

Beyond Unprecedented: The Post-Pandemic Economy
Season 4, Episode 4:
“Trump 2.0: Anticipating the Future of the SEC”

[00:00:02] **Mary Jo White:** What you’ve got in Chair Atkins will be a soulmate for cutting back the size and the breadth of the coverage that the SEC is now exerting. You’re going to see a lot of support in this administration for narrowing all of the agency’s rulemaking authority.

[00:00:21] **[Music and media clips of journalists]:** The coronavirus pandemic has tanked the global economy with unprecedented speed. The steepness of the decline here is unprecedented. This is a crisis that is unprecedented. It is unprecedented, and we just don’t know.

[00:00:36] **Eric Talley:** This is *Beyond Unprecedented: The Post-Pandemic Economy*, a limited series podcast from Columbia Law School and the Ira M. Millstein Center for Global Markets and Corporate Ownership. I’m Eric Talley, Sulzbacher Professor at Columbia Law School and the co-director of the Millstein Center.

[00:00:51] **Dorothy Lund:** And I’m Dorothy Lund, Columbia 1982 Alumna Professor of Law at Columbia Law School and co-director of the Millstein Center.

[00:01:05] **Talley:** Today, we’ll discuss what to expect from the U.S. Securities and Exchange Commission, or SEC, in the second Trump administration. We’ll explore the changes that a more conservative SEC might make to existing SEC rules and enforcement policy. And we’ll also consider the relationship between the SEC and the Department of Justice, or DOJ, and potential shifts in their dynamic. Now, during the 2024 election campaign, Donald Trump and other Republicans strongly criticized SEC policies adopted during the Biden administration, especially policies related to climate risk disclosures and cryptocurrencies. And when SEC Chair Gary Gensler steps down in January, President Trump will have the opportunity to nominate a new SEC chair, swinging the balance on the commission to a 3-2 Republican majority.

[00:01:53] **Lund:** Trump’s pick to replace Gensler, Paul Atkins, is a former SEC commissioner from 2002 to 2008 who was described in a *Wall Street Journal* op-ed as “the opposite of Mr. Gensler in temperament and regulatory ambition.” The newly configured SEC, potentially under Atkins, will be able to revise current SEC rules, regulations, and enforcement priorities. That means that the SEC may, for example,

abandon proposed rules addressing corporate, environmental, and social issues and put the brakes on enforcement actions in the crypto space. So, Eric, we're just under a month away from a significant presidential and congressional transition. What are you expecting?

[00:02:33] **Talley:** I think I'm expecting the unexpected. Look, I don't think I've seen a new presidential administration arrive with as pronounced an inclination to shrink the federal government and administrative state, at least, I don't know, since the arrival of the Reagan administration back in 1980, right? So, look, whether you're a fan or you are afraid of the impending federal moves, one thing seems certain: We're about to see some serious upheaval in the size and the shape of the federal government and the administrative state. And, look, I think we're going to start to see, you know, who the losers are and the winners are in what is kind of shaping up to be an epic budgetary game of "DOGEball."

[00:03:11] **Lund:** OK. Wow. Starting off with the dad joke right out the bat.

[00:03:15] **Talley:** Thank you very much. I'll be here all week.

[00:03:18] **Lund:** Jokes aside, you're probably right about the prediction here. So, Eric, are you a fan of what's coming, or are you feeling a little bit fearful about what lies ahead?

[00:03:28] **Talley:** Look, a little bit of both. I guess my grandpa vibe detests uncertainty on some level as a general matter, but I'm also an unalloyed fan of markets and spotting interesting arbitrage trading opportunities and especially those that occur when there's legal and regulatory uncertainty. So I do find the situation pretty fascinating. But I could use some insights on where all of this is going to go, and it would be great—just fantastic—if we had an expert to help us on these issues.

