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THE ETHICAL CHALLENGES OF GATEKEEPING IN THE SEC'S "BACK-TO-BASICS" ENFORCEMENT ERA

This article examines the evolving ethical landscape for lawyers practicing before the U.S. Securities and Exchange Commission. Under the Commission's prior leadership, so-called "gatekeepers" — including lawyers, directors, and senior executives — were often expected to anticipate, and remediate, novel securities violations. Perceived failures to do so were often met with enforcement action. Although the role of the gatekeeper remains central in the Atkins-led SEC, the paradigm has shifted. Instead of viewing gatekeepers as potential adversaries, the Atkins-led SEC aims to foster a collaborative framework that incentivizes transparency, prompt self-reporting, and independent internal investigations. Although this shift offers issuers and their counsel better opportunities for advocacy, it can pose ethical tensions for SEC-facing counsel. The article analyzes three ethical considerations that the Commission's reforms have brought into greater focus: (1) the duty of confidentiality to one's client; (2) the duties owed to non-clients; and (3) the duties owed to clients when an attorney decides to withdraw from the relationship. It concludes with thoughts on navigating these challenges in the SEC's "back-to-basics" era.

By Sarah Eichenberger *

The U.S. Securities and Exchange Commission ("SEC" or "Commission") has long been a proponent of tasking "gatekeepers" — lawyers, auditors, and independent directors — with ensuring that the market receives complete and accurate information. While the emphasis on gatekeeping is not new, the dynamics of the role have changed over the last several years. Under the Gensler-led SEC, which operated with what some have described as a "regulation by enforcement" mandate, the gatekeeper's role was to predict what might constitute a securities violation — even a *sui generis* violation — and head it off at the pass. Those who were perceived by the Commission as failing to prevent internal controls' failures risked liability. Gatekeeping under the Atkins-led SEC looks different. While the Commission's self-described focus on "bread-and-butter" enforcement continues to place a premium on corporate vigilance, the gatekeeper's role is no longer synonymous with policing novelty risks. Instead, today's SEC has largely replaced the prior administration's adversarial model with a more collaborative credo, instituting policy changes to incentivize transparency and prompt self-reporting.

∗ *SARAH EICHENBERGER is a partner at Katten Muchin Rosenman LLP's New York City office. Her e-mail address is sarah.eichenberger@katten.com.*