



LEAVING NO STONE UNTURNED: *FORENSIC UPDATE*

SEC Enforcement Has Changed Its Approach To Investigations

The world of SEC investigations has changed, and we fear it could prove costly for companies and investors alike.

Our recent experience, together with discussions with several securities lawyers, indicates there may be a shift in how the Securities and Exchange Commission (“SEC”) Division of Enforcement requests, works with, and intends to utilize information in its investigations. As a result, we have seen and heard of far-reaching requests related to company data, including emails.

Traditionally, the SEC has strongly relied upon the qualifications and work of counsel and accountants in independent internal investigations, and has therefore focused much of its work on understanding the investigation process and considering whether those procedures are sufficient to cover its concerns. The SEC’s latest stance however, appears to trend towards the Staff performing certain investigative procedures itself, regardless of what work has been done during these independent investigations.

For example, the SEC has recently requested:

- **All** email for specific members of management and/or board members for an extended period of time. These requests have included **all** email received **and all emails sent** for the requested custodians; we have heard of an instance where these requests have covered periods going back as far as **12 years**.
- A download of **all** post-closing or manual journal entries for the entity in question for the entire investigation period.
- A complete detailed listing, including cost information, of every item of inventory, reconciled to the balance sheet.
- Our forensic technology labs have seen significant expansion in imaging and processing engagements, in many instances involving entire departments’ computers.

Additionally, we have seen and heard of significant demands for document production or appearances in front of the SEC to be met in very short periods, of resistance to efforts to mutually manage production timing and process, and insistence that any changes to SEC requests be made and agreed upon in writing.

Over the past several years, a major component of every internal investigation has been the capturing, processing, searching and reviewing of transactional information and emails, including the application of email search terms that are customized for the specific case and frequently shared with and supplemented by the SEC and independent auditors. Data analytic procedures have also been a standard part of financial investigations. The SEC has not historically had the capability to process and analyze email files and transactional data in the same manner as independent counsel and their consultants. However, based on these requests for vast volumes of information, it would appear that the SEC now intends to perform some of these forensic technology procedures in-house. Perhaps this is related to what Chairman Mary Schapiro meant when she [announced at the SEC Speaks conference last week](#) that one of the current initiatives is to create a forensic technology lab within the SEC.

What this means for registrants?

We believe Audit or Special Committees of companies under investigation continue to be well served by retaining experienced counsel and accountants to perform investigations. Even in this apparent “new world,” one has to be aware of the facts and exposures in advance of producing information or reporting to the SEC.

This apparent new SEC approach for additional information will likely lead to increased cost and time being incurred by registrants as the additional information is reviewed before production, and in dealing with the inevitable additional detailed questions from the Staff. For example, requesting years’ worth of manual or post-closing journal entries without providing much needed context or specificity may create significant additional expenditures by today’s complex organizations, which often include multiple entities, business lines, reporting divisions or geographies. Preparation of such a request would likely require a review of thousands of journal entries prior to submission.

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