

# Mary Jo White Wants to Read Your Gmail

Congress is moving to bar the SEC from obtaining personal emails, and the agency isn't happy.



SEC Chairman Mary Jo White testifying on Capitol Hill, June 14. PHOTO: GETTY IMAGES

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The Securities and Exchange Commission has raised an uproar about what might seem to be a basic legal question: During an investigation, does the SEC have the power to subpoena personal emails or files from internet companies such as Google, Yahoo or Dropbox?

The Email Privacy Act, a bill unanimously passed by the House of Representatives in April, would explicitly deprive the SEC (and other civil agencies) of the ability to obtain personal emails from internet companies. It would also close a loophole allowing agencies like the FBI and IRS to obtain emails older than 180 days without a warrant. In rare bipartisan agreement, the American Civil Liberties Union and Heritage Action support the bill.

But the SEC opposes it. “Shielding emails from civil law enforcement’s reach,” Mary Jo White, the agency’s chairwoman, wrote recently, “would create an unprecedented digital shelter—one that does not exist for paper materials.”

With all due respect, the bill’s premise is not unprecedented. In fact, it essentially has been the rule at the SEC since the internet’s inception. I should know: I served in the agency’s Enforcement Division for almost 20 years, the last 11 as chief of the Office of Internet Enforcement. I led the legal team that drafted the first, second and third editions of the SEC’s online investigative guidelines.

When we created those guidelines, we found compelling legal precedent in the SEC’s handling of post-office boxes. For decades they served as an ideal “shelter” for fraudsters. Yet the SEC didn’t subpoena mail from post-office boxes. Doing so would be akin to executing a search warrant—which requires a criminal agency to prove to a judge that there is “probable cause” to believe the letters in the post-office box violated the law. Search warrants are reserved for criminal prosecutorial agencies and unavailable to the SEC. That is why the enforcement guidelines I helped write prohibited, and why the SEC has historically refrained from, subpoenaing emails from today’s virtual post-office boxes.

So why is the SEC fighting for such an extraordinary expansion of its authority? Your guess is as good as mine. It's true that if the SEC were granted unfettered access to personal emails, it would probably find them to be a treasure trove of inculpatory evidence. But simply because a privacy intrusion could be fruitful does not justify it. The government could reduce crime by registering citizens' DNA at birth or requiring geolocation devices on automobile license plates, but Americans reject such intrusions.

Make no mistake: If the SEC did someday subpoena and read personal emails, its demands would be broad and sweeping, with no consideration for privacy. It might wind up holding intimate information about the sender's friends and family that is irrelevant to its investigation, or even privileged communications with a spouse, counsel or clergy, which government agencies are generally prohibited from reading.

What in the past hindered overbroad subpoenas were not legal so much as logistical concerns. A witness might back up the proverbial truck to SEC headquarters to dump hundreds or even thousands of boxes of documents—a nightmare for staff to review and even to inventory, delaying the investigation.

Those days are long gone. Improved data handling has made storing and searching through a massive document dump not only easy but even appealing. The SEC now vacuums up terabytes of data, even going so far as to subpoena physical computer hard drives (a dubious investigatory tactic that raises its own legal questions).

Technology facilitates the capture and examination of personal emails, but that does not mean the SEC should be allowed to do so. It is not a criminal agency and operates under its own unique, and far less limiting, civil legal framework. Unlike criminal agencies, the SEC makes no distinction among targets, subjects or witnesses, meaning that throughout an investigation it treats innocent bystanders exactly the same as suspects. The SEC's administrative subpoenas rarely (if ever) are seen by a judge, let alone approved by one.

Ms. White probably will go down in history as one of the SEC's most effective and successful leaders. In its 2015 fiscal year, the agency brought 807 enforcement cases, an unprecedented number, and secured orders directing penalties and disgorgement totaling \$4.2 billion, an all-time high. There is no need to conscript Google, Yahoo and others to snoop into Americans' emails. The SEC can obtain emails as it always has, by directly subpoenaing the people it is investigating, which allows the recipient's attorney to review and object before any email or file is handed over.

The power to obtain emails through the back door should be left to criminal agencies like the Justice Department, where constitutional and statutory privacy protections are safeguarded by vigorous and established judicial oversight.

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