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SEC Delegates Subpoena Authority to Enforcement Staff

Continuing the drive to empower its enforcement staff and expedite its investigations, the Securities and Exchange Commission has removed significant barriers to the staff's ability to issue formal subpoenas.

On August 5, without inviting any public comment, the Commission amended its rules (17 C.F.R. § 200.30-4) by delegating to the Director of the Division of Enforcement authority to approve formal orders of investigation. It is these formal orders that confer the Commissioners' imprimatur on an investigation and grant the enforcement staff the power to issue judicially enforceable subpoenas for documents and testimony. Potentially more significant, in a speech given in New York the same day, Enforcement Director Robert Khuzami said he would further sub-delegate this new authority to other senior officers throughout the Division. The revised rule contains a one-year sunset provision and allows the Division Director to submit formal order requests to the full Commission whenever he deems appropriate.

The new rule likely will lead to more frequent use of formal orders and subpoenas by the staff in lieu of informal "voluntary" cooperation, and it certainly will lead to faster issuances of subpoenas when a company or individual fails to cooperate voluntarily and promptly. Until recently, formal orders of investigation were subject to full review at a meeting of all five Commissioners, requiring the staff to place the request on the Commission's calendar and submit a supporting memorandum sometimes weeks in advance. Earlier this year, the Commission reduced these barriers by allowing the staff to obtain formal orders through seriatim approval, or by approval from a single Commissioner acting as duty officer.

Now, the enforcement staff will be able obtain a formal order without the Commission's approval – or even Commission awareness of the investigation. Staff attorneys will seek subpoena authority directly from their superiors, many of whom will already

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be familiar with (and perhaps invested in) the matters being investigated. This will significantly reduce not only the bureaucratic work that must be accomplished before a formal order is issued, but also the Commissioners' visibility into the investigations being conducted on their watch.

Potential subjects of SEC investigations should be aware that faster and more frequent use of subpoenas appears imminent. In addition, public companies will need to consider the potential disclosure issues that may suddenly arise upon the issuance of an unexpected formal order or subpoena, which could occur either without any prior request for "voluntary" production or after the Staff concludes that the Company is not being sufficiently responsive to its informal requests. Although the new rule will expire in a year unless extended by the Commissioners, we expect that the Commission will be encouraging more rather than less devolution of authority as it seeks to further empower and embolden its Enforcement Division.

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