6-1-1985

SEC v. Jerry T. O'Brien, Inc.: Has the Supreme Court Overruled United States v. Powell

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Recommended Citation
SEC V. JERRY T. O'BRIEN, INC.: HAS THE SUPREME COURT OVERRULED UNITED STATES V. POWELL?

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I. INTRODUCTION

The Securities and Exchange Commission1 “must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities”2 fall within the SEC’s regulatory authority. Although the SEC has a legitimate interest in taking the steps necessary to see that there is compliance with the federal securities laws, “it is not at liberty to act unreasonably, and in appropriate circumstances the court may inquire into the reasons for an investigation and into its effects.”3 In the past, the courts have recognized that the target4 of an SEC administrative investigation has legitimate personal and business interests that may be jeopardized or even severely damaged as a result of the mere pendency of an SEC investigation.5 Thus, in any given SEC investigation, a tension

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1. Hereinafter referred to as the SEC or the Commission.


4. The term “target” is not defined in the federal securities laws or in the SEC rules promulgated thereunder. The term is generally understood, however, to refer to the “persons who are being investigated” by the SEC. SECURITIES REGULATION 1232 (R. Jennings & H. Marsh 5th ed. 1982) [hereinafter cited as Jennings & Marsh]. See also SEC v. Nat’l Student Mktg. Corp., 538 F.2d 404, 407 (D.C. Cir. 1976) (McGowan, J., dissenting) (Justice McGowan referred to “persons who were the targets of [SEC] staff investigations,” and again to “the necessary step of notifying investigation targets of the nature of the violations involved”), cert. denied, 429 U.S. 1073 (1977); Wedbush, Noble, Cooke, Inc. v. SEC, 714 F.2d 923, 923-24 (9th Cir. 1983) (The court stated that the SEC was “conducting a formal, administrative investigation of Wedbush, Noble, Cooke, Inc. (Wedbush) . . . concern[ing] suspected violations of the anti-fraud and anti-manipulation provisions of the Securities laws by Wedbush and its customers. . . . No notice of these [SEC third party administrative] subpoenas was given directly to Wedbush, the target of the investigation.”).

between the competing interests of the SEC and the target will be ever present, and the dilemma is to assure that an appropriate balance between these interests is reached at every stage of SEC investigative proceedings.\(^6\)

In its recent decision in *SEC v. Jerry T. O'Brien, Inc.*,\(^7\) the United States Supreme Court addressed the question of whether the target of an SEC investigation is entitled to receive notice of third party subpoenas issued by the SEC. The Court held that no constitutional, statutory or decisional authority justified imposing such a notice requirement on the SEC. Although the result is clear, the Court's reasoning casts doubt on the continued validity and proper application of the principles of *United States v. Powell*,\(^8\) which formed the basis of the target's claim to a notice requirement. The implications of the Court's rather cursory and cryptic treatment of the target's reliance on *Powell* potentially apply to not only SEC investigations but also to those of all other federal administrative agencies.

To give the reader a context in which to evaluate the proper balance between the inherently conflicting interests of the target and the SEC, this Article first summarizes the general nature of SEC investigative proceedings. Next, an analysis of the Supreme Court's decision in *SEC v. O'Brien* will illustrate the flaws in the Court's treatment of the notice problem and its failure to address adequately these conflicting interests.

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\(^6\) This potential conflict between the competing interests of the target and the administrative agency has long been recognized by the Supreme Court. One of the earliest Supreme Court decisions dealing with the issue of judicial enforcement of administrative subpoenas recognized that targets of administrative agencies may undertake measures to "stop much if not all . . . investigation in the public interest at the threshold of the inquiry . . . . This would render substantially impossible [the] effective discharge of the duties of investigation and enforcement which Congress has placed upon [the administrative agency]." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213 (1946). In his dissent, in *Oklahoma Press*, Justice Murphy articulated the countervailing interests of the administrative target:

> Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves.

> . . . .

> Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power.

> *Id.* at 218-19 (Murphy, J., dissenting).

\(^7\) 104 S. Ct. 2720 (1984).

\(^8\) 379 U.S. 48 (1964).
Finally, this Article will propose legislation to provide a proper balance between the competing needs of the SEC and the target.

II. THE COMPETING INTERESTS OF THE TARGET AND THE SEC IN A FORMAL INVESTIGATION

The SEC must be provided with the necessary tools to carry out its enforcement responsibilities under the federal securities laws, which were enacted for the protection of the investing public. But those powerful tools that have been given to the SEC to carry out its mandate, including the subpoena power and the power to impose significant sanctions on the target, are subject to potential abuse and may severely damage, without appropriate justification, the interests of the target of an investigation. In its O'Brien decision, the Supreme Court accepted the SEC's position that requiring notice to the target of third party subpoenas would impose an undue burden on the SEC's ability to carry out its enforcement responsibilities. What the Court failed to consider fully, however, are the legitimate concerns of a person who becomes the target of an SEC administrative investigation.

The "investigative" nature of the SEC administrative proceedings is generally given as at least a partial justification for denying the target certain rights such as notice of matters under investigation, the right to cross-examine witnesses and now, presumably, the right to receive notice of third party subpoenas. What this argument overlooks completely, however, is that the target suffers prejudicial publicity from the mere issuance of an SEC subpoena to a third party. The third party witness

11. See infra note 27.
12. See infra notes 63-65 and accompanying text.
14. See Lacy, Adverse Publicity and SEC Enforcement Procedure, 46 FORDHAM L. REV. 435 (1977); Lowenfels, SEC Investigations: The Need for Reform, 45 ST. JOHN'S L. REV. 575, 576-77 (1971). A study commissioned by the SEC reported that "[i]nvestigations are often protracted and their existence frequently becomes a matter of public knowledge. During the pendency of an investigation uncertainties are likely to be created in the minds of the investigators and those with whom they have business or other dealings. REPORT OF THE COMMISSION'S ADVISORY COMMITTEE ON ENFORCEMENT POLICIES AND PRACTICES (1972),
may receive a subpoena and be apprised of the violations that the target is suspected to have committed\textsuperscript{15} and all the while the target is unaware of these events.\textsuperscript{16} The securities industry is exceptional in its reliance on confidence-based business relationships.\textsuperscript{17} The foundation of these business relationships, which are so important to the target's continued livelihood in the securities industry, may be irreparably harmed by the SEC's conduct of its investigation through administrative summonses issued to the target's business acquaintances without notice to the target.\textsuperscript{18}

This policy basis for a notice requirement, involving "real world" concerns of negative publicity to the target, was not expressly considered by the Supreme Court in its \textit{O'Brien} decision. Notwithstanding this omission, this consideration should be balanced against the SEC's policy arguments, which did form the primary basis for the Court's decision in \textit{O'Brien}, so that a proper balance may be reached between the competing interests of the SEC and the targets of SEC administrative investigations.

A. \textit{SEC Administrative Investigations and Use of Its Subpoena Power}

Congress has delegated to the SEC broad authority to conduct investigations into suspected violations of the federal securities laws.\textsuperscript{19} The Commission generally initiates an investigation as a result of: (1) a complaint of an investor or other member of the general public; (2) a surprise inspection of the books and records to be maintained by a securities industry professional; or (3) the SEC's general surveillance and analysis of the performance of particular stocks within the marketplace where fluctuations cannot be explained by known developments relating to the is-

\textsuperscript{15} See infra notes 51-52 and accompanying text.
\textsuperscript{16} See infra notes 47-48 and accompanying text.
\textsuperscript{17} See Lowenfels, supra note 14, at 578; Lacy, supra note 14, at 435.
\textsuperscript{18} "Settlement [of SEC investigations] is also desirable from [the target's] point of view, because, apart from the costs and expenditure of time involved, a prolonged proceeding is likely to result in repeated adverse publicity and may have other undesirable and, possibly, unintended effects." The Wells Committee Report, supra note 14, at 10; see also Lacy, supra note 14, at 435-36, 438-39; Lowenfels, supra note 14, at 576; Freedman, \textit{A Civil Libertarian Looks at Securities Regulation}, 35 OHIO ST. L.J. 280, 284 (1974); Freeman, \textit{A Private Practitioner's View of the Development of the Securities and Exchange Commission}, 28 GEO. WASH. L. REV. 18, 24 (1959).
suer or the marketplace as a whole.\textsuperscript{20}

Generally, the first phase of an investigation is conducted in an informal manner.\textsuperscript{21} The SEC interviews actors involved in the suspected wrongdoing and prospective witnesses, and examines related books and records on a voluntary consent basis\textsuperscript{22} to uncover further facts and to determine if there is a factual basis to support the SEC's suspicion that a provision of the federal securities laws, or the rules of a self-regulatory organization, have been, or are about to be, violated.\textsuperscript{23} These interviews and examinations are non-public and any reports generated during the course of such proceedings are for the SEC's use only.\textsuperscript{24}

Once the informal phase of its investigation is completed, the SEC staff reviews the accumulated evidence and decides whether to request the Commission members to issue a Formal Order of Investigation.\textsuperscript{25} An FOI serves as the basis for a formal investigation and, by its terms, defines the scope of the investigation.\textsuperscript{26}

As part of its investigative authority, the SEC is empowered to issue administrative subpoenas to compel the attendance of witnesses and the production of documents determined by the SEC to be relevant to the investigation.\textsuperscript{27} This subpoena power attaches only when an FOI is en-
tered by the Commission members. As part of an FOI the Commission members customarily delegate to certain staff members the authority to issue administrative subpoenas. As a general rule, the staff member who conducted the informal investigation also seeks the entry of the FOI and is usually the person to whom the Commission delegates its subpoena power. Pursuant to the legislative delegation of investigative power, the SEC has drafted rules that govern the manner in which an investigation will proceed.

The target of an SEC administrative investigation is not required to receive notification of the entry of an FOI. Usually, the target first becomes aware of the existence of an SEC investigation when the target receives an SEC subpoena to produce documents or to testify. Alternatively, the target may receive informal notice from a third party who has received an SEC subpoena.

All proceedings conducted pursuant to an FOI are private, unless the Commission members have specifically ordered that the investigation be a matter of public record. The general policy behind the non-public nature of SEC investigations recognizes that the target, as well as any third party witnesses whose participation is required in the SEC investi-

30. E. THOMAS & R. SHIELDS, supra note 13, at 222; Lowenfeld, supra note 14, at 577.
33. E. THOMAS & R. SHIELDS, supra note 13, at 222; Merrifield, supra note 22, at 1599.
34. During oral argument before the Supreme Court in the O'Brien case, Justice Stevens suggested that targets "[o]nly do business with people willing to give notice. . . ." Supreme Court Hears Arguments in SEC Third-Party Subpoena Case, 16 SEC. REG. & L. REP. (BNA) 665, 667 (1984). See also Lacy, supra note 14, at 438; Merrifield, supra note 22, at 1599.
gation, may be "seriously injured if it became publicized that they were somehow involved in [an SEC] investigation." It is also the SEC's belief that a private investigation promotes cooperation and candor from potential participants since they can be assured that their testimony will remain confidential.

If a recipient of an SEC administrative subpoena believes that the summons is defective or is otherwise subject to challenge, the recipient may simply refuse to comply with the administrative subpoena. No penalty will attach for this failure to comply since the SEC subpoena is not self-executing. Many recipients, however, fail to realize that an SEC subpoena is not self-enforcing. This is due at least in part to the air of authority that surrounds an administrative subpoena and the procedure by which it is issued. Indeed, the text of an SEC subpoena duces tecum includes the following warning to its recipient: "Fail not at your peril."

Although Congress delegated subpoena power to the Commission, some penalties.

