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New Trump administration means big changes at SEC, DOL

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An American flag flies outside the headquarters building of the U.S. Securities and Exchange Commission.

The second Trump administration is likely to bring big changes to both the Department of Labor and Securities and Exchange Commission as major Biden administration rules could be overruled in courts, walked back, or replaced entirely given Republicans' penchant for deregulation, sources said.

Separately, among the new dynamics within the incoming administration is the Department of Government Efficiency, or DOGE, which Trump said in a November statement will "provide advice and guidance from outside of government." DOGE will be run by billionaires Elon Musk and Vivek Ramaswamy, both of whom have said they're aiming to slash federal spending and reshape government agencies.

Both Musk and Ramaswamy have criticized the SEC and current Chair Gary Gensler.

After a federal appeals court on Dec. 11 struck down the SEC's approval of Nasdaq's board diversity rule, Ramaswamy posted on Musk's X platform, "When an agency like the SEC is so repeatedly & thoroughly embarrassed in federal court for flouting the law, it loses its legitimacy as a law enforcement body."

Musk on Dec. 12 responded with a post of his own saying, "The SEC is just another weaponized institution doing political dirty work."

That same day, Musk posted a letter from his attorney to Gensler stating that the SEC is preparing "numerous counts" against Musk following a multiyear investigation. The letter didn't include any specifics.

With Musk and Ramaswamy in charge of DOGE, they will soon wield uncertain power in Washington. What impact that will have on the SEC and DOL is an open question, sources said.

"There is definitely a gravity toward streamlining and making the government smaller," said Igor Rozenblit, managing partner at Iron Road Partners and former SEC staffer from 2010-2021, noting that in Trump's first term he signed an executive order stating that for every new rule an agency issues it must repeal two others.

For the DOL and particularly its Employee Benefits Security Administration, DOGE could further restrict its already tight budget, said Andrew Oringer, who heads the Wagner Law Group's New York office and serves as its general counsel.

“Having lesser resources could make the department less able to come out with new regulations, new interpretations, new authority,” he said. “I think there’s a potential tamping down on their ability to do enforcement.”

Oringer added, “There’s a concern that a general initiative to reduce the size in government could impact the way in which the DOL is oriented.”

Lisa M. Gomez, who leads EBSA as assistant secretary for employee benefits security in the Biden administration and will be out her job come Jan. 20, said it’s imperative EBSA’s resources aren’t cut because it is a small agency with a lot of responsibility.

Any reduction in EBSA’s budget would affect “our ability to be able to service all participants in both retirement and health areas,” Gomez said, referencing a December spending bill lawmakers were considering. “So we are trying to make sure that folks in Congress are aware of this.”

New agency leaders

Among his cabinet picks to date, Trump has selected Paul Atkins, a former SEC commissioner and CEO of a financial sector consultancy firm Patomak Global Partners, to lead the SEC, and Rep. Lori Chavez-DeRemer, R-Ore., a one-term congresswoman who lost her bid for reelection in November, to take over the DOL.

Both picks, sources said, are interesting for different reasons.

“What’s somewhat striking about an Atkins appointment is Trump has shown a tendency to appoint outsiders into key positions,” said Lance Dial, a partner at K&L Gates. “Atkins is not an outsider. If anything, he’s an establishment person within the industry for a while.”

Rozenblit referred to Atkins as the “godfather of conservative securities regulation,” adding that he will likely offer a lighter enforcement approach and more of a willingness to provide guidance on a range of issues opposed to official rule-makings.

For the Chavez-DeRemer pick at DOL, some of her positions in Congress were outside the Republican mainstream, making it difficult to predict what her tenure as labor secretary could mean for retirement plan regulation and oversight, sources said.

"She was a surprising pick," said Kevin Walsh, a principal at Groom Law Group, noting these positions.

"To some extent, she seems like a substantially more pro-union pick than one would expect from a Republican administration, but the Trump administration has signaled some willingness to buck what would have been expected from Republican administrations more historically," Walsh added.

Chavez-DeRemer was one of three Republicans to co-sponsor the Protecting the Right to Organize Act, or Pro Act, a bill aimed at making labor organizing easier. Despite her support, the bill didn't advance in the Republican-controlled House.

Fiduciary rule

When it comes to retirement issues overseen by the DOL's EBSA, exactly what Chavez-DeRemer and the Trump administration will do remains to be seen, sources said.

Trump has yet to announce his pick to lead EBSA.

Chavez-DeRemer in July split with most Republicans on the House Education and the Workforce Committee when she voted against a resolution to overturn the Labor Department's fiduciary investment advice rule.

Under the Biden administration, the DOL in April finalized the Retirement Security Rule, which, among other things, changed the five-part test so that one-time advice, such as rollovers to IRAs or annuity purchases, must be in an investor's best interest.

Insurance and annuity groups have challenged the rule and after two District Court judges in July halted the rule's implementation, the lawsuits are now before the 5th U.S. Circuit Court of Appeals in New Orleans.

The 5th Circuit in 2018 struck down a broader Obama-era fiduciary rule and the Trump administration elected not to appeal the decision.

