Cooley

SEC Now Requires Commission Approval for Subpoenas, but Says It Is Not 'Walking Away' From Enforcement

March 18, 2025

On March 10, 2025, the US Securities and Exchange Commission (SEC) adopted a final rule that will require a majority of the Commissioners to agree before the SEC formally opens an investigation. For the past 15 years, that power had been delegated to the SEC's director of the Division of Enforcement – enabling SEC staff attorneys to issue subpoenas to companies and individuals without approval of the Commission. The new rule will make it more difficult for staff to gain subpoena power, adding a bureaucratic hurdle that could slow investigations down. At the same time, however, Acting Deputy Director of the Division of Enforcement Antonia Apps has insisted publicly that the SEC is not "walking away" from enforcement, but will focus on core areas, such as fraud and deceptive market practices.

Final rule eliminates delegation of authority to director of the Division of Enforcement to issue formal orders of investigation

While the requirement that the Division of Enforcement seek Commission approval is not new, it is a change to a more than 15-year-old rule. In 2009, following the financial crisis, the SEC delegated certain authorities to the director of the Division of Enforcement for a one-year period. In 2010, the SEC extended the delegation for an indefinite period, "until the Commission orders otherwise." One of the delegated authorities is "to order the making of private investigations" – in other words, to formally open an investigation, which would allow SEC staff to issue subpoenas for documents and witness testimony.

The final rule "delete this delegation provision" in order to "align the Commission's use of its investigative resources with Commission priorities." This means that the director of the Division of Enforcement can no longer issue formal orders of investigation – that power is vested solely with the SEC Commissioners. The removal of delegation authority reverts the process to one that Paul Atkins, new SEC chair nominee, was familiar with from his time as an SEC Commissioner from 2002 to 2008.

The final rule does not affect the process for enforcement staff to make informal inquiries, such as issuing a voluntary request for information.

SEC says it is not putting enforcement 'on hold' but will focus on core areas

In recent public remarks, Apps has made clear that the SEC will continue to focus on "core" areas. At the Securities Enforcement Forum in New York in January, Apps stated that there was "no blanket rule that things are on hold," and that the Division of Enforcement was taking a case-by-case approach to existing investigations. She reiterated the message at the American Bar Association (ABA) White Collar Crime conference in Miami in March, stating that the SEC is "not walking away" from enforcement and will "move forward with the core enforcement agenda always moved forward with." Those areas have traditionally included Ponzi schemes, accounting fraud, insider trading, deceptive market practices, disclosure issues and breaches of fiduciary duty.

At the same time, Apps acknowledged – both at the Securities Enforcement Forum and the ABA conference – that the SEC's approach to crypto enforcement is evolving. The SEC launched a Crypto Task Force on January 21, 2025, and created a Cyber and Emerging Technologies Unit (CETU) on February 20, 2025. Check out our February 25 Securities Litigation + Enforcement blog post to learn more about the Crypto Task Force and the CETU.

New SEC administration likely will be more open to Wells meetings

Apps also suggested that under the new SEC, the leadership of the Division of Enforcement will be open to meetings during the "Wells process." The Wells process allows individuals and entities under SEC investigation to make a written submission before the Division of Enforcement makes a recommendation as to whether the Commission should proceed with an enforcement action. Under the previous SEC administration, a meeting with the SEC during the Wells process was generally not available unless the action presented novel legal or factual issues.

But at the Securities Enforcement Forum, Apps noted that, going forward, the director or deputy director of the Division of Enforcement will “generally agree” to have a Wells meeting with counsel for a prospective defendant who requests it. She also noted that defense counsel sometimes engage in a “pre-Wells” process that involves a meeting with SEC enforcement leadership, but she cautioned that the SEC likely will not be receptive to having “two sets of Wells meetings.” While acknowledging that defense counsel are free to make informal submissions, she suggested that defense counsel and SEC staff should be clear up front about their views regarding submissions and in-person meetings.

Key takeaways

- Going forward, for SEC staff to open an investigation, they will have to persuade a majority of the SEC’s Commissioners – a bureaucratic hurdle that could slow down some investigations and force the SEC to prioritize investigations at the “core” of its mission. However, SEC staff can still use informal inquiries to request information from companies and individuals, and information obtained through those inquiries could form the basis for seeking Commission approval to open a formal investigation that includes the power to issue subpoenas.
- While the SEC’s enforcement priorities are evolving to align with the new administration’s priorities, the SEC says that it will continue to police fraud, insider trading and other traditional areas of securities enforcement.
- Individuals and companies going through the Wells process may have more opportunities to tell their side of the story prior to the commencement of an action.

Contributors

Andrew Goldstein
Bio

Luke Cadigan
Bio

Elizabeth Skey
Bio

Bingxin Wu
Bio