37. Id.
38. Jennings & Marsh, supra note 4, at 1231. Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942) ("[T]here can be no penalty incurred for contempt [for failure to comply with an administrative subpoena] before there is a judicial order for enforcement.").
41. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting) ("Many persons have yielded [to an administrative subpoena] solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid."); Cudahy Packing Co. v. Holland, 315 U.S. 357, 363-64 (1942) (The administrative subpoena "has some coercive tendency, either because of ignorance of their rights on the part of those whom its purports to command on their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation.").
42. The SEC subpoena which was served during the course of the SEC's O'Brien investigation contained the customary warning, "Fail not at your peril." Although a subpoena recipient has the option of refusing to comply with a subpoena that the recipient believes is defective and thus forcing the SEC to test the validity of the subpoena in a judicial enforcement action, rarely do subpoena recipients exercise this option. Instead they choose to cooperate in the face of the severe reprisals that may otherwise befall the subpoena recipient. It has been suggested that refusal to obey an SEC subpoena

is rarely advisable, since it will infuriate the SEC staff, and they are likely to make life as unpleasant as possible to the person involved during the subsequent course of the proceeding. It may even result in that person being named as a defendant in an injunction action or in a criminal reference to the Justice Department, which might not have occurred if he had been cooperative.

Jennings & Marsh, supra note 4, at 1231-32.
Congress did not intend these subpoenas to be self-enforcing.\textsuperscript{43} If a recipient of an administrative subpoena issued by the SEC refuses to comply, the SEC may compel compliance only by instituting an enforcement action in the appropriate district court.\textsuperscript{44} Under this legislative scheme, a person cannot be punished for failure to comply with an administrative subpoena until its terms have been reviewed by a district court\textsuperscript{45} and the court has entered an order directing compliance with the terms of the subpoena as originally issued or as modified by the court.\textsuperscript{46}

The target of an SEC investigation does not receive a copy of the FOI;\textsuperscript{47} however, if the target receives an SEC subpoena, the target may exercise the right accorded a witness in a formal investigation to examine, upon proper request, a copy of the FOI.\textsuperscript{48} No copies of the FOI, however, may be retained by the target or any other subpoena recipient, unless unusual circumstances can be shown.\textsuperscript{49} Review of the FOI by counsel prior to the target’s compliance with the subpoena is important, not merely to enlighten the target as to the nature of the SEC’s suspicions of wrongdoing, but also to determine whether any document requested or the testimony to be given is within the scope of the FOI.\textsuperscript{50}

If the target is not subpoenaed by the SEC, the target may be made

\begin{footnotes}
\item[44] Merrifield, supra note 22, at 1602 (“If a subpoenaed witness does not wish to comply with the subpoena he may refuse to appear and thereby force the staff to apply to the federal district court for an order compelling compliance.”). See also supra note 27 & 43.
\item[45] Jennings & Marsh, supra note 4, at 1231 (“There is no punishment provided for ignoring such a subpoena [issued by the SEC staff]. If a witness refuses to appear or refuses to answer questions, the only recourse of the Commission is to initiate a proceeding in court to enforce compliance with the subpoena.”).
\item[46] With respect to the court’s authority to modify the terms of an administrative subpoena before ordering compliance, see, SEC v. Arthur Young & Co., 584 F.2d 1018 (D.C. Cir. 1978) (court ordered defendant’s compliance with SEC’s third party subpoena but conditioned subpoena enforcement by modifying terms of original subpoena so as to avoid excessive burden to subpoena recipient), cert. denied, 439 U.S. 1071 (1979); United States v. Bisciglia, 420 U.S. 141, 146 (1975) (“The cases show that the federal courts have taken seriously their obligation to apply [the Powell] standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons.”); Wearly v. FTC, 616 F.2d 662, 665 (3d Cir.) (“[T]he court has the power to condition enforcement [of administrative process] upon observance of safeguards to the [target’s] valid interests.”), cert. denied, 449 U.S. 822 (1980); SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976) (enforcement of an SEC administrative subpoena was conditioned on the subpoena recipient’s right to be represented at his deposition by the attorneys of his choice, notwithstanding the SEC’s claim that it had the authority to exclude the attorneys).
\item[47] See supra note 32 and accompanying text.
\item[48] Rule Relating to Investigations 203.7(a), 17 C.F.R. 203.7(a) (1984); Tew & Freedman, supra note 31, at 8.
\item[49] Rule Relating to Investigations 203.7(a), 17 C.F.R. 203.7(a) (1984).
\item[50] E. Thomas & R. Shields, supra note 13, at 222; Winter, supra note 31, at 25.
\end{footnotes}
aware of a pending SEC investigation by a third party who receives an SEC summons issued as part of the SEC's investigation of the target.\footnote{See supra note 34.} That third party also has the right to inspect the FOI.\footnote{See supra note 48.} Frequently, however, the third party has no incentive to inspect the FOI to ascertain whether the subpoena is within the scope of the FOI, presuming, of course, that the third party is even aware of this right.\footnote{Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065, 1067 (9th Cir. 1983), rev'd, 104 S. Ct. 2720 (1984). There may even be a disincentive for the third party subpoena recipient to undertake any such evaluation of the proper scope of subpoena request, due at least in part to the legitimate concern that the witness' ongoing relationship with the SEC, as part of its usual business activities, may be made more difficult. See supra note 41; Lacy, supra note 14, at 435 ("Persons subject to SEC regulation must strive for its favor, because they are confronted with regulations administered by it at every turn, and because the agency has broad discretion in administering those legal requirements."). Moreover, in United States v. New York Tel. Co., 644 F.2d 953 (2d Cir. 1981), the court noted that Congress recognized that, prior to the adoption of the Internal Revenue Code \$ 7609 in the context of Internal Revenue Service taxpayer investigations, third party subpoena recipients had the right to challenge IRS subpoenas on a variety of grounds, including relevance, but Congress further recognized that "the interest of the third party witness in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain." Id. at 956 (citations omitted). Since the Powell criteria relate to the target's interests more than the third party's personal interests, this reasoning applies with equal force to the SEC third party subpoena notice issue. See O'Brien v. SEC, 704 F.2d at 1068-69.\footnote{See supra note 41-42.}}

The target does not receive notice of the SEC subpoena issued to a third party.\footnote{SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. 2720, 2725 (1984). See supra note 42.} As a result, the target is unable to contact the third party to explain that the pending proceedings are investigatory only, notwithstanding the compelling and accusatory nature of the SEC administrative subpoena and FOI.\footnote{The SEC is empowered to investigate suspected violations of federal securities law violations. Generally, the SEC institutes these investigations because of referrals relating to particular persons or transactions. Thus, the general starting point of most SEC investigations involves examining persons or records related to the subject transaction or person under investigation and this generally requires direct contact by the SEC with the target's business associates. See Lowenfels, supra note 14, at 577-78; Lacy, supra note 14, at 435, 438-39.} Oftentimes, the third party is a business associate of the target.\footnote{SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1051 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). In Brigadoon Scotch, the court stated: To avoid "an unnecessary imposition on [the targets]" that "possibly would damage their business" [the district court] denied enforcement [of a certain portion of the SEC's administrative subpoenas] . . . . In addition, to lessen the impact on [the personal interests, this reasoning applies with equal force to the SEC third party subpoena notice issue. See O'Brien v. SEC, 704 F.2d at 1068-69. See supra note 41-42.} These contacts between the SEC and the third party, unbeknownst to the target, at the very least besmirch the reputation of the target and can have potentially disastrous consequences to the target's business relationships and ultimately to his or her ability to engage in the financial markets.\footnote{51. See supra note 34. 52. See supra note 48. 53. Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065, 1067 (9th Cir. 1983), rev'd, 104 S. Ct. 2720 (1984). There may even be a disincentive for the third party subpoena recipient to undertake any such evaluation of the proper scope of subpoena request, due at least in part to the legitimate concern that the witness' ongoing relationship with the SEC, as part of its usual business activities, may be made more difficult. See supra note 41; Lacy, supra note 14, at 435 ("Persons subject to SEC regulation must strive for its favor, because they are confronted with regulations administered by it at every turn, and because the agency has broad discretion in administering those legal requirements."). Moreover, in United States v. New York Tel. Co., 644 F.2d 953 (2d Cir. 1981), the court noted that Congress recognized that, prior to the adoption of the Internal Revenue Code \$ 7609 in the context of Internal Revenue Service taxpayer investigations, third party subpoena recipients had the right to challenge IRS subpoenas on a variety of grounds, including relevance, but Congress further recognized that "the interest of the third party witness in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain." Id. at 956 (citations omitted). Since the Powell criteria relate to the target's interests more than the third party's personal interests, this reasoning applies with equal force to the SEC third party subpoena notice issue. See O'Brien v. SEC, 704 F.2d at 1068-69. 54. SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. 2720, 2725 (1984). See supra note 42. 55. The SEC is empowered to investigate suspected violations of federal securities law violations. Generally, the SEC institutes these investigations because of referrals relating to particular persons or transactions. Thus, the general starting point of most SEC investigations involves examining persons or records related to the subject transaction or person under investigation and this generally requires direct contact by the SEC with the target's business associates. See Lowenfels, supra note 14, at 577-78; Lacy, supra note 14, at 435, 438-39. 56. SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1051 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). In Brigadoon Scotch, the court stated: To avoid "an unnecessary imposition on [the targets]" that "possibly would damage their business" [the district court] denied enforcement [of a certain portion of the SEC's administrative subpoenas] . . . . In addition, to lessen the impact on [the
Lacking notice of the SEC third party subpoena, the target is also denied the chance to explain to the third person the basis of the target’s denial of the SEC charges under investigation, so that the target may preserve and hold the third party’s business confidence.\textsuperscript{58} Indeed, during the course of a formal SEC investigation, the target has little ability to marshal any evidence in his or her defense, that is, no ability to attend third party depositions and examine witnesses,\textsuperscript{59} limited ability for counsel to question or rehabilitate the target at the target’s deposition,\textsuperscript{60} and limited ability for counsel to object to questions posed by SEC investigators at the target’s deposition.\textsuperscript{61} As one commentator has observed, “because of the investigative nature of the proceeding, counsel does not have the right to present the [target’s] ‘case’ by calling witnesses or introducing documents into evidence.”\textsuperscript{62}

The formal phase of the SEC’s investigative proceedings conducted pursuant to an FOI generally resolves itself in one of the following ways: (1) the SEC staff may initiate administrative proceedings before the Commission seeking administrative sanctions authorized by statute;\textsuperscript{63} (2) the SEC staff may initiate injunctive actions in federal district court;\textsuperscript{64} (3) the SEC staff may refer matters to the Department of Justice for consideration of criminal prosecution if the evidence suggests willful violations;\textsuperscript{65}
(4) the SEC staff may settle the dispute with the target before any further enforcement proceedings are instituted;\textsuperscript{66} or (5) the SEC staff may let the matter die,\textsuperscript{67} generally because the investigation failed to disclose sufficient facts to support any allegation of a violation of the federal securities laws. In the event that the SEC staff declines to recommend the commencement of enforcement proceedings against a target, the staff, "in its discretion, may advise the [target] that its formal investigation has been terminated."\textsuperscript{68} Thus, the SEC need not advise a target that it has completed its inquiry into the target's activities and has decided to take no further action.\textsuperscript{69} The SEC is under no obligation to notify recipients of third party subpoenas that the SEC's investigation has been terminated with no further proceedings to be taken. Moreover, the target has not received notice of the process served by the SEC on third parties and cannot notify them of the resolution of the SEC's investigation unless informal notice was received from the third parties themselves.\textsuperscript{70}

\textbf{B. The Interests of the Target that Support a Notice Requirement in the Context of SEC Administrative Investigations}

It is generally acknowledged that those persons who are known to be connected with an SEC investigation suffer a 'taint' that can have potentially disastrous consequences to such persons' ability to earn a livelihood within the securities industry.\textsuperscript{71} This negative publicity flows

\begin{footnotes}
\item[66] SEC Rule 202.5(f), 17 C.F.R. § 202.5(f) (1984); see E. \textsc{Thomas} & R. \textsc{Shields}, \textit{supra} note 13, at 228-29 (regarding settlement practices in general); Rules of Practice 201.8(a), 17 C.F.R. § 201.8(a) (1984) (regarding SEC settlement practices).
\item[68] Id.
\item[69] See Freedman, \textit{supra} note 18, at 284-85; Lacy, \textit{supra} note 14, at 440-41; Merrifield, \textit{supra} note 22, at 1629.
\item[70] One of the recommendations suggested in the Wells Committee Report was that the "Commission should adopt in the usual case the practice of notifying [the target] against whom no further action is contemplated that the staff has concluded its investigation of the matters referred to in the investigative order and has determined that it will not recommend the commencement of an enforcement proceeding against [the target]." The Wells Committee Report, \textit{supra} note 14, at 1.
\item[71] Lacy, \textit{supra} note 14, at 435 ("The daily operations of the securities industry depend on reputation and trust."); Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968) ("So much of the stock market depends upon faith and reputation that the court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending lawsuit."); Merrifield, \textit{supra} note 22, at 1594. Merrifield states in his article:

\begin{quote}
Even though an investigation is not an indication that the SEC has determined that a violation has occurred, and despite the [non-public] nature of both informal and formal investigations, when the existence of an investigation does become known it can have detrimental effects on the [targets]. Persons such as [the target's] clients, customers, suppliers, lenders, stockholders and employees who are contacted by the staff obtain knowledge of the investigation; the knowledge spreads quickly and rumors
\end{quote}
\end{footnotes}
from the mere pendency of an SEC investigation. The turmoil and impact generated when third parties learn of a pending SEC investigation of a target can realistically be mitigated only through the efforts of the target.

