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NAVIGATING SEC INVESTIGATIONS UNDER TRUMP 2.0: DOES THE ADMINISTRATION CHANGE AFFECT PRE-LITIGATION STRATEGY?

As the SEC undergoes structural and procedural changes under the second Trump administration, companies and counsel navigating enforcement investigations face a shifting landscape. This article examines the implications of the Commission's rollback of formal order authority, anticipated changes in transparency around cooperation credit, and evolving practices in the Wells process. Drawing on recent regulatory developments and public statements, this article analyzes how these changes may affect strategic decision-making at key stages of an investigation. The article offers practical guidance for counsel seeking to engage proactively with Enforcement staff, maximize cooperation credit, and leverage new opportunities for dialogue and transparency in the investigative process.

By Tracy S. Combs and Luke Fiedler *

As the Securities and Exchange Commission ("SEC" or "Commission") undergoes structural and procedural shifts in the first months of the second Trump administration, entities, individuals, and their advisors may be recalibrating their strategies in responding to the SEC's Division of Enforcement's investigations. This article discusses the potential changes relative to the Division of Enforcement's investigative process under Trump 2.0 and analyzes how those changes might impact some of the crucial stages of responding to an SEC investigation, specifically: (1) responding to investigative requests for documents and testimony; (2) deciding whether to self-report possible securities law violations and/or cooperate with an investigation; and (3) engaging in the Wells process. Overall, we anticipate the investigative process may involve more robust dialogue with the Enforcement staff at both its beginning and end, and that the Commission and/or the staff will provide more concrete, detailed guidance regarding credit for self-reporting, cooperation, and remediation under the new administration.

FORMAL ORDER PULLBACK: STRATEGIC IMPLICATIONS

Effective March 15, 2025, the Commission amended its regulations to rescind its long-standing delegation of authority to the Director of the Division of Enforcement to issue formal orders of investigation.[1] Formal orders provide the Enforcement Division's staff with the authority to issue subpoenas for documents and witness testimony in their investigations. Prior to March 2025, delegation of formal order authority from the Commission to the Enforcement Division's Director had been in place for over 15 years. Since 2009 and in the

[1] Rel. No. 33-11366; 34-102552; IA-6862; IC-35492 (2025).

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wake of the 2008 financial crisis, the SEC had allowed the Division of Enforcement to issue orders of investigation without needing to consult the Commission.[2] Moving forward, the Division of Enforcement staff will need to obtain Commission approval by a majority vote of its commissioners, all of whom are political appointees, in order to obtain subpoena authority in its investigations of potential violations of the federal securities laws.[3]

The pull-back of formal order authority to the Commission has elicited concerns from some securities law practitioners that its practical effect might be to slow the investigative process, even as senior SEC officials have emphasized in recent public comments that the Commission's enforcement work would continue apace. Indeed, when formal order authority was initially delegated to the Enforcement Division Director in 2009, the adopting release stated 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 [investigative] functions" (emphasis added) and "increase effectiveness by more closely aligning the Commission's use of its investigative resources with Commission priorities."[4]

The next one to two years will reveal whether the pull-back of formal order authority to the Commission was indeed a harbinger of slowed or reduced investigative activity by the Enforcement Division. However, some practitioners are already predicting an immediate, practical consequence of the pull-back: more frequent requests by Enforcement staff for parties to *voluntarily* produce documents or witnesses for testimony during an investigation, without the backstop of a subpoena issued pursuant to a formal order in order to compel compliance.

An increase in voluntary requests by the staff presents both potential risks and opportunities for the parties to whom they are directed and a more complex calculus for counsel advising them. At first glance, it may seem unlikely that an increase in the staff's requests for voluntary production could drastically alter investigative outcomes. It's doubtful that a proliferation of securities enforcement defense counsel would advise their clients to outright refuse to produce documents or witnesses for testimony based on the sole fact the SEC is asking pursuant to a voluntary request rather than a subpoena. Rather, there are more nuanced considerations at play in the current environment. First, a hardline refusal to comply with a voluntary request might prompt the staff to compel compliance by subsequently seeking a formal order from the Commission, which — except in certain circumstances implicating broader policy concerns — the Commission might readily approve, in which case, the recipient of the request is back to square one. Second, and as discussed further below, refusal to comply with a voluntary request risks the party forfeiting potential cooperation credit down the road and jeopardizes the staff's goodwill.

