

## Predicting What's Next For SEC By Looking At Past Dissents

By **Osman Nawaz, Timothy Zimmerman and Michael Ulmer** (January 6, 2025, 4:53 PM EST)

It's no news that the incoming administration will result in changes at the U.S. Securities and Exchange Commission. The administration's impact is most immediately apparent through President-elect Donald Trump's nomination of Paul Atkins to replace Gary Gensler as chair of the commission.

Atkins, with a record of SEC service, deep respect for the agency and extensive markets knowledge, has been publicized as someone who is philosophically opposed to the overregulation of the crypto markets and who disagrees with overenforcement of the securities laws in general. Consistent with his past service as commissioner from 2002 to 2008, Atkins will indeed approach regulatory and enforcement decisions differently than the current administration.

Importantly, with Atkins as the new chair, the SEC will comprise a Republican majority for the first time in four years. However, Atkins has not been a member of the commission for over 15 years, and during that time, the markets have changed, and SEC enforcement has perhaps changed even more — in terms of the size, scope and subject matter of investigations, and the outcomes that parties might expect.

And significantly, Atkins will not operate in a vacuum, as he will be joined on the commission by, among others, two Republican colleagues, Commissioners Hester Peirce and Mark Uyeda. Both formerly served as counsel to Atkins and have constituted an outspoken minority in recent years.

Despite ideological differences from the Democratic majority, Peirce and Uyeda have remained steadfast, laying the foundation for a differing regulatory vision that seems poised to take center stage in the years to come. These dynamics may very well result in a new approach to enforcement, not only with respect to the types of cases and charges that the SEC pursues and how it will do so, but also the size and types of relief that it will seek.

As a result, we thought it would be useful to briefly go beyond the public statements and written dissents to look at the votes cast for recent agency and court proceedings by the current Republican commissioners. Using empirical data, we seek to provide a preview of the areas where the new majority is likely to take issue and, potentially, where enforcement may shift in the new administration.



Osman Nawaz



Timothy Zimmerman



Michael Ulmer

## **Scrolling through the public data shows unanimous approvals in the overwhelming majority of cases.**

Although the rest of this article is focused on areas of disagreement between the Republican commissioners and the Democratic majority, it is worth remembering that the commissioners often agree with each other on votes across a wide range of subject matters.

An examination of the thousands of votes cast by the commissioners since 2023 shows that more than 70% of case decisions have been unanimous. This remarkable cohesiveness may be due to an understanding that a strong and united SEC is important for the U.S. capital markets to remain the envy of the world. And it likely underscores the fact that in many cases, the party that appointed the commissioner casting the vote has no bearing on the outcome, as the great majority of areas of the securities laws are clearly settled.

## **That said, Peirce and Uyeda disagreed with the votes and philosophy of the Democratic commissioners.**

Uyeda was confirmed by the Senate in June 2022, joining Peirce, who has been a member since 2018. Since Uyeda's confirmation, the two have disagreed with their Democratic colleagues on many votes — and even when they agreed with their colleagues to institute an action, they disagreed hundreds of times with the specific parameters of violations, the penalties and other aspects.

From a numbers perspective, for example, in the last two years, Peirce and Uyeda have each voted against the SEC's decisions approximately 200 times.[1] Moreover, both commissioners have further recorded formal exceptions to aspects of actions that they otherwise approved, although Peirce has recorded such exceptions close to four times more often than Uyeda.

Analysis of the commissioners' voting exceptions and published statements reveal that they both react to any SEC tendency toward overregulation. In 2022, Peirce stated that "[t]he Commission has a habit of trying to micromanage the markets[.]"[2] In her view, "[a]bsent a compelling justification, government regulation should not override buyers' and sellers' judgments about where to buy and sell." [3]

Peirce and Uyeda similarly share concerns that the SEC's overenforcement can be akin to ex post regulation, and is thus "extremely problematic." [4] In line with those concerns, Peirce and Uyeda have objected to the commission's recent use of "enforcement action[s] as a substitute for notice and comment rulemaking." [5]

At a high level, although a granular look at SEC charging instruments and votes for more substantive and specific insights proves illuminating, the public votes indicate that the most common disapprovals or exceptions noted include particular charges, penalties, disgorgement and prejudgment interest, officer and director and penny stock bars, and undertakings.