First, what will the target do to mitigate the negative publicity that inevitably occurs when third parties learn of a pending SEC investigation after receiving SEC administrative subpoenas? The target would like to contact subpoena recipients and assure them that the SEC is conducting only an investigation, that no charges have been lodged against the target, that the SEC simply believes that securities laws violations have occurred, and that the SEC is looking for evidence to support this belief. These assurances must be immediately forthcoming in order to dispel the accusatory and compelling nature of the SEC’s third party subpoena.

Second, the target will want to explain to the third party the target’s side of the story. Many targets, not unexpectedly, will deny the veracity of the SEC’s charges of wrongdoing. The target would like to have an opportunity to explain to the third party the factual and legal basis of its denial of the SEC’s allegations of securities laws violations.

The target has real incentive to undertake efforts to contact independently third parties to provide any necessary assurances and to explain the target’s position because these subpoenaed third parties are frequently tied in some fashion to the target’s ability to conduct his or her business affairs within the securities industry. Although there may be considerable time and expense involved in contacting these third parties, the target frequently will want to communicate with them to preserve his or her business relationships. This is especially true within the securi-

\textit{Id.} at 1594 (footnote omitted).

\section{footnotes}

72. See Lowenfels, supra note 14, at 576 ("[T]he very initiation of an investigation by the SEC under the securities acts is a substantial sanction upon the investigatee."); Lacy, supra note 14, at 435.

73. See supra notes 40-41 and accompanying text; Lacy, supra note 14, at 439 ("Upon learning of an SEC investigation, the public had traditionally assumed that the subject has in fact violated the law.").

74. Lacy, supra note 14, at 438-39 ("The first group to learn of the investigation is typically made up of those with whom the target does business, who are the most promising witnesses, yet whose knowledge of the inquiry is the most damaging to the target."); see also supra note 71.

75. The Supreme Court in \textit{O’Brien} suggested that the target will contact these third parties for improper purposes, such as witness intimidation. SEC v. Jerry T. O’Brien, Inc., 104 S. Ct. 2720, 2730 (1984). The Court’s suggestion assumes that the target will also be in a position to harass the third party witness, when, in fact, the opposite may just as likely be true. It is entirely possible that the third party witness may be in a position to harass or threaten the
ties industry where confidence-based relationships from the cornerstone of the securities professional's ability to compete. Obviously, the earlier the target contacts his or her business acquaintances, the better the chances are of the target being able to explain his or her position regarding the pending SEC investigation so as to mitigate the harm that might otherwise result to these business relationships.

By contrast, the SEC has no real incentive to mitigate the harm to the target from negative publicity resulting from the mere pendency of an investigation. Indeed, as the party initiating and pursuing the investigation, the SEC has an obvious stake in indicating its belief that the target has committed the alleged securities laws violations. It is patently obvious that, even if the SEC were prevailed upon to undertake any of the explanations required to preserve the target's business relationships with third party subpoena recipients, it is highly unlikely that the SEC's efforts would be successful.

This is often the case in connection with an SEC investigation of a registered broker-dealer, where the SEC issues an administrative subpoena to an important customer of the broker-dealer. This customer may wield significant economic clout vis-a-vis his agent, the broker-dealer. This unequal bargaining power renders it highly unlikely that the broker-dealer will be able to intimidate the witness. On the other hand, the broker-dealer's continued association with this valued customer may be important to the target's ability to earn his or her livelihood in the securities industry. See Lacy, supra note 14, at 435. Other examples, where the business relationship between the target and the third party subpoena recipient is important to the target's professional livelihood, are not hard to discover, such as the relationship between the target and his bank, the target and his trade creditors, the target and his customers and the target and his employer. Frequently, in these situations, it is unlikely that the target will be in a position to intimidate this business associate who receives an SEC subpoena.

In SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), the court concluded that the SEC's administrative subpoena, which was issued to the target during the course of an SEC investigation under the Investment Advisors Act and which demanded that the target produce certain documents, was enforceable despite the target's claim, inter alia, that enforcement would abridge the target's freedom of press rights guaranteed to it under the first amendment. In reaching this conclusion, the court observed:

The alternative method by which the Commission might have attempted to investigate the commercial activities of the [target] would have been more likely to threaten a chilling of free expression than would compliance with the subpoena in question. The Commission might have addressed separate queries to all the securities industry institutions which supply the material the [target] publishes, or to the investment community members likely to be among its more prominent subscribers. Such a probe could have generated rumors which might have been much more difficult to counteract, and much more damaging, than the private investigation in question.

Id. at 1381 (footnote omitted).

The Wells Committee suggested that all formal orders and letters accompanying subpoenas prominently display a statement that institution of an investigation does not mean that the Commission has concluded that a violation has occurred. Recently,
If an SEC investigation pursuant to an FOI results in no further proceedings taken against the target, the negative impact resulting from the publicizing of the investigation to third party subpoena recipients may linger on and continue to impact negatively on the "target," who is now no longer a target.  

Obviously, this damage could have been lessened or eliminated had the target received notice so that the target could have shouldered the burden and the expense of contacting the subpoenaed third parties to provide any necessary assurances and/or explanations. If the target lies in his or her explanation to the third party about any of the details of the suspected securities laws violations that are the subject of the pending SEC investigation, the traditional antifraud remedies exist. However, if no charges are ever lodged against the target, the target, absent informal notice of the issuance of the SEC third party subpoena from the subpoena recipient itself, will have had no opportunity to exonerate himself or herself with his or her business associates. This can be particularly

the Commission implemented this suggestion in part, by including in subpoenas a notice that the "investigation should not be taken as an adverse reflection on any individual, business or security." Although helpful, even these efforts are far from a complete solution because the Commission could never deny the suspicion of misconduct manifested by the investigation, and news of that suspicion would itself impede participation in the securities markets.

Id.  

78. See Lacy, supra note 14, at 440 ("Sometimes the staff will decide not to recommend any action against the target, but the rumors and suspicions will persist."). See supra notes 63-68 and accompanying text.

79. The traditional antifraud remedies include § 10(b) and Rule 10b-5 under the Securities Exchange Act, common law fraud, and state securities laws provisions such as CAL. CORP. CODE § 25401 (West 1977). Additionally, such misconduct on the part of the target may serve as a further basis for SEC administrative investigation of the target.

80. In this type of situation, the absence of a notice requirement creates a distinction among SEC administrative targets. Those targets who are fortunate enough to receive informal notice of the issuance of third party subpoenas will have the opportunity to explain to the third party the nature of the SEC investigation and the basis of the target's denial or other position with respect to the SEC's allegations. In light of the Supreme Court's ruling in O'Brien, those targets who do not receive informal notice of the issuance of third party administrative subpoenas will be denied the opportunity to extend these assurances and explanations to the target's business acquaintances, including the third party subpoena recipients. In the event that no charges are lodged against the target following the SEC's formal investigation, the absence of any such explanation during the pendency of the investigation may have led to harsh results being visited on the head of the unsuspecting target, in the form of loss of customers or other examples of loss of confidence in the target.

Moreover, to the extent that informal notice cures the evils that result from the O'Brien ruling, we let happenstance govern the rights of targets. Those targets who get informal notice can assert their Powell rights and other rights with regard to third party subpoenas. Those who receive no notice are denied these opportunities. The Powell rights seem important enough that they should be assured to all targets and should not depend on the vagaries of informal notice.
disastrous to the target's business interests in those situations where the SEC's failure to institute enforcement proceedings is the only notification that the target may receive that no charges will be entered against the target, that is, that the target's name has been cleared. The target who has received notice of all third party subpoenas issued by the SEC and who has contacted these business associates to explain the target's position with respect to the SEC's allegations of wrongdoing may find these efforts to have been extremely valuable in the event that the SEC investigation leads to no further proceedings. The target's assurances and explanations during the pendency of the FOI proceedings may have preserved his or her business relationships, which otherwise may have terminated on the strength of the SEC's allegations of wrongdoing.

In O'Brien, the Supreme Court accepted the SEC's policy argument that a notice requirement would impose an undue burden on the SEC's ability to carry out its enforcement responsibilities under the federal securities laws. However, the Court's decision did not weigh the countervailing interests of the target, particularly the negative publicity directed to the target of an SEC investigation and its ramifications.

III. O'BRIEN REVISITED

A. The Factual Background of the SEC Investigation Involved in O'Brien

In 1978, the SEC began informally to look into certain trading activities of Harry Magnuson, and the corporation of which he was the principal shareholder, H.F. Magnuson & Co., a certified public accounting firm. The focus of the SEC's investigation was whether Magnuson traded in the stock of a specified mining company on the basis of material, non-public information.

In September 1980, the SEC entered its FOI, captioned "In the Matter of H.F. Magnuson & Co.,” which described the conduct and/or transactions that were to be investigated and specified that these activities were alleged to be violative of the registration, reporting and antifraud provisions of the Securities Act of 1933 and the Securities
Exchange Act of 1934.83

"The FOI stated that 'Magnuson, Pennaluna & Co., Inc., Benjamin A. Harrison, corporations headquartered at H.F. Magnuson & Co., and others' were suspected of engaging in securities violations. Neither Jerry T. O’Brien nor Jerry T. O’Brien, Inc., doing business as Pennaluna & Co., was named in the FOI."84 The terms of the FOI also delegated subpoena power to certain identified SEC personnel.85

The SEC then issued an administrative subpoena to O’Brien, requesting production of business and financial records and other documents.86

O’Brien voluntarily complied with the subpoena. Shortly thereafter, "in response to several inquiries by O’Brien’s counsel, a member of the SEC staff informed O’Brien that it was a ‘subject’ of the investigation."87 O’Brien then commenced an action in federal district court seeking, inter alia, to enjoin the SEC’s investigation. At about the same time as the SEC subpoenas were issued to O’Brien, a news article describing the SEC’s investigation of the targets and describing certain aspects of the SEC’s FOI in this matter, was published in the newspaper that circulated in the Spokane, Washington area, where O’Brien and certain of the other targets conduct some of their business activities.88 On motion by the

83. 104 S. Ct. at 2723.
84. Jerry T. O’Brien, Inc. v. SEC, 704 F.2d 1065, 1066 (9th Cir. 1983), rev’d, 104 S. Ct. 2720 (1984). Unless otherwise indicated, Jerry T. O’Brien and Jerry T. O’Brien, Inc. hereinafter will be referred to collectively as O’Brien. Benjamin A. Harrison is the sole shareholder of Pennaluna & Company, Inc., a private investment company, and Mr. Harrison is presently serving as Secretary of the Spokane Stock Exchange, a national securities exchange. Although Pennaluna & Company, Inc. was a securities broker prior to 1970, it now licenses its name to Mr. O’Brien and his corporation, Jerry T. O’Brien, Inc. The relationship among the parties under investigation by the SEC apparently is that Mr. Harrison is an employee of O’Brien; Magnuson is the accountant for O’Brien and for Pennaluna and Company, Inc.; and Mr. Magnuson is a customer of Jerry T. O’Brien, Inc., a securities broker-dealer. Unless otherwise referenced, O’Brien, Magnuson, Mr. Harrison and Pennaluna & Company, Inc., constituting the parties involved in the O’Brien litigation, will be referred to collectively as the targets or the plaintiffs, since “for the purposes of this litigation, the interests of all these [parties] are identical.” O’Brien, 104 S. Ct. at 2723 n.2.
85. O’Brien, 104 S. Ct. at 2723.
87. O’Brien, 104 S. Ct. at 2723.