[00:03:56] **Lund:** Funny you should mention that. We have a very, very special guest here with us today, Mary Jo White. Mary Jo led the SEC as chair from 2013 to 2017 and set a record for enforcement actions during her tenure. As U.S. attorney for the Southern District of New York from 1993 to 2002—the only woman to date to hold that position—she led the prosecution of the 1993 World Trade Center bombing and the indictment of Osama bin Laden for his role in the 1998 East African embassy bombings in Kenya and Tanzania. Today, she's a litigation partner and senior chair at Debevoise & Plimpton, where she also previously served as chair of the litigation department. And she is a proud graduate of Columbia Law School. Welcome, Mary Jo.

[00:04:41] **Mary Jo White:** Thank you. Glad to be here.

[00:04:43] **Talley:** Thanks for being here, Mary Jo. I want to start talking about the outgoing chair of the SEC, Gary Gensler, who has been there since 2021 following President Biden's election. Now, under Mr. Gensler's leadership, the SEC has pursued what many people feel is a pretty bold and at times controversial regulatory agenda. For

example, during his tenure, the SEC placed greater focus on ESG—environmental, social, and governance issues—adopted a new climate disclosure rule, beefed up penalties for violators, and crackdown on cryptocurrencies, largely through litigation. How would you, you know, with the benefit of now almost four years of hindsight, describe Mr. Gensler's tenure? Do you view his agenda as maybe too ambitious? Ambitious enough? What were the key accomplishments that he can point to both in terms of rulemaking and enforcement? And was he effective, in your mind?

[00:05:34] **White:** Yeah. I mean, I think, you know, Gary is extraordinarily knowledgeable about the markets and extraordinarily smart, period. I think he had a pretty clear vision of the challenges that his very aggressive rulemaking agenda was going to face, meaning the courts. And he also, I think, ran into an even more hostile court, frankly, to, you know, the SEC and the regulatory state in general. And I think that accounts for a number of the setbacks on the litigation front. Enforcement was extremely strong. He was criticized for what every SEC is, frankly, for regulating by enforcement. I think Gurbir Grewal, his director of enforcement, is quite smart, quite good, quite effective. But I mean, I think, you know—obviously, I'm on the other side of this issue on a daily basis—the crypto approach was justifiably criticized as really regulation by enforcement without sufficient, you know, guidance for the industry. And I think that's something that, you know, it's not easy. It's easier said than done, frankly, in the crypto space because you have what's the SEC's authority and not, you know, what guidance do you give? And I think Gary would say, you know, the Howey Test is perfectly good guidance. It tells you what a security is, what it isn't. You've got to register if it is, you don't if you don't. But, you know, I think as a matter of reality, that's a very complicated, difficult-to-answer question for the industry. So I think he's been very effective, but I think a lot of his accomplishments will not be and have not been lasting. And that's a problem. I mean, that's a problem, you know, when you go into that agency. You know, you have your agenda there, you have a wish list. You cannot accomplish all that you'd like to because, you know, there are other branches of government that will tell you, "You've gone over your skis." And I think there's a little bit of that in his tenure.

[00:07:25] **Lund:** So, Mary Jo, I want to come back to a lot of what you said as we go, because there was a lot in there. But I want to take you now to one of the most ambitious and contested initiatives under Gensler, which is the adoption of a climate disclosure rule that required companies to share information about their carbon emissions and climate-related risks. And the justification was this is going to improve and standardize statements that public companies make about their climate risks. But the rule faced, and faces, legal challenges from state AGs in Republican-led states, business groups, and others. And its enforcement is on hold as litigation is now playing out in court. Obviously, Paul Atkins is feeling differently than Gensler did about these rules. He's spoken out against climate-related disclosures and the SEC's goal of providing investors with information on this topic. What's going to happen to the SEC climate rule under the Trump administration?

[00:08:20] **White:** I think in one way or another, and I think it's unclear in which way, that rule will not go forward, whether it's by virtue of a decision by the court or a decision by

the commission not to defend that rule. And then once that's clear—that that rule is not going forward—I don't think you'll see, perhaps, anything in that space done by Chair Atkins' commission. Now, you know, that doesn't leave the world free of mandatory climate disclosure. The Europeans have rules. California will have rules that many, many public companies—not all, I think, but most—will be subject to. This was an issue that at the end of my tenure in 2017, you know, I was grappling with, too. I think there ought to be some standardized, mandated disclosure in that space. Not as broad as or as aggressive as Chair Gensler carried forward, I think, just because there are authority questions, among other things there. But because it took so long to do in his tenure, the Europeans did what they did; California's done what they did. And so what's kind of unique about the SEC rule is really in the accounting space. One thing you might see in the transition period is postponing deadlines because the commission can actually do that without notice and comment. But I think to come back to the ESG question itself, I do not see this rule going forward.

