauds, such as market manipulations, Ponzi schemes, broker and financial adviser sales practice abuses, and public company accounting frauds. In particular, we anticipate a surge in cases involving the sale of illiquid, hard-to-value alternative investments by hedge funds to retail investors, as well as private placement Regulation D offerings by private issuers that have historically been prosecuted for undisclosed exorbitant commissions and/or the misappropriation of investor funds.

This investor protection-centric approach will thus require a reallocation of enforcement resources that were otherwise tied up in cases that did not directly implicate investor losses. We would not be surprised to see several of these pending cases voluntarily dismissed, or settled on much more favorable terms than that which would have been agreed to under a Gensler regime, in order to clear the decks.

### Smaller and Perhaps Fewer Corporate Civil Penalties

Lastly, under an Atkins commission, we foresee the commission imposing smaller civil penalties on corporations where the violative conduct is perpetrated by identifiable individuals. Atkins is on record as having expressed his serious concerns with the concept

of fining, or at least imposing a significant monetary penalty upon, a corporation where its shareholders did not receive a benefit from the entity's wrongdoing and would thus arguably be unfairly penalized. Accordingly, a commission under Atkins may be disinclined to approve large civil penalties in such circumstances, or possibly refuse to approve them at all. However, we do not think this marks an end to the use of civil monetary penalties by the commission as it is too critical of a deterrence weapon in its enforcement arsenal. Rather, we believe the commission will adopt a more stringent, exacting approach when evaluating the propriety and amount of a civil penalty based upon the particular facts before it.

### What Do These Changes Mean for the SEC Whistleblower Program?

Notwithstanding the anticipated changes as discussed above, we expect the SEC whistleblower program to continue to successfully operate in its present form with no material change to its fundamental nature. However, as SEC whistleblower counsel, we will be more focused upon those whistleblower tips that are more in line with the commission's new enforcement priorities and are thus more likely to be investigated and prosecuted. Notably, the critical elements of a potentially successful whistleblower tip will remain the same: original, timely and detailed evidence, along with meaningful cooperation with the SEC. Finally, we expect that in certain cases (but not all), the financial awards paid out to our clients may be less than in the prior administration given the pro-business lense through which the commission will likely vet civil penalties.

**David Chase** is a former SEC enforcement attorney and the founder of The Law Firm of David R. Chase in Fort Lauderdale. He has represented whistleblowers in some of the SEC's most complex and high-stakes enforcement cases, earning a reputation as a leading advocate for individuals exposing corporate wrongdoing.

**Scott Silver** is the managing partner of Silver Law Group, based in Boca Raton, Florida, and is recognized nationwide for his work representing investors and whistleblowers in securities and investment fraud cases. A staunch advocate for protecting investors, Silver has been featured in major outlets such as *The Wall Street Journal*, *Reuters* and *Bloomberg*.