In Schmidt v. United States, 198 F.2d 32 (7th Cir.), cert. denied, 344 U.S. 896 (1952), which involved a derivative suit instituted by a shareholder of an insolvent corporation that had been the subject of an SEC administrative investigation, the plaintiff alleged that the bankruptcy of the corporation was caused by the manner in which the SEC conducted and publi-
SEC, the federal district court dismissed the targets' request for injunctive relief.\textsuperscript{89}

Although it was then empowered by statute to bring subpoena enforcement actions against the targets to compel compliance with its prior subpoena requests, the SEC declined to undertake such actions. Had the SEC instituted a subpoena enforcement action, the targets, as subpoena recipients, would have been provided with a forum in which to test their claim that the SEC subpoenas were defective for a variety of reasons, including the SEC's alleged failure to comply with the Powell standards.\textsuperscript{90}

Instead, the SEC "waged an aggressive investigation, issuing numerous subpoenas in the Spokane area to various mining companies and brokers." \textsuperscript{91} Indeed, the targets contended that upwards of sixty third party subpoenas were issued as part of the SEC's administrative investigation.\textsuperscript{92}

The targets then returned to the district court, requesting, inter alia, that the SEC be required to give notice to the targets of any third party subpoenas it issued as part of its investigation of the targets. By its order of March 25, 1982, the district court declined to impose such a notice requirement on the SEC. The targets then appealed this decision to the Ninth Circuit, which reversed the lower court and ordered the SEC to give the targets notice of third party subpoenas issued during the course

\textsuperscript{89.} O'Brien, 104 S. Ct. at 2724.

\textsuperscript{90.} See Jerry T. O'Brien, Inc. v. SEC, 704 F.2d 1065, 1066 (9th Cir. 1983), rev'd, 104 S. Ct. 2720 (1984); see infra notes 102-18 and accompanying text.

\textsuperscript{91.} See Jerry T. O'Brien, Inc. v. SEC, No. C-81-546 (E.D. Wash. Mar. 25, 1982), reprinted in Appellant's Petition for Writ of Certiorari at 10a, SEC v. Jerry T. O'Brien, Inc., 104 S. Ct. 2720 (1984) [hereinafter cited as District Court Order in O'Brien]. The targets claimed that the SEC was seeking substantially the same information by way of these third party subpoenas that had been requested in the earlier subpoenas directed at the targets. In this manner, the targets contended the SEC was attempting "an 'end run' around the procedural safeguards set forth in Powell," by denying the targets the opportunity to test judicially the validity of the SEC subpoenas through enforcement of the SEC's subpoenas directed to the investigative targets. Id. Moreover, the targets contended that the SEC's failure to give the targets notice of the third party subpoenas likewise denied the targets the opportunity to intervene to test the validity of the third party subpoenas under the Powell standards. Id. at 11a. For further discussion of this claim of the target, see infra notes 119-20 & 125.

\textsuperscript{92.} Respondents' Brief, O'Brien, supra note 88, at 8.
of its investigation. The stage was set for the Supreme Court to resolve the competing interests of the SEC and the targets. Its failure to do so may have reversed a developing body of important decisional authority.

B. The Targets' Argument that They are Entitled to Receive Notice of Third Party Subpoenas

The targets based their claim of a right to receive notice of the SEC's third party subpoenas on two Supreme Court decisions, Reisman v. Caplin and United States v. Powell, and their progeny.

In Reisman, the Court held that the recipient of an administrative summons “may challenge the summons . . . on any appropriate ground.” The Court also stated that “third parties might intervene to protect their interests, or in the event [that the subject of the administrative investigation] is not a party to the summons . . . , he, too, may intervene.” Reisman further established that “both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the [administrative] summons by asserting their constitutional or other claims.” Although Reisman involved an Internal Revenue Service administrative subpoena, the principles discussed in Reisman have been applied to SEC subpoenas, and to various other federal agency administrative summons.

96. 375 U.S. at 449. In Reisman, the Internal Revenue Service had issued an administrative summons to the accounting firm retained by taxpayers requesting production of the financial records of taxpayers. The taxpayers' attorneys, who had provided the requested documents to the accounting firm, brought an action seeking declaratory and injunctive relief on a variety of grounds. The Supreme Court ruled that the attorneys' action must be dismissed because they had an adequate remedy at law in that the Internal Revenue Service can enforce the summons only by an action in court, and, at that time, the witness, or any party affected by the requested disclosures, may challenge the summons on any appropriate ground. Id. at 450.
97. Id. at 449.
98. Id. at 445.
99. Hereinafter referred to as the IRS.
101. See, e.g., Atlantic Richfield Co. v. FTC, 546 F.2d 646, 649 (5th Cir. 1977). In Atlantic Richfield, the court stated that the target “may raise all its due process and regulatory procedural objections in any enforcement proceeding brought against it. Additionally, it may intervene and raise objections as a party 'affected by a disclosure,' in subpoena enforcement proceedings against [recipients of third party subpoenas].” Id. (citation omitted) (quoting Reisman, 375 U.S. at 445); Federal Election Comm'n v. Florida for Kennedy Comm., 492 F.
One of the "appropriate grounds" on which an administrative subpoena may be challenged is its failure to satisfy the criteria set out in *United States v. Powell*. Before a district court will order the summoned party to comply, the IRS must show that [1] the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [agency's] possession, and [4] that the administrative steps required by [statute] have been followed . . . .

1. The Powell criteria

The *Powell* criteria specifically refer to judicial enforcement of an administrative summons issued during the course of an IRS administrative investigation. In establishing the four-prong test, the Supreme Court relied on its authority to fashion appropriate standards for subpoena enforcement to assure that the judiciary's process is not abused by an administrative agency. The Supreme Court observed that IRS subpoenas are not self-enforcing. Instead, Congress enacted a statute that specifically requires judicial intervention to compel an IRS subpoena recipient to comply with an administrative subpoena and that gives the agency no power to impose sanctions.

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Supp. 587, 599 (S.D. Fla. 1980) (The target's "rights to intervene and object may be exercised even when the subpoenaed third party intends to voluntarily comply. A party with a right to intervene . . . may also intervene in the agency proceeding."). rev'd on other grounds, 681 F.2d 1281 (11th Cir. 1982).

102. 379 U.S. at 57-58.

103. Ten months after *Reisman*, the Supreme Court decided *Powell*, in which the Court addressed the question of what standards the IRS must meet in order to obtain judicial enforcement under § 7604 of the Internal Revenue code of IRS administrative subpoenas issued pursuant to § 7602 of the Internal Revenue Code. Section 7602 delegates subpoena power to the Commissioner of the IRS. The language of § 7602 and § 7604 is substantially identical to the analogous provisions under the federal securities laws. See, e.g., 15 U.S.C. § 78u (1982) (Securities Exchange Act). The *Powell* case involved an IRS summons issued to the president of a corporate taxpayer in connection with an IRS taxpayer investigation for tax years for which assessment would have been barred in the absence of fraud. The Supreme Court was primarily concerned with the criteria which the IRS had to satisfy in order to obtain judicial enforcement of an IRS administrative subpoena issued as part of its investigation of the corporate taxpayer. The Court ruled that the IRS need not make a showing of probable cause to suspect fraud before enforcement of its summons would be ordered. The Court then went on to set forth the four-prong test which must be satisfied before a district court will order compliance with an IRS administrative subpoena.


105. 379 U.S. at 58 n.18.

106. *Id.; United States v. Bisceglia*, 420 U.S. 141, 151 (1974). In *Bisceglia*, the Court stated: Congress has provided protection from arbitrary or capricious action by placing the
Given this legislative scheme, the *Powell* Court concluded that the courts should not simply act as rubber stamps, automatically approving every administrative subpoena that the courts are requested to enforce. To adopt any other approach would render meaningless the statutory requirement of judicial review of an administrative agency's request for judicial enforcement of its process. Thus, the Supreme Court created the four *Powell* criteria in order to give meaning to the statutory requirement that the IRS seek *judicial* enforcement of an IRS subpoena.

Although the *Powell* case involved an administrative subpoena is-

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Id. *See also Reisman*, 375 U.S. at 446; *Anheuser-Busch, Inc. v. FTC*, 359 F.2d 487, 489-90 (8th Cir. 1966); United States v. Fitch Oil Co., 676 F.2d 673, 679 (Emer. Ct. Ap. 1982) ("[T]here are no self-executing enforcement powers attributed to the agency. In these circumstances, the subpoenaed party risks no penalties for good faith non-compliance at the agency level."); *Church of World Peace, Inc. v. IRS*, 715 F.2d 492, 494 (10th Cir. 1983).

107. 379 U.S. at 58. *See also* *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir.), *cert. denied*, 449 U.S. 822 (1980). The court in *Wearly* stated:

We start from the basic premise that a subpoena from the FTC is not self enforcing. The agency must go to the district court and petition for an order directing compliance with the subpoena. In acting on that petition the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding.

Id.

108. *Penfield Co. of Cal. v. SEC*, 330 U.S. 585 (1946). In his dissent, Justice Frankfurter described the policy considerations underlying Congress' determination that an administrative subpoena should not be self-executing:

Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative.

Id. at 603-04 (Frankfurter, J., dissenting).

109. 379 U.S. at 58. *See also* United States v. Security State Bank & Trust, 473 F.2d 638, 642 (5th Cir. 1973) (Before a court can enforce an administrative subpoena issued by the Secretary of Agriculture pursuant to the Commodity Exchange Act, the court must determine that the *Powell* criteria have been satisfied. "The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena."); United States v. Tobins, 512 F. Supp. 308, 312 (D.C. Mass. 1981) ("Some review of the validity of the subpoena is clearly contemplated by the statute; otherwise the court would function as a mere rubber stamp and referral of agency subpoenas to the court for enforcement would be point-
sued by the IRS, its holding has been extended to proceedings instituted by other federal administrative agencies seeking to enforce their administrative subpoenas.\(^{110}\) Even prior to *O'Brien*, the courts had used the *Powell* test to determine the validity of SEC administrative subpoenas.\(^{111}\)

It is fairly easy for an administrative agency to show compliance
with the Powell criteria. The courts nonetheless require a factual subpoena.”); SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 123 (3d Cir. 1981). The court in Wheeling-Pittsburgh stated:

We assume as do the parties, that the same standards are applicable to enforcement of SEC subpoenas as Internal Revenue Service summonses. Thus, the subpoena issued by the Securities and Exchange Commission, like the administrative subpoena issued by the Federal Trade Commission, and the Interstate Trade Commission, as well as the administrative summons [issued under the Internal Revenue Code] is subject to the same judicial scrutiny prior to enforcement.