[00:09:51] **Talley:** It may not just be California, right? We may see a patchwork of state-based regulations. Do you anticipate that happening? Would they be preempted by the silence of the federal government or could they just kind of go with it?

[00:10:03] **White:** Yeah, I don't think they'd be preempted by the silence. I mean, remains to be seen. One of the real downsides of that happening is it's not standardized—or maybe it will be standardized. Maybe there'll be identical state rules that apply in some states, not others. But if you do business in those states, you're subject to those disclosure rules. I think you'll see in general, and you did in the first Trump administration, the state AGs and the state securities regulators stepping into what they may consider to be a void in various areas. And they do have powers. There are some limits on that, by virtue of federalism, but it won't be unanimous, obviously, because you have Rs and you have Ds and that tends to define pretty much what you think and what you do.

[00:10:44] **Lund:** Do you feel that this rule going away is a loss for investors, for companies perhaps subject to different disclosure regimes across the board, or not such a big deal?

[00:10:56] **White:** Look, I think it's a loss that the SEC would be absent from the space entirely. Again, I think its authority is narrower than I think Chair Gensler thought to operate in this space to mandate disclosures. But I think the agency ought to be in the space. Now, I must say, when I saw what California had done and the SEC rule wasn't out yet, I thought, if I were there, what I would have done is to piggyback, you know, on California in areas particularly where I didn't have authority or might not have authority at the SEC or be held not to have. That wasn't quite the approach that was taken there. But I do think the SEC should not be absent in the space. Now under, you know, Chair Atkins, it may end up being absent in this space other than to sort of comment on what's already required of registrants by the European rules, the California rules, and perhaps to give some guidance what companies ESG disclosures should be careful to avoid. For example, you know, not to basically tout your investing based on ESG factors when

you're not. I mean, that'll still be a part of an enforcement agenda, I think, even under Chair Atkins.

[00:12:09] **Talley:** So, Mary Jo, another SEC policy that is almost certain to see major changes in the coming Trump administration is cryptocurrency. Under Gary Gensler, the SEC clampdown on crypto and several high-profile enforcement actions, including Coinbase, Binance, Terraform, several others, leading to a lot of discussion—some criticism, some praise. Without going into any specific case, give us a sense, you know, what to expect. Mr. Trump has established his own crypto project last year, and he's pledged to end the Biden administration's anti-crypto crusade. And unsurprisingly, perhaps, the nominated chair, Mr. Atkins, has himself called for looser restrictions on crypto assets and is expected to be friendlier to the industry overall. What is crypto regulation enforcement going to look like over the next four years? What are the implications for crypto friendly SEC? And do you think crypto should be regulated by the SEC or elsewhere?

[00:13:08] **White:** I think a perfect fit on regulation, is nothing quite fits. The SEC's authority doesn't quite fit, the CFTC's [Commodity Futures Trading Commission] doesn't quite fit. I don't see there becoming sort of another agency in the, you know, in this climate by any means. But look, I think that the most dramatic policy shift, if we can say that, is crypto. I mean Chair Atkins and President-elect Trump are pro-crypto, you know, pro the U.S. being competitive, a leader, indeed, in that space. The SEC's authority is unclear. I think Chair Gensler wouldn't agree with that, but it clearly is unclear. So I think you'll see on the enforcement side a dramatic rollback one way or the other, whether those cases that are pending, you know, will be dismissed or not. That's a question mark. But certainly going forward, you're not going to see, except in the cases of fraud, I think in the crypto space, those cases will be, you know, fraud wherever it comes from, will still be a staple of SEC enforcement. I think you may see, and it's a question of whether the majority holds long enough for it to happen, some legislative action in the space supported by Chair Atkins to bring greater clarity to it. And, you know, I think the industry wants responsible regulation in the space, but right now, they don't know what to do. And so that's going to be a sea change.

