

Limit On SEC Enforcement Authority May Mean Fewer Actions

By **David Axelrod and Erin Fountaine** (April 16, 2025)

On March 10, the Republican-led U.S. Securities and Exchange Commission published a final rule revoking the director of the Division of Enforcement's long-standing authority to issue formal orders of investigation.[1]

The move signals increased commissioner control over enforcement decisions, consistent with the Trump administration's efforts to reduce the power of nonpolitical government employees. The new rule is significant given the gating effect of formal orders on enforcement actions; staff cannot open an SEC investigation without a formal order, nor can they issue related subpoenas to compel witness testimony or document production.[2]

The new formal order rule upends 15 years of practice at the SEC.

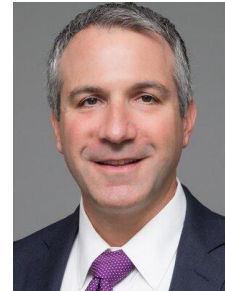
In 2009, following the Bernie Madoff debacle and the financial crisis, the SEC was criticized for not moving quickly enough to investigate. In response, the commission delegated formal order authority to the director of enforcement to "expedite the investigative process by removing the need for Enforcement staff to seek Commission approval prior to performing routine functions," and to reduce "the time and paperwork ... associated with obtaining Commission authorization prior to issuing subpoenas." [3]

Subsequently, the director of enforcement subdelegated this authority to certain senior Division of Enforcement officials, including associate directors and associate regional directors.[4] This had the effect of giving nonpolitical career SEC Division of Enforcement staff the authority to open investigations and move expeditiously; indeed, in the year following the commission's original delegation, its staff obtained more than double the number of formal orders and opened more investigations than the year before.[5]

Under the first Trump administration in 2017, the commission revoked the director of enforcement's subdelegation to senior enforcement officials,[6] but the Biden SEC later restored it in 2021.[7] The commission's original delegation of formal order authority to the director of enforcement had remained intact, until now.

The new rule passed by a contested vote, with the SEC's Republican majority — consisting of then-acting Chair Mark Uyeda and Commissioner Hester Peirce — voting in favor, and lone Democratic Commissioner Caroline Crenshaw voting against. The Senate had not yet voted to confirm Trump's appointee for SEC chair, Paul Atkins, so he did not vote on the new rule. Following his confirmation by the Senate on April 9, the SEC's commissioner count is now three Republicans and one Democrat.

Though the SEC offered little explanation for the change, it stated in the final rule that it seeks to "increase effectiveness by more closely aligning the Commission's use of its investigative resources with Commission priorities," based on its "experience with its nonpublic investigations." [8] It further stated that the rule will ensure "the utmost insight" into new cases.[9]



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This is certainly true. There is no doubt that requiring the Division of Enforcement to seek commission approval to open a formal investigation will allow it to prioritize the use of resources and greater insight into every investigation the Division of Enforcement seeks to open.

The formal order change is consistent with other changes at the SEC.

The formal order rule change is one of many recent shakeups at the SEC that aligns with the Trump administration's stated campaign to "end[] the weaponization of the federal government,"[10] and follows on the heels of several executive orders issued to that stated end.

For instance, on Feb. 18, Executive Order No. 14215 established unprecedented presidential "supervision and control" over independent regulatory agencies like the SEC by subjecting them to Office of Management and Budget reporting requirements from which they were previously exempt.[11] Under this order, the SEC may not take "significant regulatory actions" without first submitting them for review to the Office of Information and Regulatory Affairs, a division of the OMB.[12]

Additionally, this order requires the SEC to embed a "White House Liaison," and the SEC chair must "regularly consult with and coordinate policies and priorities with the directors of the OMB, the White House Domestic Policy Council, and the White House National Economic Council." [13] SEC leadership must now abide by OMB-established "performance standards and management objectives," and may not advance regulations, guidance or litigation positions that contravene "the President or the Attorney General's opinion on a matter of law." [14]

The SEC again saw its regulatory and enforcement power reimagined in Executive Order No. 14219.[15]

Issued on Feb. 19, it purports to "commence the deconstruction of the overbearing and burdensome administrative state" by requiring regulatory agencies, including the SEC, to coordinate with the Department of Government Efficiency in axing regulations that meet certain criteria.[16]

These criteria target regulations "unjustifiably impeding technological innovation, infrastructure development, disaster response, inflation reduction, research and development, economic development, energy production, land use, and foreign policy objectives," as well as regulations that "impose undue burdens on small business" and "impede private enterprise and entrepreneurship." [17]

Further, the SEC must terminate all existing enforcement proceedings that "do not comply with ... [a]dministration policy." [18]

During his Senate Banking Committee confirmation testimony on March 27, Atkins indicated his willingness to work with DOGE toward these aims of "creating efficiencies in the agency or otherwise," and stated his plan to "make sure that taxpayer funds are being used properly and that the work of the Commission is being done effectively and efficiently."

Changes will affect SEC enforcement, but should not lead to complacency.

The public is already beginning to see the Trump administration's policies reflected in the SEC's approach. Indeed, while the SEC — during both the first Trump presidency and the Biden presidency — had a robust enforcement appetite toward the cryptocurrency industry, the commission in the second Trump administration has acted quickly to voluntarily terminate a spate of those cases in recent weeks.

