
PE Pathways* — Exploring the Administration's Regulatory Impact on Private Equity*Speakers: Thao Le, John Ford, and John Falco****Recorded: February 25, 2025****Aired: April 22, 2025****Thao Le:**

Welcome to *PE Pathways*, where we bring together experienced dealmakers to share their thoughts on current private equity and M&A trends and developments. On today's episode, we will be discussing how the Trump administration may impact the private equity industry from a regulatory perspective with a focus on Investment Company and Investment Adviser Act Regulation Enforcement. I'm Thao Le, a partner in our firm's Private Equity and Investment Funds group, and I'm joined today by my colleagues, John Ford and John Falco, two seasoned lawyers in the Investment Adviser and Investment Company Regulation arena.

John and John, why don't you introduce yourselves?

John Ford:

Thanks, Thao. I'm John Ford. Like you said, my practice involves investment fund, investment advisory regulation. It's been the bulk of my practice for 25-plus years. So I've seen a lot of administrations come and go through Washington and have seen the regulatory changes that have come and gone with them as those administrations have changed. Happy to be here with you today to talk a little bit about that.

John Falco:

And I'm John Falco. I'm also a partner here in our investment management group and focus on many of the same areas as John, particularly closed-end funds and registered adviser regulatory issues.

Thao Le:

Thanks, guys. Why don't we just kick this off? During the US election, which was a – depending on who you ask, it was a very long election period or a short election period. But one of the things that I did notice was that there wasn't a lot talked about the private equity industry, specifically. It wasn't really brought up by either candidate for the presidency, but it is a topic of discussion now as we see what's happening. The Trump administration will definitely have an impact on the private equity industry, while it may not be direct, but it could certainly be indirect. We just don't know, given the fury of executive orders that come out, which oftentimes give us an indication of what this administration may be doing.

But the private equity industry works within a number of regulations, particularly those that are overseen by the SEC, including the Investment Company Act, the Investment Advisers Act, and

the Securities Act, and all the regulations that are under those statutes. With everything going on, I'd really like to focus on what the Trump administration and the acting and incoming SEC chairman made due to the private equity industry or rather what some of their thoughts are in developing business and lightening the regulatory load on businesses, what that really means.

Recently, Mark Uyeda, which is the acting SEC Chairman, recently spoke at a conference in which he noted that the commission is returning to facilitate capital formation and to facilitate funding for entrepreneurs. He had a lot packed into his speech, which I'm sure that many in the industry have looked at. But what were some of the key items that you saw in the commissioner's speech?

John Ford:

A couple of things, maybe even before we get to that particular speech, to just sort of preface that we're very early into this administration, and the commission has yet to be fully replenished from some of the departures that happened at the end of the Biden administration. Chair Gensler tendered his resignation and Jamie Lizárraga also resigned. The commission is now at three members, as opposed to the usual five, including the absence of President Trump's nominated Chair of the SEC, Paul Atkins. A lot of the speculation is coming on, like you mentioned, acting Chair Uyeda's comments; one of the other existing holdover commissioners, Hester Peirce's comments made in several public speeches and addresses since January 20th.

They're giving us a little bit of an early signal about regulatory priorities in this administration, but we're very, very far from having a complete picture because Chairman Atkins has yet to be confirmed.

John Falco:

He's still in the queue. If you look back to the last two chair appointments where Senate confirmation occurred, it was April and May. We're a little bit of ways from – he's got eight or nine other candidates that need to be confirmed that are ahead of him within the queue.

John Ford:

Like you said, Thao, I don't know that the regulation of private equity sits high on the broader regulatory agenda of this administration, but I do agree with what you said in your opening question that unlocking some of the regulatory shackles that have been placed on capital formation over the past four years will be, I think, viewed as an engine towards some of that economic growth that is and has been something that was talked about in the election cycle and since.

