

Return of More Subpoena Power to SEC's Division of Enforcement

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On February 9, Acting Securities and Exchange Commission (SEC or Commission) Chair Allison Herren Lee announced that senior officers in the SEC's Division of Enforcement (Division) will once again be authorized to approve the issuance of Formal Orders of Investigation (Formal Orders). A key building block of the Division staff's investigations, the Formal Order authorizes the staff to subpoena documents and take sworn testimony. With this subpoena power back in the hands of the Division's senior officers, the staff now may conduct and complete enforcement investigations at a faster pace. This is a significant development in the enforcement landscape given that market activity, and misconduct, frequently changes and is developing more rapidly than ever.

This announcement marks the return of the protocol governing Formal Orders to the policy in place four years ago. Specifically, in 2009, former SEC Chair Mary Schapiro originally authorized the Division's associate directors to issue Formal Orders in response to industry outcry regarding the SEC's failure to timely detect and address Bernard Madoff's Ponzi scheme. Senior Division staff maintained this authority throughout former SEC Chair Mary Jo White's tenure, but following her resignation in 2017, the policy was scaled back. Her interim successor, former Acting SEC Chair Michael Piwowar, circumscribed the policy to allow only the head of the Division to approve the issuance of Formal Orders. This policy was maintained through the tenure of recently departed SEC Chair Jay Clayton.

The policy shift implemented by former Chair White in 2009 had a direct impact on enforcement outcomes — both in terms of timing to complete investigations and, correspondingly, the number of overall proceedings brought by the SEC. Prior to 2009, only the Commission itself could issue Formal Orders and only after Division staff submitted a memorandum explaining why subpoena power was necessary. This memorandum was also reviewed by other SEC divisions impacted by the investigation at issue. This process increased the amount of time needed to issue subpoenas, and given their critical role, delayed investigations and enforcement outcomes overall. This is evident from the number of enforcement actions brought by the SEC every year between 2001 and 2016. In a worst case scenario, the delay could potentially prevent Division staff from completing an investigation in time to file an enforcement proceeding before the running of a statute of limitations.

Although former Acting Chair Piwowar and former Chair Clayton's policy did not return to the lengthy pre-2009 approval process, the protocol in place during their tenures limited Formal Order approval power solely to the head of the Division — which still resulted in some delays in enforcement investigations and corresponding outcomes.

President Biden has nominated former Commodity Futures Trading Commission (CFTC) Chair Gary Gensler to be

the next SEC chair. Under Gensler's leadership, CFTC enforcement became more robust, and the agency brought more enforcement actions under his leadership than it had previously. Specifically, in the five years following his installment as CFTC chair, the agency brought 119 more enforcement proceedings than in the five years prior. Observers of the CFTC and the SEC speculate that Gensler, if confirmed, will leave Acting Chair Lee's Formal Order approval policy in place to strengthen the SEC's enforcement powers. As such, we should expect more and faster enforcement activity in the coming years.

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