112. The summons enforcement proceeding is intended to be a summary proceeding. It is initiated when the administrative agency files a petition for enforcement. The federal agency must submit, along with its petition, evidence of its compliance with the Powell criteria, which in general are the standards that must be satisfied for the issuance of an administrative summons. Assuming that the agency meets that burden, the district court will then enter an order to show cause why the administrative summons should not be enforced. The summons recipient will then have a limited amount of time to respond to the order to show cause. At this time, the burden of proof shifts to the summons recipient to establish his or her defense that judicial enforcement of administrative process would constitute abuse of the court's process or should otherwise be denied. Although there is general agreement that this burden is a heavy one, the courts have disagreed as to the degree of proof required to satisfy this burden. See, e.g., United States v. Garden State Nat'l Bank, 607 F.2d 61, 70 (3d Cir. 1979); United States v. Kis, 658 F.2d 526, 539 (7th Cir. 1981). In general, the summons recipient is required to challenge the federal agency's Powell showing by filing responsive pleadings, supported by affidavits that allege specific facts which tend to refute the agency's showing of compliance. If at this point the taxpayer has failed to refute the administrative agency's prima facie showing of compliance with the Powell criteria, then generally, the district court will rule on the matter on the basis of the parties' pleadings without an evidentiary hearing. SEC v. Howatt, 525 F.2d 226, 229 (1st Cir. 1975).

The summons recipient may be entitled, upon proper request to the district court, to engage in a limited amount of discovery to assist in meeting the burden of showing specific facts that rebut the agency's prima facie showing. In Donaldson v. United States, 400 U.S. 517, 528-29 (1970), the Supreme Court acknowledged that the Federal Rules of Civil Procedure, including the discovery provisions, apply to summary proceedings such as administrative subpoena enforcement proceedings, although the Court also recognized the inherent power of the district court to limit the application of the Federal Rules of Civil Procedure in summary proceedings. See also United States v. McCarthy, 514 F.2d 368, 372 (3d Cir. 1975); Powell, 379 U.S. at 58 n.18.

The summons recipient's right to an evidentiary hearing on the question of whether the administrative summons ought to be judicially enforced is not absolute. However, the courts disagree as to the requisite degree of showing that must be made by the recipient in its responsive pleadings in order to gain the right to an evidentiary, adversarial hearing on the issue of subpoena enforcement. In other words, the summons recipient is not automatically entitled to an evidentiary hearing before the district court will order enforcement of the administrative subpoena. While courts may have disagreed on the appropriate standard, they have agreed that the taxpayer must make some threshold showing to be entitled to the hearing.” United States v. Kis, 658 F.2d 526, 539 n.39 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). With respect to this evidentiary hearing, at least one court has said that the summons recipient must: develop facts from which a court might infer a possibility of some wrongful conduct by the [administrative agency]. . . .

If the [summons recipient] can present enough specific facts to meet this stan-
showing of compliance with the *Powell* criteria to satisfy themselves that the staff of an administrative agency have not exceeded the scope of their statutory authority in the issuance of administrative process.\footnote{113} After all, the SEC decides in the first place what material is relevant to its pending investigation.\footnote{114} The same SEC investigator then frames a subpoena requesting this information.\footnote{115} That administrative subpoena cannot be enforced unless a district court first determines that the SEC has acted properly by complying with the *Powell* standards.\footnote{116} Thus, judicial intervention for the purpose of examining an agency’s administrative process to determine compliance with the four-prong *Powell* test provides assurance that an administrative agency will not exceed its statutory delegation of subpoena authority.\footnote{117} In sum, the *Powell* criteria do have some

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\footnote{114}{See supra notes 25-30 and accompanying text.}

\footnote{115}{Id.}

\footnote{116}{See supra notes 110-11 and accompanying text.}

\footnote{117}{In *United States v. Monsey*, the court stated:

Enforcement [of administrative summonses] enlists judicial powers of compulsion which are not automatically invocable. The Court may not permit its process to be abused. Inquiry into circumstances surrounding the original issuance of the summonses may reveal improper purposes which judicial enforcement should not sanction through assistance. Enforcement would be equally objectionable where the judicial action would itself effect an abuse of the summons. Events subsequent to administrative issuance may change circumstances to such an extent that enforcement of a summons may bring about improprieties. Such equitable considerations demand that the court consider intervening occurrences as well as the status quo at the date of issuance. . . . Cognizance of those facts does no more violence to admin-
substance, despite the administrative agencies' protestations to the contrary on the ground that these standards are so easily satisfied. 118

2. The targets' right of intervention to assert agency's failure to satisfy Powell criteria

In O'Brien, the targets argued that the Supreme Court's earlier decision in Reisman v. Caplin permitted them to request intervention in subpoena proceedings instituted by the SEC against a non-complying third party. 119 Relying in large part on language stating that the target, as a party "affected by a disclosure," has the right to request intervention in third party proceedings "on any appropriate ground," 120 the targets in O'Brien argued that "any appropriate ground" includes the alleged failure of the SEC to satisfy the Powell criteria.

The Reisman Court specifically mentioned several claims that the target of an administrative investigation could assert as appropriate grounds for intervention in a third party administrative subpoena enforcement proceeding, such as the attorney-client privilege or a claim that the subpoenaed material "is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." 121 Moreover, the Court's enumeration in Reisman of some appropriate substantive grounds on which to challenge the validity of an administrative subpoena did not purport to be exhaustive. 122

429 F.2d 1348, 1351 (7th Cir. 1970) (citations omitted).
118. United States v. Security State Bank & Trust, 473 F.2d 638, 642 (5th Cir. 1973). The court in Security State Bank stated: Where the person who is subject to the subpoena refuses to comply and challenges the subpoena in court, the burden is upon the [administrative agency] to show that the investigation is for a lawful purpose and that the evidence sought in the subpoena is relevant to the investigation. This follows from the fact, first, that an affirmative showing of lawfulness is necessary to enable the court to discharge its affirmative duty[, ] . . . to determine the extent to which the subpoena is in accordance with law and to enforce the subpoena to that extent. Second, the acceptable practice under analogous administrative schemes, as defined by the cases, requires the government to sustain a minimum burden analogous to the one imposed here. The cases teach that the burden is not great, but they teach that it does exist. Id. at 642 (citations omitted).
119. Supra note 100 and accompanying text.
120. Reisman, 375 U.S. at 449.
121. Id.
122. Id. See also SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 124-25 (3d Cir. 1981). The court in Wheeling-Pittsburgh Steel Corp. stated: Our analysis is further supported by the persistent theme running through the [Supreme] Court's decisions in this area that an administrative summons can be challenged "on any appropriate ground." . . . [The Court has subsequently quoted this language [in several of its opinions]. . . . In LaSalle, the Court went even further.
Notably, the targets in *O'Brien* never argued that their right of intervention under *Reisman* was mandatory. This position is in accord with established Supreme Court precedent which holds that a target's right of intervention is permissive only and that the judicial determination of whether intervention should be granted in a particular case requires "[t]he usual process of balancing opposing equities."\(^{123}\)

3. A target must receive notice of SEC's third party subpoenas to protect his or her rights under *Reisman* and *Powell*

In order to assert his or her rights under *Powell* or to assert any other appropriate challenge to the SEC's subpoena to a third party, a target must receive prior notice of the issuance of the administrative subpoena to the third party. Without such notice, a target is unaware of the opportunity to assert his or her rights and whatever rights he or she may have thereby become illusory.\(^{124}\)

In *O'Brien*, the targets asked the district court for notice of administrative process issued by the SEC to third parties as part of its investigation of the targets. The targets asserted that they could only protect their rights to be investigated in accordance with the standards enunciated in *Powell* if they first received notice of the third party subpoenas. The targets could do this by instituting an action to restrain a third party from voluntarily complying with a subpoena that was defective because it did not comply with the *Powell* standards, or alternatively, by seeking intervention in a third party subpoena enforcement proceeding instituted by the SEC.\(^{125}\)

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\(^{125}\) See *District Court Order in O'Brien, supra* note 91, at 10a-11a. The targets in *O'Brien* also argued that, on the facts of their case, the SEC's strategy had the effect of doing an "end run" around a target's legal remedy of refusal to comply with the SEC subpoena directed to the target, expecting that the SEC would then commence subpoena enforcement proceedings to compel the target's compliance with the SEC administrative subpoena. The district court rejected this argument, stating that the targets had an adequate legal remedy. This is consis-
Although observing that this "argument is not without appeal," since "[i]t would be relatively easy to project a hypothetical where a government agency could effectively render the Powell protections a nullity," the district court refused to impose a notice requirement on the SEC. 126

tent with well established precedent which holds that, since the subpoena served on the target is not self-executing, the appropriate course of action for the target who objects to the subpoena is to refuse to comply with the subpoena, thereby forcing the SEC to institute subpoena enforcement proceedings in federal district court. The target may then assert its objections to the validity of the administrative subpoena within the context of these proceedings. Since no penalty attaches to the target who receives an administrative subpoena for its failure to comply with the subpoena until such time as a judicial decree ordering compliance with the subpoena is entered, the legal remedy is deemed adequate, and the target's request for equitable relief, such as declaratory relief, generally is denied on these grounds. Reisman, 375 U.S. at 445-46. See also Atlantic Richfield Co. v. FTC, 546 F.2d 646, 649 (5th Cir. 1977) (The target "had an adequate remedy at law through [administrative agency] enforcement actions and suffered no undue hardship in being remitted to that remedy by the district court's denial of [equitable] relief.").

In the O'Brien case, the SEC declined to institute subpoena enforcement proceedings against the targets, thereby effectively robbing the targets of the opportunity to challenge the SEC's administrative subpoenas as violative of the Powell standards. Thus, under the particular facts of the O'Brien case, the SEC avoided showing compliance with the Powell standards by the strategy of requesting essentially the same information from third parties who had no incentive to refuse compliance and test the SEC subpoenas for validity under Powell. The Supreme Court's ruling in O'Brien can only encourage the SEC to follow this tactic in the future, thus completely frustrating Congress' intent in requiring judicial review of administrative subpoenas.

126. District Court Order in O'Brien, supra note 91, at 11a. As part of the basis of its decision in O'Brien, the district court believed that the targets had "an adequate remedy at law" in that they could seek to suppress information obtained by a third party subpoena defective under the Powell standards, if and when such information was used in a subsequent civil, criminal or administrative proceeding instituted by the SEC at the conclusion of its administrative investigation of the targets. O'Brien, 104 S. Ct. at 2724. Alternatively, the district court believed that the targets lacked standing to impose a notice requirement on the SEC because the information sought by subpoenas issued to third parties was information which belonged to third parties and in which the targets held no protectible interest. District Court Order in O'Brien, supra note 91, at 12a-13a. Since the subpoenaed information belonged to the third parties, the district court reasoned that the targets had no blanket right to notice when this information was sought. Id. In making this ruling, the district court apparently relied quite heavily on the reasoning of the Supreme Court's decision in United States v. Miller, 425 U.S. 435, 443 (1976), which "established that, when a person communicates information to a third party even on the understanding that the information is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." O'Brien, 104 S. Ct. at 2726. The decision in Miller, however, at most disables the targets in O'Brien "from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers." Id. The Miller decision does not disable the target from asserting, in the context of third party subpoena enforcement proceedings, the right to be investigated in accordance with the Powell standards.

The district court did recognize, however, the force of the targets' argument in O'Brien:

The natural query at this juncture is what protections exist for the ostensible "target" of an investigation if he is not aware of process outstanding against third parties. Plaintiffs suggest that the only effective remedy would be to require notice to
The United States Court of Appeals for the Ninth Circuit reversed the district court decision, concluding that notice to the target of third party subpoenas is necessary "[t]o assure that the target has the opportunity to assert" the target's right to be investigated in accordance with the standards set out in *Powell*.127

C. The Supreme Court's Decision in SEC v. Jerry T. O'Brien, Inc.

In *O'Brien*, the Supreme Court held that there was no constitutional, statutory or decisional authority for imposing a notice requirement on the SEC. Although it seems well-settled that there is no constitutional or statutory basis for any such notice requirement,128 the Court erred in concluding that there was no case law supporting the targets' claim that they were entitled to receive notice of the Commission's issuance of third party process.

Those under investigation whenever such process is issued. The argument is not without appeal.

District Court Order in *O'Brien*, supra note 91, at 11a (footnote omitted).