[00:14:32] **Lund:** Mary Jo, in your opening remarks, you mentioned the Howey Test and how this current SEC regime has focused on regulating by enforcement and the view that our existing legal doctrine can tell us enough about when something is a security and subject to SEC rules and when it's not. How has that regime played out and do you think that more guidance in this area is needed? If so, what particular areas would you like to see rules to help us figure this out?

[00:15:02] **White:** In full disclosure, I represent Ripple. So, you know, I have views on this of my own, just in the interest of full disclosure. But you know, look where would guidance be most helpful? I mean one place it clearly would be most helpful is after a full vetting, guidance on whether what you've got is a security and what permutation is in the security or not. One of the things that is in reality on the ground happened in this administration is although there's been an expression of openness to talk to crypto

players in the industry about what to do or not, the fact is that nobody can register and some of them have wanted to. But guidance has not even been informally forthcoming in order to permit that path in many cases. You can't do that. I mean, I think one other change that, frankly, I hope to see and I think we'll see is just more discussion between the SEC and the industry and those that it regulates in a constructive way—doesn't mean the SEC's in industry's pocket. But right now, to get an answer from the SEC staff on anything has been very, very difficult because of, I think, the fear of the staff perhaps overstepping where the chair is in crypto. So I do think you may need some legislative fix though, too. So I don't know that the SEC can do all this on its own, even if it wants to. It clearly will be more crypto friendly. There will be more guidance and more dialogue with the SEC in the industry. And then I think there may be a legislative fix as well.

[00:16:34] **Talley:** Well, let me pivot out of that in a slight way, because one of the potential downsides of using litigation in front of different judges, those different judges can, in the case of crypto, actually did come up with different conclusions of whether cryptocurrencies constitute securities. But the other thing it's kind of an interesting question is not on the litigation side or the enforcement side, but rather on the rulemaking side. And where we sit right now with respect to the Supreme Court's overall view of the administrative state and its ability to and its empowerment to make rules. Now, the Supreme Court has just granted cert to a case challenging not the SEC's but the FCC's [Federal Communications Commission's] rulemaking authority under the so-called nondelegation doctrine, which my hazy memory, as I was barely paying attention to this in law school, says something like there are constitutional limits on the extent to which Congress's legislative power can get delegated to the authorities through the executive. So this is going to go in front of the Supreme Court this term. Adding to that intrigue, I guess, is that when it goes in front of the court, is likely going to be John Sauer, who's Mr. Trump's nominee for solicitor general, who's going to inherit the job of defending the administrative agency's rulemaking power. How is that even going to work? And and you kind of think on the one hand, a lot of signs point to the administration pulling back on the size of government, so maybe Mr. Sauer just waves the white flag. But on the other hand, regulation by litigation was also, you know, purportedly a sin of the previous SEC's approach. And if the regulatory mandates get pulled back, doesn't litigation become kind of the only option left?

[00:18:15] **White:** Perhaps. It may mean enforcement and litigation now. Yeah. No. It could drive you to that point. Look, I mean, this is the nondelegation doctrine. If we want to label it as that, you know, as a whole, you can drive a Mack truck through, which I think Chair Atkins might want to be part, you know, at least a passenger there, you know, not a driver maybe, but a passenger. I mean, I think there's going to be a lot of sympathy, a lot of sympathy on his part, because I think long before sort of the administrative state dialogue became in vogue, I think Chair Atkins was a vocal critic of the agencies exercising too much regulatory power. So, yeah, I think you're going to see a lot of support in this administration for narrowing the, all of the agencies' rulemaking authority. It's not just brand-new with the Trump administration. You know, the *independent* agencies—which is, by the way, why I accepted being chair of the SEC, because it was an *independent* agency—but they've always been a thorn in the side of

both the executive and Congress. And so any opportunity to bring them more within the fold of particularly Congress, this administration is going to be supportive of that. I mean, there's a lot of nuts and bolts kinds of things in the SEC jurisdiction that don't get as much of the attention—market structure issues are some of them—that aren't as politically loaded or have, you know, really any realistic authority questions. The SEC has that authority—and its important authority—to protect the investors and the markets. You'll see a lot of attention there, I think, with this administration. That'll be the kind of rulemaking they do, you know, not not the issues that have been on Chair Gensler's agenda.

