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What the SEC's Revocation of Delegated Authority Means for Investigations: Key Takeaways

By Sanjay Wadhwa, Robert Stern, Andrew Dean, Howard Dicker, and Adé Heyliger

On Monday, March 10, 2025, the SEC (or Commission) announced it is amending its regulations to eliminate the delegation of authority to its Enforcement Director to issue formal orders of investigation, which empower the SEC enforcement staff to issue subpoenas in connection with investigations.[1] The Commission noted that the amendment is "the result of the Commission's experience with its nonpublic investigations" and that it is "intended to increase effectiveness by more closely aligning the Commission's use of its investigative resources with Commission priorities."

The SEC's action takes away from the Enforcement Director authority that has existed at the staff level for more than fifteen years.

The SEC initially delegated this authority to the Enforcement Director on August 11, 2009, for a one-year trial period to allow Commission review of the Division's exercise of such authority. At the time, the SEC noted that the delegation was "intended to expedite the investigative process by removing the need for enforcement staff to seek Commission approval prior to performing routine functions." A little over a year later, on August 16, 2010, the SEC amended its rules to extend the Director's delegated authority to issue formal orders of investigation beyond the one-year period.

Since then, the delegated authority has been exercised by Enforcement Directors or, pursuant to sub-delegation, by the senior officers of the division throughout the country. The exercise of such delegated authority has by and large been unremarkable. At the same time, the Commission retained full power to reconsider any formal order at a Commission meeting just as any other recommendation by the Enforcement staff would be considered.

Takeaways

- The withdrawal of delegated authority could mean that the process for investigating potentially violative conduct likely will be lengthier, because obtaining a formal order will now require seeking authorization from the Commission, a multi-step and multi-week process, compared to obtaining that same authority from the Director of Enforcement, which could be achieved in a matter of days.
- Another possible consequence of the announcement, intentional or not, is that for some investigations it could raise the bar for Enforcement staff to pursue conduct that may be more on the margins or out of favor with a majority of the Commission.

[1] It is well-settled that mere "official curiosity" as to whether parties are complying with legal requirements can be a sufficient basis for an agency like the SEC to issue administrative subpoenas. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

- For investigations involving non-SEC registrants, Enforcement staff may look to advance their investigations by issuing voluntary requests for information to the extent feasible, although there are limitations in doing so. For example, staff generally cannot obtain bank records and auditor documents without a subpoena.
- The recipient of a voluntary request could ask to proceed with a subpoena in lieu of a voluntary request in order to pressure-test whether the Commission would preliminarily support a potential charge. But that could be less than ideal given the potential reputational damage that can result from word getting out that a party has received an SEC subpoena. And from a practical perspective, requiring the staff to issue a subpoena runs the very real risk of losing cooperation credit if at the end of the process you are looking to settle the matter. For these reasons, asking for a subpoena in lieu of a voluntary request is a strategic decision that will need to be made carefully taking into account all the facts and circumstances.
- SEC-registrants (*e.g.*, broker-dealers, investment advisers) are generally required to provide documents to the SEC pursuant to the staff's voluntary requests for information, so those investigations may not be significantly impacted.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Securities Litigation practice, please speak to your regular contact at Weil, or to the practice group leader or authors listed below:

Practice Group Leader:

Caroline Zalka (NY)	View Bio	caroline.zalka@weil.com	+1 212 310 8527

Authors:

Sanjay Wadhwa (NY)	View Bio	sanjay.wadhwa@weil.com	+1 212 310 8750
Robert Stern (DC)	View Bio	robert.stern@weil.com	+1 202 682 7190
Andrew Dean (NY)	View Bio	andrew.dean@weil.com	+1 212 310 8970
Howard B. Dicker (NY)	View Bio	howard.dicker@weil.com	+1 212 310 8858
Adé Heyliger (DC)	View Bio	ade.heyliger@weil.com	+1 202 682 7095

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