But the nature of voluntary requests may also create opportunities for parties and their counsel to shape the investigation, particularly in early-stage discussions with enforcement staff, because the staff's need for parties' cooperation with their requests necessitates engagement. By engaging the staff in a robust discussion of the requests, counsel may gain insight into the SEC's investigative focus. Defense counsel may use the voluntary nature of requests to negotiate their scope, and that type of negotiation provides an opportunity — for both sides — to focus on the production of documents or witness testimony that gets to the heart of the matter being investigated, rather than burden the recipient with more broad-based requests that SEC subpoenas have sometimes included. If it appears advantageous to offer a witness for testimony pursuant to a voluntary request, defense counsel may have more success pressing the SEC to disclose in advance the topics of anticipated questioning or to identify relevant documents the staff plans to use — information the staff has historically

[2] Rel. No. 34-60448 (2009); *extended by* Rel. No. 34-62690; 34-62821 (2010).

[3] *Note also* Executive Order, *Ensuring Accountability for All Agencies* (Feb. 18, 2025) (directing, *inter alia*, the chairmen of independent regulatory agencies, such as the SEC, to submit for review all proposed and final "significant regulatory actions" to the Executive Office of the President).

[4] Rel. No. 34-60448.

carefully guarded — which may result in more efficient witness preparation. As a result — and contrary to many practitioners' expectations — if the staff's more limited subpoena power results in more robust, upfront scoping discussions with counsel in the early stages of an investigation, it may indeed help accomplish the investigative efficiency and effectiveness that prompted the 2009 delegation of formal authority to the Enforcement Division in the first place.

SELF-REPORTING, COOPERATION, AND REMEDIATION: A NEW ERA OF TRANSPARENCY

It appears likely that, under Trump 2.0, there may be increased transparency from the Commission and/or the Division of Enforcement about what potential benefits a party stands to gain for self-reporting securities law violations, cooperating with enforcement investigations, and remediating past misconduct or gaps in compliance-related policies and procedures. The Department of Justice ("DOJ") and the Commodity Futures Trading Commission ("CFTC"), both under new leadership in the new administration, have already provided such public guidance with unprecedented specificity. If the SEC follows suit, it would further efforts by the Division of Enforcement under prior administrations to provide greater clarity about what the Enforcement Division considers effective cooperation and could provide more concrete assurances about what the "rewards" of that cooperation might be with respect to charging decisions and potential remedies.

On May 12, 2025, the Criminal Division of the DOJ revised its Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP") to, as stated by Matthew Galeotti, its current Chief, "clarify the outcomes that companies can expect" if a company self-discloses misconduct to the Criminal Division, fully cooperates with its investigation(s), timely and appropriately remediates the misconduct, and no aggravating circumstances exist.[5] While prior versions of the CEP created a presumption of a declination to prosecute (or other outcomes) which could be overcome, the recently revised CEP provides both a detailed written and visual flowchart for the circumstances in which voluntary self-disclosure, cooperation, and remediation *will* result in declination to prosecute, a non-prosecution agreement, a reduction in penalty, and/or no requirement to engage an independent compliance monitor.

Similarly, on February 25, 2025, the CFTC's Division of Enforcement issued an Enforcement Advisory on self-reporting, cooperation, and remediation, providing guidance to the CFTC's Enforcement staff on how to evaluate a company's or individual's self-reporting, cooperation, and remediation, and whether such actions warrant a reduction in proposed penalties, defined in the Advisory as "Mitigation Credit."[6] In the Advisory's accompanying press release, current Acting Chairman Caroline D. Pham stated that the Advisory "demonstrates the CFTC's renewed commitment to fair treatment under the law and principles of regulatory consistency, transparency, and clarity." The Advisory includes descriptions of four "tiers," respectively, for self-reporting and cooperation, from none to "exemplary," and sets out a "Mitigation Credit Matrix," a grid that outlines the range of credit the CFTC may apply to its calculation of a civil monetary penalty depending on the intersection of the "tiers" of a party's self-reporting and cooperation, with a maximum reduction of 55% for both exemplary self-reporting and cooperation.