[00:19:54] **Lund:** To do their work—to make rules and investigate violations—the SEC needs resources. After Trump's election, he announced the creation of DOGE, the Department of Government Efficiency, headed by Elon Musk and Vivek Ramaswamy. So DOGE is, of course, tasked with slashing excess regulations, cutting wasteful expenditures, and restructuring federal agencies. We don't know yet how much the SEC's budget is going to be affected by DOGE. But, you know, remember, Musk is currently under SEC investigation for potential securities law violations, and he wants to do major cutting. Even before this potential of drastic restructuring, does the SEC have funds to pursue effective wrongdoing?

[00:20:42] **White:** The SEC is, I mean, it can always, and every chair that I'm aware of to this point has always, rightly, truthfully said they need more resources to carry out what is really a vast array of responsibilities. And they do better in some, you know, Congresses than they do in others in terms of getting their budget or most of their budget requests. So, yes, they have enough resources to do what they need to do now, in my view. They certainly did when I was chair. I would have liked more, you know, in some areas. But, you know, and it's not self-funded, unfortunately. It became close to being self-funded after the financial crisis, but didn't quite make that, even though it's deficit neutral as an agency. But what you've got, you know, in this administration, I think in Chair Atkins, will be a soulmate for cutting back the size and the breadth of the coverage that the SEC is now exerting. So, for example, enforcement will definitely be an area of his focus. He's talked a lot about that being it's too aggressive, it's too creative, it's too many other things. It's the biggest division at the SEC by far. Something interesting to watch will be whether Chair Atkins says I need fewer resources rather than more. That would be a dramatic change from every other chair, who, once you get in that seat, you have things you want to do that need to be funded. But the restructuring that he has said that he's interested in doing has a fair amount of downsizing in it. And so, you know, I would expect Congress, certainly this Congress that will be in power at least for the first two years, to be very friendly to Chair Atkins on his budget requests. But what to watch is what he asks for and doesn't.

[00:22:25] **Lund:** And so what does downsizing mean for regulation and enforcement? Are we in for a financial industry free-for-all?

[00:22:33] **White:** The priorities and enforcement will be different. Chair Atkins has shown himself to be a very strong proponent of enforcement to protect retail investors in

the pump and dump areas and the Ponzi scheme areas. I mean, you're not going to see a rollback there. You're not going to see some Wild West occurring. I think you'll see fewer resources spent in the private-fund space than the private-adviser space. I think Chair Atkins is, I think, much more a believer in sophisticated investors really can take care of themselves and don't need the SEC to do that. So you'll see some pullbacks in some kinds of enforcement. Those are almost policy decisions that impact enforcement. But, no, I think the SEC will still be a strong enforcer. Yes, you worry about if you don't have enough resources because, you know, unlike DOJ, which investigates and prosecutes frauds, every single participant in the markets is under the purview of the SEC. And you can't be missing from any space if you want whatever regulations you think makes sense to be enforced. And so, you know, if there's too much of a cutback, it can do a fair amount of damage, I think, to our markets. But I don't expect that to happen under Chair Atkins. He's very smart. He knows the market. He is a proponent of free markets, but he also knows that, you know, the strength of our markets is also in this integrity, frankly, and that means enforcement.

[00:23:54] **Talley:** I want to get to the DOJ in a second. But one quick follow up on this: What's the tradeoff between how broadly a government agency tries to enforce things and the fines, penalties, disgorgements, consequences from the targets that it does go after? And, you know, there is a theory out there that if you increase those potential fines, disgorgements, penalties, and so forth, you actually don't have to go after as many targets because the consequences are significant. On the other hand, when the consequences are significant, you should expect a big fight over those consequences. When you were at the commission, was this a discussion that you guys had about how broadly to cast your net as opposed to how intensely to go after infractions of the targets that you did isolate?