The commission has also established a new task force dubbed "Crypto 2.0."^[19] With Peirce at the helm, the task force seeks to draw "sensible" regulatory bounds and deploy "judicious[]" enforcement resources around cryptocurrency so as to foster "innovation."^[20] The task force has since held roundtables with industry members in order to learn "about what the regulatory issues are and what the Commission can do to solve them," signaling a more industry-collaborative approach to the controversial debate about regulatory jurisdiction over cryptocurrency than in the past.^[21]

Similarly, counsel should consider the practical ways in which the SEC's recent modification to formal order procedures will reshape the SEC enforcement landscape. First, by requiring commissioner approval on the issuance of formal orders, the new rule will slow the pace of SEC investigations significantly.

Under the prior delegation of authority, Division of Enforcement staff could obtain formal orders from enforcement leadership as a matter of routine. Under the new rule, all enforcement staff will need to wait for the opportunity to pitch new investigations to the SEC's commissioners, who oversee all of the SEC's divisions, not just the Division of Enforcement.

Then, staff will need to wait for the commissioners to review and decide. The SEC's newly reduced speed of investigation should inform attorney deliberations about whether and how to respond to subpoenas, enter into tolling agreements, or pursue litigation in lieu of settlement with the agency.

Similarly, in light of the commission's current political makeup, the new rule will likely reduce the SEC's official enforcement activity at large by raising the bar to obtain formal orders. It may also narrow the scope of subpoenas eventually authorized.

Given the new rule's probable impact on the rate at which staff are likely to obtain formal orders, it is expected that staff will increasingly seek the production of information from businesses and individuals on a voluntary basis, instead of via subpoenas.

The SEC's Enforcement Manual, for example, permits staff to request voluntary document production, voluntary document creation, voluntary phone interviews and voluntary record testimony under oath.^[22] Recipients of voluntary requests for information should consider the prudence of cooperation, including the likelihood that refusal — or alternatively, cooperation — will lead to formal orders and subpoena practice.

While some regulated entities must produce certain information if asked, other information may be statutorily protected from voluntary requests, such as by the Electronic Communications Privacy Act or the Right to Financial Privacy Act.^[23] Additionally, obligations may attach to voluntary requests even if they are declined. Such obligations could include, for example, the duty to preserve electronic information if the request reasonably indicates forthcoming litigation.

As the SEC reconfigures under the new administration and stands poised to take a more business-friendly orientation generally, market participants should nevertheless keep in mind that other entities and stakeholders have concurrent jurisdiction over securities regulation and enforcement, including state agencies, securities exchanges, self-regulatory organizations and in applicable instances, private plaintiff investors. Counsel should anticipate increased activity by these entities, especially in Democratic-led states like New York and California, and should be aware that changes at the SEC may mean increased attention elsewhere.

In sum, it is clear from statements and conduct by the new administration and the SEC itself that the Division of Enforcement is headed for a new era of limited autonomy, and as a consequence, an unprecedented clawback of its power and presence in the realm of securities regulation. The commission's recently published rule on formal orders is one clear means toward that end, with more major shifts at the markets' top cop surely to follow.

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[1] Delegation of Authority to Director of the Division of Enforcement, 90 Fed. Reg. 12105 (Mar. 10, 2025).

[2] SEC Enforcement Manual § 2.3.3.

[3] Delegation of Authority to Director of Division of Enforcement, 74 Fed. Reg. 40068 (Aug. 5, 2009). <https://www.sec.gov/files/rules/final/2009/34-60448.pdf>.

[4] Memorandum, Carl W. Hoecker, Inspector General, Review of Certain Actions Taken by Commissioner Michael Piwowar as Acting Chairman, at 3 (Aug. 24, 2017).

[5] Compare Select SEC and Market Data Fiscal 2008, at 21 (2008) (recording 233 formal orders issued and 890 investigations opened in fiscal year 2008), with Select SEC and Market Data Fiscal 2009, at 19 (recording 496 formal orders issued and 944 investigations opened in fiscal year 2009).

[6] Memorandum, Carl W. Hoecker, Inspector General, Review of Certain Actions Taken by Commissioner Michael Piwowar as Acting Chairman, at 3 (Aug. 24, 2017).

[7] Statement, Allison Herren Lee, Acting Chair, Empowering Enforcement to Better Protect Investors (Feb. 9, 2021).

[8] Delegation of Authority to Director of the Division of Enforcement, 90 Fed. Reg. 12105 (Mar. 10, 2025).

[9] Id.

[10] Ending the Weaponization of the Federal Government, 90 Fed. Reg. 8235 (Jan. 20, 2025).

[11] Ensuring Accountability for All Agencies, 90 Fed. Reg. 10447-48 (Feb. 28, 2025).

[12] Id.

[13] Id.

[14] Id. at 10447-49.

[15] Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10583 (Feb. 19, 2025).

[16] Id.

[17] Id.

[18] Id. at 10584.

[19] Press Release, U.S. Securities and Exchange Commission, SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force (Jan. 21, 2025).

[20] Id.

[21] Press Release, U.S. Securities and Exchange Commission, SEC Crypto Task Force to Host Four More Roundtables (Mar. 25, 2025).

[22] SEC Enforcement Manual §§ 3.2.3, 3.3.3, 3.3.4 (2017).

[23] Id. § 3.2.3.