The SEC has provided guidance regarding credit for cooperation and self-reporting in prior administrations, including: (1) a 2001 Report of Investigation and Statement, commonly referred to as the "Seaboard Report," where the Commission articulated an analytical framework for evaluating cooperation by companies;[7] (2) a 2006 statement on financial penalties, which includes guidance as to when remediation and cooperation should be considered relative to the propriety of imposing a corporate penalty;[8] and (3) a 2010 policy statement announcing the analytical framework by which the Commission evaluates cooperation by individuals.[9] In the past several years, in

[5] 9-47.120, *Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (rev. May 12, 2025), https://www.justice.gov/criminal/media/1400031/dl?inline.

[6] CFTC Division of Enforcement, *Advisory on Self-Reporting, Cooperation, and Remediation* (Feb. 25, 2025), https://www.cftc.gov/PressRoom/PressReleases/9054-25.

[7] Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Exchange Act Rel. No. 44969 (Oct. 23, 2001).

[8] Securities and Exchange Commission, *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, Press Release (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.

[9] Securities and Exchange Commission, *Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions*, Policy Statement (Jan. 19, 2010), https://www.sec.gov/files/rules/policy/2010/34-61340.pdf.

its Orders Instituting Proceedings in settled cases, the Commission has included details regarding corporations' self-reporting, cooperation, and remediation that were instrumental in a Commission decision not to impose corporate civil penalties or impose reduced penalties, presumably with the intent to provide guidance to the industry.[10] In public remarks in May 2024, former Enforcement Director Gurbir S. Grewal outlined "five principles of effective cooperation in SEC investigations," stating that "a cooperative and collaborative approach . . . can help put you and your clients in the best position to get cooperation credit."[11] However, with rare exceptions,[12] and unlike the DOJ, the Commission has not made its declination decisions public, and the SEC's prior reports and policy statements have not provided the type of concrete guidance on the potential reduction of penalties or the future assurances of a declination in certain circumstances set forth in the DOJ's recently-revised CEP or the CFTC's recent Advisory on Mitigation Credit.

That may change in the current administration. With former SEC Commissioner Paul Atkins now serving as its Chair, the SEC may follow the DOJ and CFTC in issuing more detailed, specific, and committing guidance discussing how the Enforcement Division staff will evaluate self-reporting, cooperation, and remediation in recommending charges and remedies to the Commission, and what the Commission will credit towards a reduction in penalties and in what amounts. Indeed, in his remarks at the 2008 Practising Law Institute's SEC Speaks program, Chair Atkins (then a Commissioner) stated that "[c]ompanies should have a clear understanding of what it takes to receive cooperation credit, and that credit should be fairly and evenly administered."[13] If the Commission does follow DOJ and CFTC in issuing specific guidance, it will provide parties and counsel a more defined roadmap for evaluating the risks and benefits of cooperation (including voluntary requests) and a more solid platform from which to argue for specific relief before and during the Wells process, as discussed below.

THE WELLS PROCESS: TOWARDS AN "OPEN-JACKET" POLICY

Finally, the Wells process may become more accessible and more transparent under the new administration. For those unfamiliar with it, the Wells process occurs after the evidence-gathering portion of an SEC investigation is complete. The Enforcement staff sends a "Wells Notice" to parties under investigation, notifying them that the staff has determined that it intends to recommend certain charges and corresponding remedies to the Commission. The Wells Notice generally invites a written "Wells Submission" by the recipient, permitting the recipient to present evidence, legal arguments, and mitigating circumstances that the recipient wishes the staff to consider before making an enforcement recommendation. The Wells process also often involves a Wells meeting with the staff at which counsel for the recipient of the Wells Notice is permitted to make arguments, and, often, engage directly with Enforcement Division supervisors, sometimes including the Director and/or Deputy Director(s) of Enforcement him- or herself.