In that same speech that you referenced by acting Chair Uyeda at the Florida Bar Securities Conference just a couple days ago, the theme of his remarks was a return to normalcy with a lot of emphasis on the tools that the commission has available to facilitate capital formation. Capital formation and a return to normalcy should be music to the ears of private equity because private equity is all about the hopeful, efficient allocation of capital with an eye towards bringing a company along its growth cycle and achieving a profitable exit for that private equity fund.

Capital formation and loosening some of the regulation creates a lot of opportunities for private equity in that area.

Thao Le:

John – John Ford, that is – I might have to start calling you guys Ford and Falco, like I do in the office. But actually I pose this question to both of you. When Uyeda was talking about going back to a sense of normalcy, what does that really mean? I mean, normalcy as in to what administration or –

John Ford:

I think regulators to the regulated. It should be a working relationship where each benefits the other to some extent. I know that the regulated bristle at the notion of being benefited by regulation, but part of the strength of the regulatory environment is the confidence it instills in investors, that overlay of regulation, that predictability in how that regulation is going to be applied. I mean, I've talked to lots of registrants, private equity advisers, all of that. Most understand that regulation is part of life. For the most part, sponsors and investors embrace the regulation. They get it.

What they don't like is unpredictable regulation or regulation that is inconsistent with sort of past levels. That's what we've seen over the past four years; inconsistent applicability, applicability in areas where it never existed before. In each of those instances, it resulted in high costs, challenges in the application, and severe penalties for getting it wrong when the instructions were pretty vague.

John Falco:

I think too, though, some of this also has to do with the increasing pace of technology. The industry wants to go fast and do new product development in different strategies and different asset classes. The SEC was formed 80 years ago, it's an agency that works very slowly. They don't like to move fast because they want to make sure that nothing gets through them that shouldn't be out there.

John Ford:

That balance that needs to be struck in facilitating capital formation is always tempered by investor protection and market protection. I don't think there's going to be any departure from that mission. It's a very core mission. You've got to remember, commissioner or named commissioner, commissioner candidate Atkins, has been a commissioner before. When he was a commissioner before, his stance was not repealing all regulations and referrals. His stance was for reasonable application of SEC authority consistent with its mission and not beyond its mission.

I think when Commissioner Uyeda signals return to normalcy, I think that's exactly what he's signaling, that kind of commission and that kind of relationship between the commission and the capital markets.

Thao Le:

Falco, you were talking earlier about this notion of technology moving so much faster than the SEC. I would say any government.

John Falco:

And it's accelerating, right? Because with AI and quantum computing and digital assets, blockchain. The commission can't keep up, and it's an interesting dynamic because you've got an entity that wants to regulate, protect investors. But it also wants to permit and capital formation. They want to make sure that this supports a healthy economy that's productive for the nation. Even if the administration changes the attitude of the SEC, I think that fight is still there, just because of the quickening pace of technology.

Thao Le:

One of the things in the recent speech by the acting chairman, he mentioned a sensible approach to cryptocurrency. Just to let everyone know, I come more from the background of the private equity funds, unregistered fund products. John and John tend to lean more towards the registered fund products. The one thing I've often noticed in private equity fund documents is they often have an investment restriction that prohibits the investments into cryptocurrency. You may see a little bit more leeway with a percentage of assets under the registered funds to invest in cryptocurrencies. But do you think that "sensible approach to cryptocurrency" is really going to open the door for funds, whether they're registered or unregistered, to really be making their headway into cryptocurrency?

John Ford:

Maybe. Right? From a fiduciary perspective, when the investment adviser to that fund is making their investment decision, they have to analyze all of the risks that go along with it. One of the risks that they had to analyze was a custody risk. It's not that dissimilar from the way you'd analyze custodial assets in far-flung third-world emerging markets. You've got custody risks associated with a lack of stability in a particular securities market where you have to physically custody in that market. Crypto's not that different. Up until some of the regulations prohibiting US banks from custody and crypto were lifted as recently as last week through another one of those executive orders.

Thao Le:

How many are we up to now? Have you been taking account?

John Ford:

No. . . 197.

Thao Le:

Okay.