The district court also candidly recognized the importance of the novel question raised by the targets' claims: "I cannot say with certainty that this heretofore unresolved question could not be determined otherwise on appeal. The issue is intriguing, eminently arguable, and certainly substantial in the sense that the questions raised should be authoritatively determined." *Id.* at 15a.

127. 704 F.2d 1065, 1069 (9th Cir. 1983), rev'd, 104 S. Ct. 2720 (1984). The basic premise of the Ninth Circuit's reasoning is its conclusion that a "court will not enforce an SEC subpoena directed at the target of an investigation unless the agency, at an evidentiary hearing, demonstrates that it has complied with the requirements of *United States v. Powell*" 704 F.2d at 1067. The SEC argued that the rights created under *Powell* are held only by the subpoena recipient and therefore the only party entitled to enforce the *Powell* standards is the recipient of the administrative summons. The Ninth Circuit concluded, however, that the targets of SEC administrative investigations "do have a right to be investigated consistently with the *Powell* standards. As a practical matter, this is a right that only [the investigative targets] would assert." 704 F.2d at 1068 (citations omitted).

The Ninth Circuit went on to reason that notice to the target of service of SEC third party subpoenas was necessary to assure the investigative targets of their opportunity to assert their "right to be investigated consistently with the *Powell* standards . . . . As a practical matter, unless the target of an SEC investigation receives notice of subpoenas served on third parties, no one will question compliance with the *Powell* standards as to those subpoenas." 704 F.2d at 1069. *See also* United States v. Genser, 582 F.2d 292, 306 (3d Cir. 1978). The court in *Genser* stated:

While the third party recipients of summonses may well be motivated to refuse to comply on the grounds that the summonses are overbroad or unduly burdensome, there is little reason to expect them to raise the defense that the summonses were issued to further a solely criminal investigation of the [target]. This is not a matter of the third party bank's interest but of the [target's]. Thus, the courts have provided that the [target] may challenge the validity of a summons issued to a third party either at the investigatory stage or, if necessary, at the trial level.

*Id.* at 306 (citations omitted).

Justice Marshall, writing for the unanimous Court in *O'Brien*, dismissed the targets' claim based on existing case precedent in a very brief, three sentence passage:

There are several tenuous links in [the targets'] argument. Especially debatable are the propositions that a target has a *substantive* right to be investigated in a manner consistent with the *Powell* standards and the assertion that a target may obtain a restraining order preventing voluntary compliance by a third party with an administrative subpoena. *Certainly we have never before expressly so held.*

The Court then assumed arguendo that the rights identified and relied on by the targets in *O'Brien* do exist but nonetheless concluded, based on certain articulated policy considerations, that the targets were not entitled to receive notice. The Court's summary treatment of the targets' decisional law argument is a fundamental flaw in the Court's analysis and casts doubt on the continuing validity of the Court's earlier decisions in *Powell* and *Reisman* and their progeny.

1. The Court's analysis of the targets' argument based on existing decisional law

The Court dispensed with the targets' argument based on decisional precedent by stating that the Supreme Court has never before *expressly* held that "a target has a substantive right to be investigated in a manner consistent with the *Powell* standards." In support of this carefully crafted distinction of its earlier holdings, the Court first pointed out that the specific language in the *Reisman* decision upon which the targets' argument was premised had been dictum in that opinion. The Court emphasized that a target's right of intervention is permissive, not mandatory. The Court seems to say that the "permissive" nature of a target's right of intervention means that no underlying substantive right exists. What this line of reasoning overlooks, however, is that a *permissive* right of intervention assumes that the target does *hold* a right to intervene. The "permissive" nature of this right to intervene does not deny the existence of the right, but rather describes the manner and circumstances under which this right may be exercised.

Moreover, this hairsplitting, semantic treatment of the targets' argu-

129. 104 S. Ct. at 2729 (emphasis added).
130. *Id.*
131. *Id.*
132. *Id.* at 2729 n.19.
133. *Id.*; see supra note 123 and accompanying text.
ment by the Court overlooks the substantial body of law developed by the lower courts, following Reisman and Powell, that there is a right of intervention to challenge an administrative agency's failure to comply with the Powell standards. The Supreme Court did not acknowledge, much less distinguish, the numerous decisions invoking Reisman and/or Powell in the specific factual context of a target's request for intervention in a judicial proceeding instituted by an administrative agency to enforce its subpoena issued to a third party.

For example, United States v. Union National Bank involved a taxpayer's (target's) request for leave to intervene in an IRS instituted proceeding to enforce its summons issued to a third party witness (bank) during the course of the IRS investigation of the taxpayer (target). The target claimed in its petition for intervention that the IRS' third party subpoena failed to comply with the Powell standards. This claim was based on the grounds that, first, the IRS was not investigating the taxpayer for a proper purpose since the IRS was considering recommending institution of a criminal prosecution; and second, that the IRS already had possession of the requested information. The court noted that the taxpayer's right to intervention was not absolute but was permissive and was to be granted only when the "usual process of balancing opposing

134. See supra notes 100-01 & 110-11.

135. See, e.g., SEC v. Oklahoma State Bank, FED. SEC. L. REP. (CCH) ¶ 96,939 (N.D. Tex. 1979); SEC v. Fourth Nat'l Bank of Tulsa, FED. SEC. L. REP. (CCH) ¶ 96,940 (N.D. Okla. 1979); SEC v. Amarillo Nat'l Bank, 474 F. Supp. 1042 (N.D. Tex. 1979). With respect to non-SEC administrative investigations that involve the administrative target's reliance on Reisman and/or Powell as the basis of the target's claim for intervention to challenge the validity of the federal agency's third party subpoena for failure to comply with Powell criteria, see Callahan v. First Pa. Bank, 422 F. Supp. 1098, 1099-100 (E.D. Pa. 1976); Atlantic Richfield Co. v. FTC, 546 F.2d 646, 649-50 (5th Cir. 1977); United States v. Cortese, 614 F.2d 914, 919 (3d Cir. 1980); United States v. First State Bank of Clute, 626 F.2d 1227, 1228 (5th Cir. 1980); United States v. Security State Bank & Trust, 473 F.2d 638, 642 (5th Cir. 1973); Slocum v. United States, 303 F. Supp. 373 (D. Minn. 1969); United States v. Benford, 406 F.2d 1192 (7th Cir. 1969); United States v. Lako, 520 F.2d 622 (3d Cir. 1975); United States v. Monsey, 429 F.2d 1348 (7th Cir. 1970); Wild v. United States, 362 F.2d 206 (9th Cir. 1966). See also Ramos v. United States, 375 F. Supp. 154 (E.D. Pa. 1974). In Ramos, a taxpayer's motion to quash an IRS third party subpoena was denied on the ground that "[u]nder the rule of Reisman, [the taxpayer (target)] has ample and full opportunity for a judicial determination of his challenges to the [third party] summons [in the summons enforcement hearing] . . . . This is so even though the [taxpayer (target)] is not the summoned party. Reisman held that interested third parties might intervene in these enforcement proceedings to protect their interest.” Id. at 156; United States v. Friedman, 532 F.2d 928, 931 (3d Cir. 1976) (District court permitted taxpayer (target) of IRS investigation to intervene in proceedings instituted by IRS to enforce third party subpoenas issued to certain banks and an accountant. The district court's decision to permit intervention was not an issue raised on appeal to the Third Circuit.).

equities" weighed in favor of the taxpayer's intervention. The court in
Union National Bank received assurances from IRS representatives as to
the purpose of the IRS' investigation and was satisfied that the docu-
ments sought by the IRS were not already in the possession of the IRS.
The taxpayer's request for intervention therefore was denied because the
IRS actually satisfied the Powell standards. However, the court's discus-
sion of the merits of the taxpayer's request for intervention assumed that
a taxpayer has a right to intervene in a third party subpoena enforcement
proceeding and that an appropriate basis on which to seek intervention is
to assert the failure of the IRS to satisfy the Powell standards when the
third party subpoena was issued.

Equally important, in Union National Bank, the taxpayer alleged
that certain provisions of the Internal Revenue Code dealing with IRS
subpoena issuance were unconstitutional because these statutes did not
require that the IRS "give notice of the service of the [third party] sum-
mons to the taxpayer." With respect to this claim, the district court
only commented: "This question does trouble the court but is com-
pletely moot in the present case because the respondent bank did, in fact,
notify the taxpayer of the issuance of the summons and a full hearing was
afforded to the taxpayer on his right to intervene."

The tone of the court's reasoning suggests that it would have re-
quired that such notice be given had the issue been before it. Indeed,
the court's entire discussion of the taxpayer's (target's) claim for inter-
vention, on the ground that the IRS' third party subpoena failed to sat-
isfy the Powell standards, assumed that a target has "the right to be
investigated in accordance with the Powell standards," and that this right
may be a proper basis on which a taxpayer (target) may seek intervention
in a third party subpoena enforcement proceeding, although in this par-
ticular fact situation the taxpayer's allegations of infringement of its Pow-
well rights did not tip the equities sufficiently in its favor so as to support a
grant of intervention.

The Court's failure in O'Brien to address the numerous decisions

137. Id. at 633 (quoting Donaldson v. United States, 400 U.S. 517, 530 (1971)).
138. Id. at 634.
139. Id.
140. However, the tone of several other decisions suggests that there would have been a
disagreement among the courts as to whether to impose such a notice requirement on federal
administrative agencies, although, notably, none of these decisions required the court to ex-
pressly consider the notice question and none of these decisions were cited by the Supreme
Court as support for its ruling in O'Brien. Thus, the significance of the reasoning in these
decisions is unclear. See, e.g., Application of Cole, 342 F.2d 5, 7 (2d Cir.), cert. denied, 381
U.S. 950 (1965); United States v. Bank of Commerce, 405 F.2d 931, 934 (3d Cir. 1969);
that rely on the principles handed down in Reisman and Powell casts doubt on the continued validity of relying on Powell and Reisman for the proposition that a target does hold a substantive right to challenge an administrative subpoena for failing to satisfy the standards set out in Powell. Not unrealistically, Justice Marshall's summary treatment of the issue would enable counsel for federal administrative agencies to argue that an administrative target has no substantive rights under Powell.

2. The policy concerns that form the real basis for the Supreme Court's decision in O'Brien

The Supreme Court, as the final part of its reasoning in O'Brien, assumed for the sake of argument the existence of the rights asserted by the targets under Reisman and Powell. Nonetheless, the Court denied the targets any right to notice of third party subpoenas. This denial was expressly premised on two policy considerations: administrative burden and a fear of abuse of the right by targets. In the Court's view, these policy reasons apparently outweigh any right to notice even were such a right indicated in light of Powell and Reisman. However, none of the policy considerations relied on by the Court appear to justify the conclusion reached by the Court. The proper balance between the policy considerations suggested by the SEC and the legal and practical reasons suggested by the targets in O'Brien does not dictate the prophylactic rule of no-notice that was adopted by the Court.

a. administrative burden

The Supreme Court emphasized the heavy administrative burden that would be placed on the SEC and the courts by requiring notice. The Court first pointed to the problem of defining "targets" for the purpose of determining who is entitled to receive notice. The Court explained: "The SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law. To notify all potential wrongdoers in such a situation of the issuance of each subpoena would be virtually impossible." What the Court overlooked here, however, was the distinction between the informal phase and the formal phase of SEC investigations.

During the informal phase of the SEC's investigation, no subpoena

141. See supra note 135 and accompanying text.
142. 104 S. Ct. at 2729.
143. Id. (footnote omitted).
144. See supra notes 22-24 & 28 and accompanying text.
power attaches.\textsuperscript{145} To the extent that the SEC is investigating \textit{informally} a multitude of persons suspected of wrongdoing in connection with a particular securities transaction, there is no problem of identifying “targets” since no subpoena will issue during this phase. If it results in formal proceedings,\textsuperscript{146} the investigation has proceeded sufficiently to identify certain persons suspected of wrongdoing, as it had in the \textit{O'Brien} case.\textsuperscript{147} In this situation, it is apparent that those persons specifically identified in the caption of the FOI are the subject of a further SEC investigation and “are affected by a disclosure.”\textsuperscript{148} As such, they are “targets” and their identity is not impossible to ascertain. Notice of third party subpoenas certainly ought to go to those persons whose identity is readily ascertainable from the caption of the FOI.

