

SEC Big Seeks to Punish Firms for 'Unreasonable' Document Delays

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SEC examiners' No. 1 complaint is "unreasonable delays" on the part of firms in producing documents and data requested of them. Asserting attorney-client privilege when it's not warranted is another big gripe, said Andrew Bowden, head of the agency's exam unit, at a conference Wednesday.

As a result, Bowden said he has told the Division of Enforcement and the commissioners that he would like to see firms hit with enforcement actions in such instances.

"Be aware that we are going to try to push people to be more timely and fully accountable with production of documents," said Bowden during a panel discussion Wednesday at the [Investment Company Institute](#)'s Mutual Funds and Investment Management conference in Palm Desert, Calif.

At the same time, the SEC has an "increasing appetite" for fund firm data, said Bowden.

For the agency's cop squad, use of data over the past three to five years has been "transformative," said Andrew Ceresney, head of the Division of Enforcement, who spoke during the same panel.

The SEC has used data to identify potential insider trading, suitability violations and aberrational performance, among other issues, Ceresney said. Most of the cases referred to the Division of Enforcement come from the Office of Compliance Inspections and Examinations, but the number of investigations stemming from data analytics is growing, he added.

But industry representatives pointed out that at times, the volumes of documents requested can pose challenges. Michel Downer, SVP at [Capital Research and Management](#) and the panel's moderator, noted that SEC examiners have made very broad requests for documents at his firm. Downer asked Bowden if he was telling firms to speed up their process for handing over documents or whether the SEC official was implying that firms are delaying turning over documents in order to avoid scrutiny.

In response, Bowden said he's seen a range of practices at firms.

Often what the SEC sees in delays could be the result of a "disconnect" between the SEC staff's expectations of how long it should take to produce documents and the reality of how long it does take, "even by well-meaning firms," said Randall Lee, partner at [WilmerHale](#) and also a panelist.

Lee also cautioned that it is easy for firms to lose track of the documents they've given the SEC. "Our advice to firms always is keep meticulous records of what you have produced to [the SEC] staff — and that takes time."

A firm's review of which documents are covered by attorney-client privilege is also time-consuming, said Lee. Firms can do a first pass at discerning those documents with searches for specific terms, but to do it right requires "an actual human being," he added.

Most fund shops try to respond to the SEC's document and data requests in good faith and as quickly as possible, says Paul Huey-Burns, partner at **Shulman Rogers**, in an e-mail response to questions.

"The problem is that examiners' requests tend to be overbroad and at times almost irrational," says Huey-Burns, who was not among the panelists. Broad requests are especially difficult for smaller firms and can represent an "existential threat in terms of time and expense," he adds.

Bowden did not refer to any prior enforcement actions over a firm's failure to produce documents in an exam, or because of a delay in handing them over. Nor did he mention cases the agency has brought due to excessive assertion of attorney-client privilege.

Yet at least one securities attorney says it would be unwise for fund firms to ignore Bowden's warning.

"Nothing Drew Bowden says is an idle threat," says Todd Cipperman, managing principal of [Cipperman Compliance Services](#). It's also just good practice for firms to be ready to quickly comply with the SEC's demands for documents, he adds.

"The quicker you can hand over documents to the SEC, the more likely it is that you can keep the temperature down in an exam," Cipperman says.

Further, the law is clear that firms must maintain certain books and records, and those records are subject to exams by the SEC at any time, says Jeffrey Maletta, partner at [K&L Gates](#).

Bowden also warned firms that examiners are more vigilant in checking on problems that were previously uncovered to see if they have been resolved. Only 10% of investment advisor exams are referred to enforcement, he said. Most fund firms end up with a so-called deficiency letter, in which the SEC outlines problems discovered and how they should be addressed.

"We're going to show up a year later to make sure you did what you promised to do," Bowden said, adding that it's always been important to address deficiencies, but it's "increasingly important because we're checking up on it more."

A big factor in whether an issue is escalated to enforcement is "recidivist conduct," Bowden added.

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