## **Peirce and Uyeda have a less expansive view of what constitutes fraud.**

In one of the more common voting exceptions, based on public statements, it seems that Peirce and Uyeda have expressed their disapproval of the SEC's efforts to charge certain types of conduct as fraud. Peirce and Uyeda have expressed their views in votes and dissents against regulating conduct through the application of anti-fraud provisions or the use of certain charges, particularly Sections 17(a) of the Securities Act and 206(4) of the Advisers Act.

Peirce has disapproved of over 50 Section 206(4) charges since 2023. She has explained that Section 206(4) "is an uncomfortable home for routine compliance obligations" that turns "even foot-faults" into enforcement actions under an anti-fraud provision,[6] and has warned that using such anti-fraud statutes to regulate mere noncompliance "could lead people to believe that the adviser has engaged in much more nefarious conduct" than what is being punished.[7]

Peirce instead believes that generic compliance rules for advisers would better be enforced through other tools, such as the SEC's "general rulemaking authority in section 211 of the Advisers Act, [its] recordkeeping authority under section 204, or [its] authority under adviser supervision section 203(e)(6)."[8]

Peirce and Uyeda have further separately expressed similar concerns regarding what they believe to be a misuse of Section 17(a) — a charge to which both have repeatedly taken exception since 2023.

**They also have a preference for a narrower focus of internal controls provisions.**

Peirce and Uyeda have also objected to the overuse of internal controls and disclosure control charges as stand-alone charges, when more serious charges were not warranted.

In several votes last year, both commissioners took exception to charges brought pursuant to Section 13(b)(2) of the Exchange Act.[9]

In a recent dissent to settled proceedings for alleged disclosure and internal control failures, Peirce and Uyeda explained that they were concerned that the SEC was "playing Monday morning quarterback" by "engag[ing] in a hindsight review to second-guess the disclosure[.]" "[r]ather than focusing on whether the companies' disclosure provided material information to investors[.]"[10] And Peirce has dissented from what she views as the SEC's attempts to regulate "corporate activity through disclosure requirements[.]"[11]

**They have a preference for relief carefully crafted to the company and the circumstances at hand.**

Peirce and Uyeda have conveyed disapproval at times of what they seemingly perceive as the SEC's undisciplined approach to disciplining respondents in enforcement actions.

For example, Peirce has expressed an aversion to implementing bars on otherwise legal activities. Since 2023, she has taken exception to officer and director bars in more than 40 votes, and to penny stock bars in more than 90 votes.

Her view on the practice of prohibiting future legal conduct in the case of penny stock bars seems to stem from her belief that "[a] bar designed to protect the public is remedial, not punitive." [12] As such, she said that the "extraordinary limitation on the ... right to engage in lawful economic activity requires equally extraordinary facts to justify it[.]"

Instead, Peirce asserted that "tailored bars" precisely aimed at protecting the public from likely future harm could serve the public interest "without unnecessarily impinging on the respondents' right to engage in lawful economic activity with their own money." [13]

Peirce and Uyeda have similarly disapproved of undertakings imposed by the SEC over the past two

years. The commissioners took exception to specific undertakings in multiple votes, although Peirce took exception with undertakings in nearly 25 votes, whereas Uyeda took exception with undertakings in around 10 votes.

Though the exact undertakings to which the commissioners took exception are not disclosed, it is reasonable to infer from the orders underlying the respective enforcement actions that some of Peirce and Uyeda's most often objected-to undertakings are requirements for settling entities to retain independent compliance consultants, which can impose significant financial and human resource commitments going forward after a matter has been resolved.[14]

Finally, Peirce and Uyeda have also voiced their disapproval of steep penalties levied by the SEC in recent years. Since 2023, Peirce has taken exception to penalty and/or disgorgement amounts in more than 165 votes, while Uyeda has done the same in more than 70 votes.