In rare circumstances, the identity of the targets of the investigation will not be readily ascertainable from the caption of the FOI. An FOI may be entered where, after an informal investigation, the SEC staff concludes that there is a sufficient factual basis to allege violations of the federal securities laws but that these allegations must be framed in terms of “John Does” because the identity of the actual participants cannot yet be ascertained.\textsuperscript{149} This does not mean, however, that the ultimate “targets” of such an investigation do not have the right to be investigated in accordance with the standards set out in \textit{Powell}, even while their identity remains unknown. In this situation, it is possible to develop procedures to protect the unknown targets’ rights until such time as their identity is ascertained and the terms of the SEC’s FOI are amended to include their names as “targets.”

Consider an analogous situation: “John Doe summonses” in the context of IRS administrative investigations.\textsuperscript{150} The IRS is required in

\begin{itemize}
\item \textsuperscript{145} See supra notes 22 & 28 and accompanying text.
\item \textsuperscript{146} See supra notes 25-26 and accompanying text.
\item \textsuperscript{147} See supra notes 83-84 and accompanying text.
\item \textsuperscript{148} Reisman v. Caplin, 375 U.S. 440, 445 (1964).
\item \textsuperscript{149} One particularly well-publicized formal SEC administrative investigation of unidentified targets is the on-going SEC investigation of suspected inside traders in Santa Fe International Corporation stock and options immediately preceding the public announcement in 1981 of the takeover of Santa Fe by Kuwait Petroleum Corporation. For several years, the SEC has been attempting, through a variety of measures, to learn the identities of these suspected inside traders. As a result of a recent Swiss court ruling in its favor, the SEC was able to obtain certain documents that disclosed the identity of certain of these suspected traders. It appears that these individuals had been pursuing every strategy available to them to protect against disclosure of their identities to the SEC. \textit{Swiss Court Rejects SEC Request in Santa Fe Insider Trading Case}, 15 SEC. REG. & L. REP. (BNA) 271 (1983); \textit{SEC Seeks Default Against “Unknown” Santa Fe Purchasers}, 16 SEC. REG. & L. REP. (BNA) 1210-11 (1984).
\item \textsuperscript{150} I.R.C. §§ 7609(f), 7609(h) (1982). The operation of the John Doe summons provisions in § 7609 has been summarized as follows:
these situations to go to court and make a showing, by affidavit, that there is a reasonable basis for believing that a person or group of persons may fail or may have failed to comply with a provision of the internal revenue law and that the information requested by subpoena is not readily available from other sources.\footnote{5} In this way, the law seeks to protect the rights of the unknown "targets" of IRS administrative investigations. Since the Supreme Court's concern apparently focuses on ascertaining the actual identity of the "targets," the analogy to the mechanism of a "John Doe summons" in the context of IRS investigations provides a remedy in the relatively infrequent situation where the identity of the target(s) cannot readily be ascertained from the caption of the FOI entered by the Commission.\footnote{2}

The Court considered another administrative burden on the SEC presumably flowing from a notice requirement: a person not considered

\footnote{Whenever a summons is issued to such a third-party recordkeeper, \textit{[a defined term under § 7609]}, the provisions of \textit{[§ 7609]} allow the taxpayer an opportunity to intervene and assert any legal objections to the IRS's acquisition \textit{[of the taxpayer's records]}. There is, however, an exception to this important protection. The exception is that when the identity of the taxpayer is not known and is thus not revealed in the summons the IRS proposes to serve, the IRS must petition the Court for issuance of a "John Doe" summons, which does not name the taxpayers to whom records sought from the third-party recordkeeper apply. The Court is required to determine the merits of such a petition for a summons on the basis of an \textit{ex parte} hearing only. In such \textit{ex parte} cases, the burden is upon the IRS to establish \textit{[the criteria set out in § 7609(f)]}. \textit{In re Oil and Gas Producers Having Processing Agreements with Kerr-McGee Corp., 500 F. Supp. 440, 441 (W.D. Okla. 1980).}

\footnote{151. The policy objectives that are served by congressional enactment of the procedural safeguards of § 7609(f) have been described this way:

The rules regarding the service of summonses are divided into three categories. The IRS is free to serve, without prior judicial approval, a direct summons on any person if the summons is necessary to facilitate the investigation of that person's tax liability. If a summons is to be served on a third-party record keeper, however, the IRS must provide notice to all third parties whose tax records will be affected by the summons before it may serve the summons. An exception to this rule applies in cases in which the IRS is unable to determine the identities of these third parties. Under such circumstances, a John Doe summons may be issued to the record keeper only after the IRS, in an \textit{ex parte} hearing, has satisfied the three criteria listed in section 7609(f).

Section 7609(f)'s criteria thus constitute a procedural safeguard which Congress created to provide extra protection to unknown target taxpayers to whom the IRS cannot give notice. More specifically, sections 7609(f) and (h) were enacted to provide a prior restraint on the IRS's power to serve John Doe summonses, mainly "to preclude the IRS from using such summonses to engage in possible "fishing expeditions."" Balancing this purpose, however, was Congress's concern that the restraint not unreasonably delay or otherwise pose an undue burden on the IRS's legitimate use of John Doe summonses. Congress therefore required the IRS to apply \textit{ex parte} for authorization to issue such summonses, so that "the question whether a John Doe summons could be served should not become embroiled in an adversary proceeding."


152. \textit{See supra} note 149 and accompanying text.}
a target would request a hearing to determine his or her status as a target. However, this concern of the Court misapprehends the realities of an SEC investigation. The taint of an SEC investigation may have disastrous consequences for the target of such an investigation. As a result, individuals rarely seek the status of being named as a target of an SEC investigation. Therefore, it is highly unlikely that an unknown individual, whose name is not included in the caption of an FOI, would petition the court for a hearing to determine his or her status as a target, thereby lifting the veil of anonymity.

b. targets who receive notice will use this knowledge to impede SEC investigations

The second policy consideration expressly identified by the Supreme Court was that the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the

153. The Court suggests that a "person not considered a target by the Commission could contend that he deserved that status and therefore should be given notice of subpoenas issued to others." 104 S. Ct. 2729. This concern of the Court just does not comport with the realities of those formal SEC investigations where the identities of the targets (subjects) of investigation are not readily ascertainable. See supra note 149 regarding the ongoing efforts of the SEC to learn the identity of certain unknown targets, who presumably wish to remain anonymous. Furthermore, due to the negative publicity that flows from the status of being a target of an SEC investigation, it is not likely that a person would petition the court to gain that status.

154. See supra note 71 and accompanying text.

155. Any such request of a district court is likely to be dismissed very quickly on the basis of the well-established rules that the courts cannot compel the SEC to undertake an investigation nor are the courts permitted to review an SEC decision not to investigate a person. See Crooker v. SEC, 161 F.2d 944, 949 (1st Cir. 1947); Gordon v. SEC, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,628 (N.D. Ga. 1980); Tew & Freedman, supra note 31, at 6.

Moreover, the relatively improbable situation where a person who believes that he or she is the target of an SEC investigation would request a hearing to determine his or her status as a "target" is so slight that this potential for administrative burden does not tip the balance of policy considerations in favor of the no-notice rule adopted by the Supreme Court. If there continues to be genuine concern about the possibility of unidentified targets bringing motions to ascertain their identity as targets, then perhaps Congress should consider adoption of a statute, similar to I.R.C. § 7609(f) regarding the issuance of John Doe summonses. Section 7609(f) seeks to protect the rights of unknown targets of IRS administrative investigations when the IRS proposes to issue certain types of third party subpoenas. This approach should adequately dispose of the Court's concern, to the extent that subsequent developments indicate that it is a realistic one.
Commission. More seriously, the understanding of the progress of an SEC inquiry that would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government. 156

There are several weak links in this "parade of horribles" envisioned by the Court. First, these concerns assume that every target, or at least a significant number of SEC investigative targets, are unscrupulous and would therefore engage in tactics, such as witness intimidation, which would undermine the integrity of the investigative and quasi-judicial proceedings Congress has established. The Court's fears reflect a belief that the target has probably committed the securities laws violations that form the basis of the SEC's administrative investigation. Why else would the target take steps to resist the SEC's investigation?

The Court apparently believes that all targets will undertake dilatory measures. However, the Court's position assumes that all targets who take measures to resist an SEC investigation do so for dilatory purposes and not from legitimate motives, such as a good faith belief that such measures are needed to curb excesses of the SEC staff's delegated authority or a good faith belief that the target's rights, such as the attorney-client privilege, are being invaded by the SEC's investigative efforts.

The Court's obsessive concern with potential delay and obstructionist tactics in which a target could engage overlooks an analogy to the discovery process in civil litigation, where this same concern poses a similar threat to the ability of the opposing party to conduct proper discovery. In civil discovery, however, the approach to these concerns is not to deny the litigants notice of pending discovery requests, but is to presume that all parties will act properly to facilitate the progress of each side's discovery efforts, and to impose sanctions on those parties that do not. The Court's single-minded focus on its belief that SEC investigative targets will act improperly if they receive notice of third party subpoenas seems to give undue deference to the conclusion that the target is guilty of the suspected securities laws violations that are under investigation. However, the analogy to civil discovery helps to put matters back in proper focus: (1) by entitling the target to a presumption of innocence until proven guilty, and (2) by the derivative proposition that the target is entitled to a presumption that he will act in good faith until such time

156. 104 S. Ct. at 2730 (footnote omitted).

157. This phrase was borrowed from Respondent's Brief, O'Brien, supra note 88, at 42-49.
that the target's conduct warrants the opposite conclusion.\footnote{158. See infra text accompanying notes 165-69.}

The Court's concern also misapprehends the implications of the notice requirement. The target does not obtain by way of notice any greater right to challenge the subpoena. Rather, the target is simply made aware of the opportunity to challenge the validity of the SEC's administrative subpoena on whatever grounds may otherwise exist to attack the third party subpoena, including the ground that the SEC has failed to comply with the Powell standards.

The Ninth Circuit's decision in \textit{O'Brien} did not involve any expansion of the rights of targets of SEC administrative investigations to challenge SEC subpoenas. The court of appeal's ruling would have ensured that every target had notice of the opportunity to protect his or her right to be investigated in accordance with the Powell standards. However, the Supreme Court's ruling in \textit{O'Brien} has created an inequality of rights among SEC administrative targets. The effect of the Supreme Court's ruling is to deny to certain targets notice of the opportunity to challenge third party subpoenas, while at the same time permitting this opportunity to those targets who are fortunate enough to receive informal notice of the SEC's third party subpoenas. As it stands now, the SEC administrative target is entitled to assert its Powell rights only in those situations where the target somehow receives informal notice, generally from a third party recipient of an administrative summons. Moreover, all of the Court's concerns and assumptions regarding the target's possible dilatory tactics apply with equal force to the situation where the target receives "informal" notice. The obvious question is: Why did the Court deny a notice requirement to all targets, thereby creating a situation in which certain SEC administrative targets will have the opportunity to challenge an SEC third party subpoena while other SEC targets will be denied this opportunity?

