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## Regulatory Update

# SEC Reportedly Requiring Enforcement Staff to Seek Commission Approval for Formal Orders of Investigation

By [Brad Bondi](#) and [Michael Wheatley](#)

On February 2, media outlets reported that the Securities and Exchange Commission (SEC or Commission) has told SEC Enforcement attorneys that they need the approval of the agency's commissioners for all formal orders of investigation. Formal orders are necessary before SEC Enforcement attorneys can issue subpoenas for testimony or documents.

This action could be a precursor to the SEC rescinding a 2009 SEC rule that delegated authority to issue a formal order of investigation to the SEC's director of Enforcement and other senior officers of the Division of Enforcement.<sup>1</sup>

Before 2009, the Commission approved formal orders of investigation after the Enforcement staff prepared a memorandum for the Commission summarizing the facts and the possible securities law violations.

This practice had three key attributes.<sup>2</sup>

*First*, under the historical approach, before seeking a formal order, the SEC Enforcement attorneys often would engage in informal detective work. This frequently involved seeking information, on a voluntary basis, from the entity under investigation. This informal work often provided the Enforcement attorneys assurance that there had been no wrongdoing and allowed the SEC and the entity to forego a more intrusive and costly investigation.

*Second*, under the historical approach, the Commission was involved in the early stages of enforcement cases, allowing it to provide guidance to the Enforcement attorneys before they compelled testimony and issued wide-ranging document subpoenas. The Commission's approval of a formal order also provided a check on the Enforcement attorneys' investigative power and stemmed questionable investigations.

*Third*, under the historical approach, the fact that Enforcement attorneys had opened an investigation was raised to the highest levels of the SEC, including to the Commission, senior officers in the Division of Enforcement, directors of the other SEC divisions and anyone who attended the closed Commission meeting where the matter was discussed. This allowed Enforcement attorneys to incorporate senior-level feedback into their early decision-making and formulation of the investigative plan.

Since 2009, however, whether and to what extent Enforcement attorneys operated with delegated authority has fluctuated. After President Obama took office in 2009, the Commission amended its rules to delegate authority to the director of Enforcement to open formal orders of investigation and issue subpoenas.<sup>3</sup> The director then subdelegated this authority to other senior officers in the Division of Enforcement, including regional directors and associate regional directors.<sup>4</sup> This delegation and sub-delegation reduced the Enforcement staff's incentive to conduct informal, initial detective work, eliminated an important check on enforcement power and removed the beneficial early involvement of the Commission and other senior SEC leaders. In February 2017, after President Trump took office, the Commission rescinded the sub-delegation of formal order authority but left in place the delegation of authority to the director of Enforcement.<sup>5</sup> The Commission reinstated the sub-delegation in February 2021, after President Biden took office.<sup>6</sup>

The Commission's recent instruction to Enforcement attorneys likely signals a return to Enforcement attorneys conducting investigations informally, involving the Commission early in the investigative process, and communicating and cooperating with other senior SEC officials from the outset of an Enforcement inquiry.

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<sup>1</sup> See, e.g., Chris Prentice, *Exclusive: SEC's Republican-led commission tightens oversight of probes, sources say*, Reuters (Feb. 2, 2025), available at <https://www.reuters.com/world/us/secs-republican-led-commission-tightens-oversight-probes-sources-say-2025-02-02/>.

<sup>2</sup> For additional information, see Bradley J. Bondi, *A Questionable Delegation of Authority: Did the SEC Go Too Far When It Delegated Authority to the Division of Enforcement to Initiate an Investigation?* Center for Financial Stability, (Sept. 20, 2016), available at [http://www.centerforfinancialstability.org/research/Bondi\\_092016.pdf](http://www.centerforfinancialstability.org/research/Bondi_092016.pdf).

<sup>3</sup> See 17 C.F.R. § 200.30-4 Delegation of Authority to Director of Division of Enforcement.

<sup>4</sup> See SEC Office of Inspector General Memorandum, *Review of Certain Actions Taken by Commissioner Michael Piwowar as Acting Chairman* at 3 (Aug. 24, 2017), available at <https://www.sec.gov/files/Review-of-Certain-Actions-Taken-by-Commissioner-Piwowar.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> See SEC Commissioner Allison Herren Lee, *Statement of Acting Chair Allison Herren Lee on Empowering Enforcement to Better Protect Investors* (Feb. 9, 2021), available at <https://www.sec.gov/newsroom/speeches-statements/lee-statement-empowering-enforcement-better-protect-investors>.