John Ford:

No. Unless you have predictability in determining the custody and how those assets are going to be maintained, it's hard to get comfortable with making a risk determination as to whether they're going to be there. That's on top of the risk determination about what's behind that actual digital asset investment. But clearing some of the more administrative risk concerns that are apart from the investment is helpful.

One of the other things that I think is helpful in one of the other commissioners, Hester Peirce, in her remarks in a speech maybe a week, 10 days ago, she laid out the beginnings of a framework for what the commission may pursue regarding regulation of digital assets during this term. A lot of that would be a little bit more color on the guidance about what is and what is not a security when it comes to different attributes of digital assets. The staff put out some guidelines for making those determinations. But again, that's going back to the prior administration when Chairman Clayton was in place, and those so-called Howey Test guidelines came out in maybe 2018 or 2019. The staff has talked a little bit about digital assets since then, but mostly only in the context of enforcement action saying not that.

What I think a sensible framework would be is some kind of framework that's clearly articulated, easily defined, and easily self-determinable by market participants to conclude that they're either in or out of securities regulation and act accordingly. Then for the SEC to consistently apply that when they opt to enforce the laws for those who don't. All that's going back to the theme of capital formation – there's a lot of capital on the sidelines. There's a lot of interest in digital assets, crypto, whatever. But it's not a prudent allocation of those assets where you have uncertainty in how the law is going to be applied.

John Falco:

John,, that regulation under crypto, how do you think that would be formulated? Would that be sort of a safe harbor provisions where, for instance, if you're under this threshold, you can safely rely on this safe harbor?

John Ford:

The industry's been pretty vocal in some of the litigation. They've been vocal in their briefs. They've laid out a bunch of different proposed ideas as to how regulation might work. With one of these moonshot type things, the staff's got to put together a working group with industry stakeholders, and come up with something, and then actually listen to them when it's proposed, and come out with something that's going to work.

With the technology moving as quickly as you said it is, they're going to need buy-in from the industry as to what actually works and what's going to be sustainable and durable so that you

don't have to go back and revise it every time some nuance gets developed that changes the one or two attributes of a particular token.

John Falco:

I think with many of the proponents of Atkins as chair coming from the crypto industry, I think that you could probably put a small wager on the idea that that's going to be priority for this administration once he's confirmed.

Thao Le:

Let me pivot a little bit because I know that there was a lot of rulemaking initiatives under the prior administration and prior SEC Commission. I want to talk about whether any of those types of rules are going to survive in this administration because some of them were actually pretty helpful, right? Let's talk about accessing capital. Another way of accessing capital is when you have change of control or liquidity events with the private equity investments. One of which is you sell to another private equity firm or another strategic buyer. You often have brokers, or I should say investment bankers, and sometimes finders. What is the current state of play of finders in the broker-dealer world, and what regulation are we anticipating in regard to finders getting a fee?

John Falco:

Well, I mean, there was the conditional exemptive order that the staff had proposed in 2020 under the Trump administration with respect to kind of providing some framework for finders to operate in various ways without registering as a broker dealer. You might imagine that that's going to be revived and considered again, and that there will be a little bit more guidance rather than the kind of cobbled together quasi finders exemption that's based on kind of a fax in circumstances, determination of the actual activity of the finder, and allow people to really feel comfortable that they're going to be able to keep the compensation they receive for finding investors on behalf of the issuers.

John Ford:

Yes. I mean, the 2020 proposal, it wasn't perfect. There were a lot of folks that feel like it fell short of where they wanted it to be, in what conduct could be undertaken by unregistered persons acting as finders. But it was way better than nothing, and it was way better than the uncertain environment that John just described. That came out so late in that administration. I think, apart from the shortcomings that people thought it didn't go far enough, just the timing was bad. It came out in October. The election was in November. The new administration was in, and the new administration had different priorities, and this went nowhere.

It wasn't that there was backlash that could be characterized as partisan-driven, like some of the other proposals we've seen over the past four years. It was a good proposal at a bad time. For things like that, there should, you would think, be not that much opposition to revisiting it.