In a 2021 speech early in his tenure as Enforcement Director, Director Grewal indicated that he and then-Deputy Director Sanjay Wadhwa would pull back on granting Wells meetings out of deference to the staff's judgment, except in instances that involved novel factual or legal questions or raised significant programmatic issues.[14] That may change in the new administration. In April 2025, the Division of Enforcement underwent a restructuring. Previously, the Division had a single Deputy Director; it now has four: Deputy Directors covering the Northeast, West, and Southeast regions, along with a Deputy Director for the specialized units.[15]

[10] *See, e.g.*, *Stanley Black & Decker, Inc.*, Admin. Proc. No. 3-21497 (Jun. 20, 2023) (imposing no civil penalty and stating that Stanley Black & Decker self-reported the perquisite disclosure failures and other conduct potentially implicating the federal securities laws, cooperated with the SEC's investigation, and implemented remedial measures).

[11] *See, e.g.*, Grewal, Gurbir S., *The Five Principles of Effective Cooperation in SEC Investigations*, Remarks at Securities Enforcement Forum West 2024 (May 23, 2024), https://www.sec.gov/newsroom/speeches-statements/grewal-remarks-securities-enforcement-forum-west-052324.

[12] Securities and Exchange Commission, *SEC Credits Former Axa Rosenberg Executive for Substantial Cooperation during Investigation*, Lit. Rel. No. 22298 (Mar. 19, 2012), *available at* https://www.sec.gov/litigation/litreleases/lr-22298.

[13] Atkins, Paul S., *Speech by SEC Commissioner: Remarks to the 'SEC Speaks in 2008' Program of the Practising Law Institute*

footnote continued from previous column…

(Feb. 8, 2008), https://www.sec.gov/news/speech/2008/spch020808psa.htm#foot4.

[14] Grewal, Gurbir S., *Remarks at SEC Speaks 2021* (Oct. 12, 2021), https://www.sec.gov/newsroom/speeches-statements/grewal-sec-speaks-101321.

[15] Atkins, Paul S., *Testimony Before the United States Senate Appropriations Subcommittee on Financial Services and General Government* (Jun. 3, 2025).

With additional staff at the Deputy Director level, it may become more common for a Deputy Director to substantively engage in Wells meetings on more routine cases, giving defense counsel an avenue to argue their side directly to senior enforcement officials. And, those discussions may become more robust given the additional division of labor at the Deputy Director level.

The Enforcement Division may also be more willing to share a greater portion of its investigative file with defense counsel as part of the Wells process in the new administration. As a Commissioner, Chair Atkins advocated for an "open-jacket" policy from the Division of Enforcement; in other words, sharing with defense counsel evidence, both incriminating and exculpatory, related to its proposed charges during the Wells process. In his speech at SEC Speaks in 2008, Chair Atkins called an "open-jacket" policy "due process," and said "[i]f we have a strong case and feel we can win in court under the 'preponderance of the evidence' standard (which is far short of the 'beyond a reasonable doubt' standard in criminal cases), should we not be open with our evidence? In addition to protecting the rights of individuals and companies, an open-jacket policy has practical benefits to the SEC; defense counsel sees the evidence the SEC has against its client and, as a result, is less inclined to fight it out in court."[16] If Chair Atkins's past comments offer insight into changes at the Enforcement Division on the horizon, the agency may well be more willing to embrace the "open-jacket" policy he has long supported, to the benefit of more transparent and robust dialogue during the Wells process.

CONCLUSION: STRATEGIC ADAPTATION REQUIRED

While it may often seem as if nothing is new under the sun when it comes to guiding entities and individuals through an SEC Enforcement investigation, the new administration has signaled that it is likely to be open to an increased role for defense counsel to engage the staff in meaningful discussions regarding requests for documents and witness testimony, the credit due for self-reporting, cooperation, and remediation, and regarding the contents of the investigative file during the Wells process, with active engagement in the process by Enforcement senior officials. Among other things, those who calibrate their cooperation to guidance issued by the new administration, engage early on scoping investigations, and use the Wells process strategically will be best positioned to navigate investigations under Trump 2.0 and achieve favorable outcomes. ■

[16] *Supra* n.13.