[00:24:40] **White:** Yeah, I guess I would say under my—and my background is enforcement, so this would not be surprising—but my focus was both. I had an initiative that I unfortunately allowed to be renamed as “broken windows,” which actually I named as “blitz and bundle,” which meant that if you had important regulations on the books that hadn't been enforced for a long time, you needed to do something to call attention to them. So where we had our debates—and prior commissions did, and this commission, the new commission will certainly—was mostly on the size of corporate penalties for public companies. And there's one theory of thought, which I subscribe to, that you do need large corporate penalties in appropriate cases for deterrence. There's another school of thought that Chair Atkins subscribes to, and did before and will now, that when you do that, you're really not, you know, general deterrence is hard, right? I mean, it's a lot of theory around a lot of studies around it and including ones that say it doesn't work, right? But clearly what does happen is that the shareholders of the public companies bear the brunt of those penalties and that that's not really what you're trying to accomplish. And that has been kind of a Democratic-Republican divide for many, many years in the commission. The Atkins SEC will definitely emphasize that that's not good enforcement. You want to prevent some of what you're, you know, enforcing against. You want a dialogue with the industry. You want to enhance compliance appropriately. But what you don't want to do is, in the interest of speculative deterrence,

as he would see it, punish the shareholders. You know, look, my view is that you do a combination of things to create strong enforcement. And one of the things you do, in my view, you know, are strong—in appropriate cases—strong corporate penalties, because I do think it affects deterrence, frankly. So does I think, you know, one of my more unpopular initiatives of requiring admissions, in certain cases, of wrongdoing. I think that by and large hasn't been continued by any subsequent SEC and certainly won't be, I don't think, in the Atkins administration.

[00:26:49] **Talley:** Under the Biden administration, we saw an increased cooperation, I guess, between the SEC and the DOJ to combat various types of securities fraud violations. And that collaboration has long been around in which, you know, the two departments share resources and information on insider trading, other cases that may have criminal components. But I think more recently it's entailed more parallel SEC and DOJ proceedings, such as simultaneous actions being brought at both levels, say, in 2023 against a broker dealer and his friend for various types of insider trading allegations in *U.S. v. Meadow*. So under the SEC, which will be evidently put under an Atkins diet, what's that SEC and DOJ going to look like under the Trump administration?

[00:27:37] **White:** Yeah, I mean, you know, I think it's easier to predict where the SEC is going to be on various issues under Chair Atkins than it is to predict where DOJ is going to be until presumably, once confirmed, Attorney General [Pam] Bondi makes some statements about her priorities and initiatives. But almost irrespective of that, I think the strong cooperation will continue between DOJ and SEC. I mean, it has been there for decades. You know, what changes is where they cooperate. You know, so again, Chair Atkins, I don't know where he is precisely on insider trading, but certainly on the significant, most serious securities frauds, SEC goes to DOJ because they want the deterrent of jail time, you know, because that does make for stronger enforcement. I think Chair Atkins will be right there in those kinds of cases. You know, an interesting question to pose is, you know, where are both agencies actually on FCPA [Foreign Corrupt Practices Act] violations? Been many fewer cases under this administration actually in that space than in the prior Trump administration. But I've heard President-elect Trump not have such kind words for FCPA. So that may not be an area of cooperation, may not be an area of priority for either either DOJ or the SEC. But I think the cooperation, it's just too useful to both agencies for that not to continue.

[00:29:02] **Lund:** Mary Jo, thanks so much for joining us.

[00:29:05] **White:** Thank you.

[00:29:06] **Lund:** Our guest today was Mary Jo White. Make sure to follow us on Apple, Spotify, or wherever you get your podcasts. Thanks so much for listening.

[00:29:16] **Talley:** *Beyond Unprecedented* is brought to you by Columbia Law School and the Ira M. Millstein Center for Global Markets and Corporate Ownership. This podcast is produced by the Office of Communications, Marketing, and Public Affairs at Columbia Law School. Our executive producer is Michael Patullo. Kara Avanceña, Julie

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