Thao Le:

I completely agree with both of you that something is better than nothing, and relying on this very loose definition of finders and then an exemptive relief letter or, no, actual letter, I should say, that was very, very fact-specific. You had to do it to a T in order to rely on it.

John Ford:

Right. If we were going to go back to a theme that sort of seems to have been a common thread to everything we've talked about going back to the beginning, if it's facilitate capital formation, well, having some kind of workable finder's exemption ought to further that, right? If it's consistent with the regulatory initiatives of this administration, it's ripe for bringing back.

Thao Le:

Yes. Just about the capital access and capital formation, what do you think this means for the IPO market then?

John Ford:

Well, look. It's pretty widely recognized that the IPO market is not what it used to be. I've heard it described as dysfunctional. Frankly, a lot of people have attributed that to the regulatory uncertainty of whether the SEC regulatory compliance scheme for a public company is too burdensome to justify. Is the juice of the public markets worth the squeeze of the reporting hassles? I don't know. There's also been fairly aggressive antitrust claims coming in. Now, granted, that's not the SEC, but these are all very chilling factors towards the IPO market.

Sensible regulation that enables more IPOs seems like a good thing than it seems like it would be a really good thing for PE funds. That's the traditional exit that hasn't been there. So you're stuck with companies that maybe 20, 25 years ago would have gone public in the ordinary course and provided a very natural exit for a PE owner. Now, you've got portfolio companies that are getting long in a tooth. They're in there seven, eight years. It's difficult to find another PE partner or a strategic partner to do the sale. It just limits the number of exits, and it ties up capital that private equity funds could be allocating elsewhere.

Thao Le:

I want to talk a little bit more now about the operational aspects of the private investment fund advisers and how the incoming administration and commissioner, as well as current rulemaking. Two things that always come up are, at least in my world when talking to clients, it's like this custody rule is a little bit of a pain to me because it's not like I'm dealing with securities like everyone thinks about when they're trading securities. I'm buying privately held companies. Then also, I'm a smaller shop, and I need to be able to rely on service providers to help me out.

I mean, there's been some activity in both the custody rule and adviser service providers. Falco, you want to talk a little bit about that, what you're seeing?

John Falco:

Sure. I mean, with the custody rule, there is a proposal out there. I think this kind of dovetails into what we talked about, the incoming chair to provide some clear custody rules for digital assets and certainly around those assets that aren't easily custody, right? Those things that aren't share certificates held in the bank vault, I think that there are ways to make sure that the assets of a fund are custody of an appropriate manner.

But also kind of facilitating transactions and not creating a burden within a firm where they have to look at every asset and build a procedure around the custody of it in a way that is probably not cost-effective. Again, it's kind of striking the balance of investor protection and making sure that you're not creating impediments to an adviser or a fund manager from entering into an asset class because they can't custody them. Again, it's detrimental to the market and to the economy at large.

There was also another proposal that would require investment advisers to diligence, monitor and keep records with respect to any service providers that they use, which as you alluded to. I think generally the pushback on that is that investment advisers are fiduciaries. They're doing this anyway because it's their business. If you need to rely on a service provider, you're doing that work anyway. I don't know the necessity of a rule that everybody has to follow in a particular manner is really a well-thought-out path for regulation because each firm is different. Each firm has different resources. It's a different size, different products, different clients. It just seems that's maybe a little bit over-regulation in that area.

Thao Le:

I mean, that sounds like a prime rule or a proposal that would be withdrawn by this commission, right?

John Ford:

I mean, even beyond the proposals, one of the executive orders required or requested that commission suspend the implementation of rules that had previously been adopted, but had yet to reach the mandatory compliance date, so everything's a little bit on hold. But, Thao, as you know all too well, because something is put on hold temporarily does not mean that it's going to be abandoned or not come back. Yes, that is a reference to the Corporate Transparency Act.

Thao Le:

I feel like we need to do a different podcast just to say what the state of play is on the Court for Transparency Act.

John Ford:

I think a daily podcast covering that is probably something you could do. Five minutes every morning on what today brings with the Corporate Transparency Act.