But in 2020, the department under the Trump administration issued PTE 2020-02, an exemption that permits investment advice fiduciaries to receive compensation for more types of guidance that are otherwise prohibited under the Employee Retirement Income Security Act, such as rollover recommendations, so long as they comply with the exemption's conditions, which include care and loyalty obligations and conflict-of-interest mitigation.

“With this particular secretary, predicting what’s going to happen is hard,” Oringer said. “The last time that the amended fiduciary rule was rejected by the courts, the Trump administration did not appeal to the (U.S.) Supreme Court, but then they went and reinterpreted the rule in a way that was averse to financial institutions,” he said, noting PTE 2020-02.

Ali Khawar, principal deputy assistant secretary at EBSA under the Biden administration who will be out of his job once Trump is sworn in, said it’s unclear what the Trump administration will do concerning fiduciary investment advice because a rule such as the Retirement Security Rule is needed to prevent conflicts of interest.

“In the universe where the court strikes it down, I’m not sure that the next administration is … going to be able to not do anything here and leave it as it is,” Khawar said. “Because there are a lot of reasons why further action is needed. And in the same way that we saw in the Trump administration, an effort to address this problem in not dissimilar ways once you focus on the core of it, it actually is quite consistent administration to administration. It’s a very market-driven solution rather than a top-down government solution.”

ESG considerations

Elsewhere at EBSA, the Trump administration will weigh what, if anything, to do on the consideration of environmental, social and governance factors when selecting investments.

Under the Biden administration, the DOL in 2022 finalized a rule that permits such consideration. In the first Trump administration, the department issued a rule that said retirement plan fiduciaries could not invest in "non-pecuniary" vehicles that sacrifice investment returns or take on additional risk.

Biden administration officials maintain that their rule is neutral and maintains the department's position that fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.

In February 2023, Chavez-DeRemer supported a resolution to overturn the Biden administration’s ESG rule but the resolution was later vetoed by President Joe Biden.

“In light of her vote on the ESG resolution, and in the light of the idea that I think every change of control of the White House has led to changes in the ESG rule or sub-regulatory guidance, the next Trump administration is very likely to redo the ESG rule,” Walsh said. “To me, that’s the low-hanging fruit.”

The Trump administration will also take a look at the department’s qualified professional asset manager exemption, or QPAM exemption, which allows institutions to engage in transactions involving U.S. retirement assets from 401(k) plans, individual retirement accounts and corporate pension plans that are otherwise prohibited under ERISA.

In April, the Biden administration finalized a rule to expand the types of misconduct that disqualify financial institutions from qualifying for the QPAM exemption, in stark contrast to a piece of guidance the department issued late in the Trump administration. In November 2020, the DOL issued an opinion letter that said foreign convictions weren't disqualifying to obtain a QPAM exemption.

"It would be unsurprising for the Trump administration to go back and at least tweak QPAM again,” Walsh said.

Crypto

At the SEC, sources expect an Atkins-led agency to be more friendly to the regulated financial industry and advocate a less hostile approach to cryptocurrency firms.

Since 2017, Atkins has led industry efforts to develop best practices for digital asset issuances and trading platforms as co-chair of the Token Alliance, according to his Patomak Global Partners biography.

“His involvement in the crypto (space) certainly sends a message that this is going to be a different SEC than the anti-crypto Gensler agency,” said Jay A. Dubow, a partner who co-leads Troutman Pepper Hamilton Sanders' securities investigations and enforcement practice group.

Crypto stakeholders have accused the Gensler SEC of taking a “regulation-by-enforcement” approach to the industry and have clamored for years for regulatory clarity. Gensler has maintained a position that there are already sufficient regulations in place under laws governing securities, commodities, money laundering and sanctions.

Sources are unsure exactly how Atkins will try and regulate the crypto market, but Dial said the difference between Atkins and Gensler will be stark.

“It’s certainly not going to be, ‘Let’s sue all the crypto firms and try and keep crypto out of the U.S. markets,’” Dial said.

Iron Road’s Rozenblit said Atkins may aim to exempt crypto assets from the SEC’s custody rule, which requires registered investment advisers to park client assets with qualified custodians.

“I think changing the custody rule would be a massive change because I do think there is some desire by some managers to invest in crypto and they can’t because of the custody requirement,” Rozenblit said.

Climate disclosure

One of the major rules finalized under Gensler was the public company climate disclosure rule. Finalized in March, the rule requires public companies to disclose a host of climate-related information in their periodic reports and registration statements.

Following court challenges, the rule has been halted and the lawsuits, which have been consolidated, are now the before 8th U.S. Circuit Court of Appeals in St. Louis.

Atkins has been an outspoken critic of the climate disclosure rule and in a 2022 op-ed asserted that the rule wouldn't hold up in court. If the rule did survive the court challenge, an Atkins-led SEC could opt not to enforce it or write its own rule.

Beyond climate disclosure, sources expect Atkins to have a lighter regulatory touch than Gensler.

Under Atkins, the SEC "won't be pushing the envelope in the way Gensler tried to do," Dubow said. "I think they will also be more responsive to comments and concerns from (the) industry before enacting final rules."

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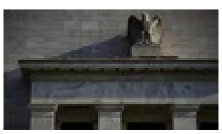

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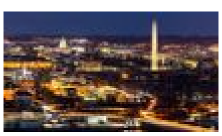

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