In May 2024, the commissioners said in a joint statement, "imposing outsized penalties for minor violations risks creating a counter-productive dynamic between the Commission and regulated entities." [15] The commissioners did not stop there, disapproving the SEC for turning "regulatory foot faults" into "ever-steeper penalties that bear little to no relation to real-world harm," a practice that they warned fuels "the perception that the Commission's penalty regime is more a tool to generate numbers for year-end statistics and less a means to achieve outcomes that enhance market integrity and investor protection." [16]

## **Conclusion**

While impossible to say with certainty what will happen to the SEC assuming Atkins is confirmed once Trump takes office, we think following the votes in the context of past policy pronouncements and case disagreements reveals a path already paved for the newly constituted commission in 2025 and beyond.

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*Osman Nawaz is a partner at Gibson Dunn & Crutcher LLP and previously led the SEC's Enforcement Division's Complex Financial Instruments Unit.*

*Timothy Zimmerman is of counsel at Gibson Dunn.*

*Michael Ulmer is an associate at the firm.*

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[1] See generally Commission Votes, <https://www.sec.gov/about/commission-votes> (available through the SEC's front page Quick Links).

[2] Hester Peirce, Ordering Competition, SEC (Dec. 14, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-order-competition-20221214>.

[3] Id.

[4] E.g., Mark Uyeda, Statement Regarding GHS Investments, LLC, SEC (Aug. 19,

2024), <https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-ghs-investments>.

[5] Hester Peirce and Mark Uyeda, UnRulemaking: Statement Regarding DST Asset Manager Solutions, Inc., SEC (Aug. 17, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-dst-asset-manager-solutions-inc-081723>.

[6] Hester Peirce, Uprooted: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, SEC (Aug. 23, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-doc-registered-investment-adviser-compliance-reviews-08232023>.

[7] Hester Peirce, Outsourcing Fiduciary Duty to the Commission: Statement on Proposed Outsourcing by Investment Advisers, SEC (Oct. 26, 2022), <https://www.sec.gov/newsroom/speeches-statements/peirce-service-providers-oversight-102622>.

[8] Hester Peirce, Statement on Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, SEC (Feb. 9, 2022), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-cybersecurity-risk-management-020922>.

[9] See, e.g., R.R. Donnelley & Sons Co., Release No. 34-100365 (June 18, 2024), <https://www.sec.gov/files/litigation/admin/2024/34-100365.pdf> (Peirce, H. and Uyeda, M. approving except as to the Section 13(b)(2)(B) charge and penalty).

[10] Hester Peirce and Mark Uyeda, Statement Regarding Administrative Proceedings Against SolarWinds Customers, SEC (Oct. 22, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-solarwinds-102224>.

[11] Hester Peirce, Dissenting Statement on Buybacks Disclosure Proposal, SEC (Dec. 15, 2021), <https://www.sec.gov/newsroom/speeches-statements/peirce-buyback-20211215>.

[12] Hester Peirce, Perpetual Personal Penny Stock Prohibitions: Statement on the Recent Orders Imposing Bars in the Public Interest, SEC (Jun. 21, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-penny-stock-prohibitions-20230621>.

[13] Id.

[14] E.g., E. Magnus Oppenheim & Co. Inc., Release No. 34-97114 (Mar. 13, 2023), <https://www.sec.gov/files/litigation/admin/2023/34-97114.pdf> (Peirce, H. approving except as to certain undertakings and the cease-and-desist order, and Uyeda, M. approving except as to certain undertakings); Eastone Equities LLC and Yu, Release No. 33-11284 (May 7, 2024), <https://www.sec.gov/files/litigation/admin/2024/33-11284.pdf> (Peirce, H. and Uyeda, M. approving except as to undertakings).

[15] Hester Peirce and Mark Uyeda, Forget about Collaborating—Stop, Pay-Up, and Listen: Statement on Intercontinental Exchange et al., SEC (May 22, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-intcntl-exchange-052224>.

[16] Id.