Thao Le:

That would be the ultimate punishment on me.

John Falco:

Although having exemptions from the CTA for the registered funds and adviser spaces makes the CTA a little bit less onerous for John and me.

Thao Le:

Oh, 100%. But let's talk about one more thing because I think that I would have to say the past four years, if not the past eight years, for registered investment advisers to get a routine examination request to say, "Hi, we're the SEC. We just want to come in, knock on your door, and make sure everyone's playing in the sandbox very well and following the rules." But it always seemed to be that that type of routine inquiry, I would always advise clients, you need to treat that as if you are going to enforcement because the smallest bit fault could result in a very protracted explanation to the SEC.

John Ford:

Yes, I guess. I mean –

Thao Le:

I'm more cynical, I think, from that point.

John Ford:

I have a slightly different take on that. I think that you should not rule out the possibility that bad answers can lead to enforcement. But when you're in enforcement and the battle lines are drawn, it's strictly go through the lawyers, and you're at war with a hostile. In the examination process, it's a little bit like wariness where you're in the boxing ring. You're moving around, but nobody's really hitting each other yet. You have to keep your defense up, and you have to be wary, but nobody's actually punching you yet. If you're able to go through the three minutes, you may not get hit.

It's a little bit of a different approach. We've had a number of clients go through significant examinations over the past four, five years. They don't knock on your door anymore. I mean, that's part of it, right? You just get a letter, and then you're told to submit these documents to this data room. Securely, the SEC looks at them, and they don't come back. Well, I mean, that cuts both ways. If the SEC actually came in and sat down with you, they would ask you a question like, "What does this mean?" Sometimes, it's a very simple explanation.

We've seen situations where because of a lack of communication, the particular reviewer misconstrued something in this vast pile of documents, and they went down the wrong road with

the wrong set of assumptions. It led to really long and very serious sounding letters that were all over a misunderstanding. It could have been cleared up a lot sooner.

Thao Le:

Just on this point, though, I mean, I was leading into what we think will be the enforcement environment, right? Because if you read some, like the latest *Wall Street Journal* article I had read about Paul Atkins, I think, had a little bit more of a mentality of maybe taking a step back from the enforcement agenda as much as others. But what do you think that incoming Atkins views would mean to the enforcement, particularly if you're coming out of a routine examination like that?

John Falco:

Look at the two biggest themes of enforcement, probably. I don't have the stats in front of me. The two biggest themes, my two takeaways from the last four years, has been a whole bunch of cases on off-channel communications, which are very easy to prove. Yes, maybe there's some misconduct there. But a lot of times, it's convenience, not malfeasance. But it's an easy way for the SEC to get big-ticket enforcement penalties. The other is a whole raft of enforcement actions against crypto sponsors where unregistered security sales, and that's in absence of clear regulation.

I mean, when Atkins was commissioner, fraudsters still got prosecuted. Fraud is always going to be prosecuted. If you are a bad actor, you can not only expect the enforcement folks to find you, but they're also going to treat you harshly, and nobody's really going to feel bad about it because it erodes the trust in the entire capital markets, investment adviser space, fund space. We have bad actors out there doing bad things. The whole industry gets painted with that brush, and everybody's got things to talk about with their clients, and nobody wants to have those conversations. Those things should always be subject to enforcement, and they should be treated harshly.

It's the meaningless ticky-tack stuff that I think you're going to see a move away from, and I think that's going to be a welcome respite because it eats up a bandwidth of internal people. It eats up capital. Unfortunately, you won't have to hire big law firms to help you on these things, but we've got other things to do as well. I mean, the expectation in the past was that they'll come in for an exam. They'll notice various deficiencies or areas where they think you could improve. Then you would respond to them, clean up your act, or change your procedures, and really implement their suggestions in a positive way that works.

