SEC Already Has Ample Authority to Preserve and Obtain E-Mail from Uncooperative Subjects

In a letter dated April 24, 2013, the SEC Chairman has proposed a major new idea: to create a court order process enabling civil regulatory agencies to obtain electronic communications from an ISP for use in a civil proceeding "upon satisfying a judicial standard comparable to the one that governs receipt of a criminal warrant." We are pleased to see that the SEC is no longer arguing that it should be able to issue subpoenas to compel production from service providers.

However, the proposal from the SEC raises a host of new questions. Importing the probable cause standard into the civil context would have to be thoroughly examined through hearings. Indeed, since the SEC proposal would expand the authority of all civil investigative agencies, the Congressional committees that oversee those agencies should determine whether, e.g., the IRS, EPA, FTC and CFPB should have this new authority.

In the meantime, the SEC letter understates the powers already available under ECPA to the SEC and other regulatory agencies. The letter notes three concerns, all of which are already addressed under current law:

- Persons who violate the law frequently do not retain copies of incriminating communications;
- They may choose not to provide e-mails in response to Commission subpoenas;
- Individual account holders sometimes delete responsive e-mails.

Current law already has authorities to deal with these issues. To begin with, ECPA authorizes any governmental entity, including a regulatory agency, to require an ISP or other service provider to preserve any evidence in its possession. 18 USC 2703(f). These preservation demands can be issued by any agency, in any kind of matter, without even a showing of need or relevance, and they can be issued at the earliest stages of an investigation, thereby preventing the deletion of data.

In addition, ECPA already allows any regulatory agency to issue administrative subpoenas to any ISP or service provider to compel disclosure of account information (not the contents of communications). S. 607 would not affect this authority. The information that can be obtained with an administrative subpoena includes dates of service, types of service utilized, and records of session times and durations. With this information, the agency can get a good picture of what services an individual or entity used and during what time periods, including when the person accessed his account, making it impossible for the individual to claim, in response to a subpoena, that he has no responsive records in his possession or control.

Armed with data preservation plus evidence of the usage of an account, the government can then use the same methods it uses to compel compliance with any of its subpoenas.

As one former SEC enforcement attorney now in private practice representing those facing SEC investigations has written, "Although it is possible to challenge SEC subpoenas, rarely are such challenges successful or advisable." Stanley C. Morris, "You Said What to the SEC?!!!" http://www.cormorllp.com/html/secpublication.htm