That's not the case anymore, or it hasn't been recently. Now, it's sort of we want to find as many scalps as we can. As John said, they're looking for the easy stuff. It's a clear violation. Even though there was no investor harm, even though there was no fraud, we're talking about technical compliance issues where they can say, "Hey, we have an enforcement scout." It used to not be that way. It used to be more constructed where we're coming in, we're checking you out, and this is the time for you to right the ship for those things that weren't fraud, wasn't knowingly violating the rules or the statute, and there was no investor hurt.

Now, it's sort of been different. I hope that changes in the new administration where there's absent kind of fraud or knowingly violating the rules, that there will be that end recidivism. If you say you're going to do something, you have to do it, those types of things. The commission will work with the industry on these exams and not run to enforcement with easy wins.

Thao Le:

Yes. I'm hoping like the two of you that the enforcement agenda would be much more intentional and thoughtful as to what's there.

John Falco:

Well, if you look back at the past four years, a lot of these enforcement decisions have to be elevated to the commission level, and the commissioners themselves vote on accepting the recommended remediation punishment, et cetera. There were certain of these where it was a 3-2 split in the vote. Uyeda and Peirce were voting against some of these. Some of the remarks early on have been, "Hey, let's just be done with this. I think the industry gets our expectations, and there's no reason to just keep using this to extract fees from them."

Thao Le:

Just on some final thoughts, since we're running out of time here. Let's say at the time of the recording of this episode, we're about 30 days into this administration. I'm going to ask you guys to take out your crystal ball, your magic 8-Ball, whatever you want to call it, and tell me for each of you, just give me one item that you think is going to be predicted for this administration and also, hopefully incoming at Commissioner Atkins. Like the one item that the private equity industry should kind of take away and think about what may be coming in the pipeline. We may do another session and say where are we now six months later to see how good your magic eight ball is or your crystal ball. Let's put it that way. So who wants to start, Ford or Falco?

John Ford:

Well, I mean, I hate to make enemies at the end of any podcast, but the only thing that I've heard the administration talking about concretely was certain tax changes regarding carried interest. That's going to remain a pitched battle between the industry and this administration because of all the initiatives that are out there that doesn't seem to be a lot of sympathy towards that preferential tax treatment. There's supposedly one big, beautiful bill being pushed through that includes tax reform. If that bill is one of the priorities, I think that's more likely to be a near-term thing relative to everything else, given all that's out there.

Thao Le:

Yes. I think I read somewhere that in this beautiful big bill is that there would be a carve-out to whatever rules that may be modified for carry for the oil and gas industry. We will see how that plays out.

John Ford:

Battle lines have been drawn.

Thao Le:

Falco, what do you got? What predictions are you making here?

John Falco:

I think that some of the rules that we discussed or the proposals are probably going to get rescinded. Particularly, I think the service provided rule will probably go away. I think there will be an effort to get, and maybe it's an incremental and little steps to get a framework for work for crypto, particularly in the registered space. Also, in both registered and private, the custody requirements for digital assets. I think you're going to see some activity there. I don't think you're going to see a wholesale solution to crypto by a large-scale rulemaking. But I think they're going to solve issues that are small, they can handle. There's already a common industry way of doing certain things that I think there'll be some guidance at least and maybe we'll make you.

Thao Le:

On that thought, I would just want to say that with the private equity funds and their ability to invest in crypto, I think that the rules to have sensible approach to crypto is going to be nice. Do I think that it's really going to change your private equity industry? Probably not because I think there are a lot of rules that kind of overlap with each other like the custody rule that a lot of these advisers have to comply with. Unless there is a whole package that addresses the custody rules and the cryptocurrency and how they're held, I think the private equity industry is going to be a little behind it. Quite frankly, that's not the bread and butter, so that's not going to be their focus. But you might be able to see some type of basket that a private equity fund may be able to invest a small percentage of their assets into crypto.

That being said, I just wanted to thank you both for taking the time and joining me on this episode, and want to thank the audience as well for joining us. We hope you find our discussion insightful and valuable as you navigate the new normal under this new administration, whatever that may be. Remember to subscribe to our podcast, *PE Pathways*, on your favorite platform, and stay tuned for more episodes where we continue to explore the dynamic world of private equity.

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