The answer may lie in the actual, unarticulated justification for the result reached by the unanimous \textit{O'Brien} Court. The law that has grown up around the Powell requirements purportedly applies to determine the validity of any federal agency's administrative subpoena.\footnote{159. See supra notes 100-01 and accompanying text.} However, not all federal agency investigations are alike.\footnote{160. See \textit{United States v. Armada Petroleum Corp.}, 562 F. Supp. 43, 52-53 (S.D. Tex. 1982), \textit{aff'd}, 700 F.2d 706 (Emer. Ct. App. 1983).} The scope of statutorily delegated investigative power may differ as well as the uses to which the investigative results may be put. For example, certain agencies may be empowered to investigate all suspected violations of laws within their Ju-
risdiction (IRS); other agencies may be empowered to investigate only suspected violations of the laws administered by that agency committed by a particular class of people. An example of the latter type of agency is the Equal Employment Opportunity Commission, the investigative powers of which are concerned exclusively with employers' violations of equal employment laws.\textsuperscript{161} Additionally, the statutes may reflect different uses for investigative data collected by the administrative agency. For example, the IRS may institute collection proceedings,\textsuperscript{162} while the EEOC may institute legal action to eliminate employment discrimination.\textsuperscript{163}

These varying degrees of congressional limitations on agencies' investigative authority reflect the different policy objectives each agency is authorized to pursue.\textsuperscript{164} In light of the varying policy objectives, the Supreme Court in \textit{O'Brien} may have been unwilling to impose a notice requirement across the board on the multitude of federal agencies by engrafting a notice requirement onto that body of common law known as the "law of administrative subpoenas." Instead, the Court may have been persuaded that the decision to impose such a notice requirement on

\begin{footnotesize}
\begin{enumerate}
\item[161.] 42 U.S.C. § 2000e-5(b) (1982) provides in relevant part: Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer, employment agency, labor organization . . . within ten days, and shall make an investigation thereof.
\item[162.] See United States v. Baggott, 103 S. Ct. 3164 (1983) (describing proper purposes of IRS taxpayer investigations and the types of collection proceedings that may follow upon the IRS' issuance of a formal notice that the taxpayer owes a deficiency).
\item[164.] See United States v. Bell, 564 F.2d 953 (Emer. Ct. App. 1977), wherein the target of a Federal Energy Administration (FEA) investigation contended that the \textit{Powell} standards should be applied to require the FEA to show not only (1) that the investigation was conducted pursuant to a legitimate purpose and (2) that the inquiry was relevant to that purpose, but also (3) that the FEA does not already possess the information and (4) that the required administrative steps have been followed. To require these two additional elements of proof would restrict the broad and necessary powers of enforcement conferred on the FEA by Congress and the President under the Emergency Petroleum Allocation Act and Federal Energy Administration Act. There is a critical difference between the procedures necessary for obtaining essential facts for enforcing the Allocation Act and obtaining such facts for enforcing the Internal Revenue Code. Under the latter, annual statements (tax returns) are required to furnish the information. Indeed, application here of the very different Internal Revenue Code enforcement procedures would defeat the Congressional call for "prompt action by the Executive Branch of Government" in Section 2(a) of the Allocation Act in achieving a goal of the Act.
\end{enumerate}
\end{footnotesize}
a particular federal administrative agency must depend on the purpose for which that agency was given its investigative power. This approach necessitates a separate examination of each federal agency's investigative powers within the context of the statutes creating that administrative agency. Although the Court's unwillingness to adopt a notice requirement that, with little difficulty, could potentially extend to all federal administrative agencies is quite understandable, the reasoning employed by the Court further masks this unarticulated concern and adds unnecessary confusion and uncertainty to the law of administrative subpoenas.

Whatever policy reasons may exist to defeat imposition of a notice requirement as part of other agencies' administrative investigations, they do not apply to SEC administrative investigations. Consistent with the paramount statutory goal of investor protection, and in order to promote the proper balance between the conflicting interests of the SEC and the target, imposition of a notice requirement is warranted.


A statutory solution to this notice problem may be designed that provides a more equitable balance between the competing interests of the SEC and its administrative targets than the solution provided by the Supreme Court's ruling in O'Brien.

A. A Statute Providing for Notice to the Target is Sufficient to Mitigate the Harm to the Target

Notice to the target of all third party subpoenas permits the target the opportunity to invoke previously existing rights with respect to the validity of the SEC subpoena. Notice does not enlarge the scope of these pre-existing rights.165 The bases on which the target can challenge the SEC's third party subpoena include the alleged failure of the subpoena to

165. See United States v. New York Tel. Co., 644 F.2d 953, 956-57 (2d Cir. 1981) (court noted that I.R.C. § 7609 did not create any new substantive rights on behalf of targets of IRS administrative investigations); United States v. Pittsburgh Trade Exch., Inc., 644 F.2d 302, 306 (3d Cir. 1981) (The provisions of § 7609 "did not enlarge the substantive grounds on which a taxpayer could resist enforcement [of an IRS third party subpoena]."). However, enactment of the notice requirement in § 7609 has not been interpreted by the courts as abolishing the rights created under Reisman and Powell. United States v. Berg, 636 F.2d 203, 205 (8th Cir. 1980); United States v. Island Trade Exch., Inc., 535 F. Supp. 993, 996 (E.D. N.Y. 1982) In re Tax Liabilities of John Does, 688 F.2d 144, 149 (2d Cir. 1982) ("[W]e think it clear that section 7609(f) does not enlarge or contract the substantive rights to enforcement already available to the taxpayer.").
comply with the Powell standards, as well as any claims of privilege, trade secret or confidentiality that the target may hold. No other rights are involved.

Providing notice does not mean that a target is entitled to be present at a requested deposition or document production. Thus, any proposed statute need not get mired down in resolving issues such as the target's right to question witnesses and lodge objections. In this manner, a notice only requirement dispenses with many of the procedural obstacles that the Court feared the target might erect if the target were to receive notice of all third party subpoenas. Since the statute delineates the scope of a target's right, further case by case treatment would not be required to resolve those questions that were left open under the Ninth Circuit's reversed ruling in O'Brien.

B. This Statutory Solution is Consistent with the Objective of Investor Protection Under the Federal Securities Law

A statutory solution balancing the competing interests of the SEC and the target is included in APPENDIX A to this article. This proposed statute is modeled after section 7609 of the Internal Revenue Code, which provides for notice to a target (taxpayer) in IRS investigations

166. See supra text accompanying note 111.
167. See PepsiCo v. SEC, 563 F. Supp. 828 (S.D. N.Y. 1983). In PepsiCo., the district court held that the target was not entitled to receive notice of all third party subpoenas. The reasoning of the district court was essentially the same as that adopted by the Supreme Court in O'Brien. The facts of the PepsiCo. case arguably provide an even more persuasive basis on which to base a notice requirement than do the facts of the O'Brien case. In PepsiCo, the target of the SEC investigation, who had extensively cooperated with the SEC, requested notice of SEC third party subpoenas issued to former employees of PepsiCo. so as to prevent the disclosure of privileged or other confidential information, particularly by disgruntled former employees seeking retaliation against their former employer, who was now an SEC investigative target.

168. Section 7609 was enacted by Congress as a response to the Supreme Court's decision in United States v. Miller, 425 U.S. 435 (1976), wherein the Court concluded that the taxpayer (target) of an IRS investigation had no protectable fourth amendment interest in the records and other materials requested by the IRS third party administrative subpoena issued to the taxpayer's bank. In response to this line of Supreme Court decisions, culminating in the Miller decision, Congress, concerned about the effect of these decisions on the individual citizen's right to privacy, amended the Internal Revenue Code to include § 7609. In its report on § 7609, Congress specifically mentioned the need to balance the competing interests of the IRS and the administrative target:

The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy.
where administrative subpoenas are issued to “third party record-keepers,” a defined term under section 7609.

Under the suggested legislation, the SEC must give notice to the target of all third party summonses issued as part of the SEC’s formal investigation of the target. However, where there are legitimate concerns, such as the intimidation of witnesses or the destruction of requested documents, the statute contains a mechanism which protects the targets’ rights, while also permitting the SEC investigation to go forward unimpeded.


As originally enacted, § 7609 required the IRS to provide the taxpayer (target) with notice of administrative subpoenas served on “third-party record keepers,” a defined term under § 7609, if the third party subpoena requested production of “records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons . . . .” 26 U.S.C. § 7609(a)(1) (1982). Thus, notice of the third party subpoena is to be sent to the taxpayer (target) “as the person relating to whose business or transactions the books or records are kept.” H.R. REP. No. 94-658, 94th Cong., 2d Sess. 307 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2897, 3204 (footnote omitted). The taxpayer was then entitled under § 7609 to stay the third party’s compliance with the IRS third party subpoena by simply sending a letter to both the IRS and the third party subpoena recipient. In order to obtain the third party’s compliance with the subpoena, the IRS was required to institute enforcement proceedings.

In 1980, Congress held hearings regarding proposed amendments to § 7609 which would change the procedure used by a taxpayer to lodge his objections to the third party subpoena. Under this suggested amendment, the taxpayer would be required to shoulder the burden and expense of instituting proceedings to challenge the validity of the IRS third party subpoena, a burden that had rested on the IRS under § 7609 as it was originally enacted. See Godwin v. United States, 564 F. Supp. 1209 (D. Del. 1983).

At the hearings on this proposed change to the procedures under § 7609, the IRS did not contend that the taxpayer should not receive notice of the third party subpoena; rather, the IRS contended that the procedure under § 7609 permitting the taxpayer an automatic stay of enforcement of the third party subpoena was an undue administrative burden on the IRS. See Review of Taxpayer Privacy Issues: Hearing Before the Subcomm. on Oversight of the Comm. on Ways and Means, 96th Cong., 2d Sess. 121-22 (1980) (statement of Stephen J. Csontos, Legislative Counsel, Tax Division, Department of Justice) (“What we [the IRS] are suggesting is that [Congress] consider changing these procedures [under § 7609] without modifying the basic right that [Congress] gave taxpayers in 1976.”). See also id. at 107-08 (statement of Jerome Kurtz, Commissioner, Internal Revenue Service).

The proposed changes in § 7609 were adopted by Congress and became effective in 1982. The IRS’ position with regard to § 7609 suggests that it is not the notice requirement that is burdensome to the government agency. As long as the taxpayer must bear the expense of initiating proceedings to protect his right to privacy, it appears that taxpayers in general will initiate such proceedings with far less frequency than if the statute imposes the burden of seeking compliance on the IRS. Telephone interview with Katy Basile and Robin Holbrooke, Disclosure Division of the IRS’ Los Angeles Office (June 26, 1984 and July 3, 1984) (Ms. Holbrooke indicated that since the amendment to § 7609, the IRS “has an easier time in getting compliance [with a third party subpoena] without [the necessity of instituting] a formal enforcement proceeding.”).
A court may excuse the SEC from complying with the statute's notice requirement upon a proper, factual showing that the target is likely to destroy the requested documents or harass a potential witness. Contrary to the assumptions made by the *O'Brien* Court, this statutory proposal assumes that any efforts the target makes to resist the SEC investigation will be made in good faith and for proper motivation. If the SEC can demonstrate the contrary to a court, it can dispense with the notice requirement in order that the investigation proceed apace. But in the absence of such a showing, the target is entitled to receive notice of all third party process served by the SEC so that he or she can protect his or her important interests that may otherwise be negatively impacted during the pendency of the SEC's investigation.  

The scheme of this statutory solution is consistent with the paramount objective of the federal securities laws: protection of the investing public. Affording notice to the investigative target of third party administrative process does no violence to the statutory goal of investor protection, absent a showing of the likelihood that the target will engage in dilatory or obstructionist tactics. On such a showing, however, the SEC is excused from compliance with the notice requirement, consistent with the objective that the SEC be permitted to conduct its investigation in a prompt fashion for the protection of investors.

V. Conclusion

The Supreme Court's *O'Brien* decision generates considerable confusion with respect to the proper application of the Court's earlier decisions in *Powell* and *Reisman*, and casts doubt on the continuing validity of the *Powell* criteria. It appears that, unless the *Powell* standards are eventually to be done away with by the Court,  

169. The administrative burden in the form of the cost of mailing a copy of the SEC third party subpoena to the target is not overwhelming, especially when balanced against the target's interests, and therefore, is not an onerous burden to place on the SEC.

170. Some future case obviously will require the Court to address the purpose for which the *Powell* standards were created. Such a case will require the Court to address the need for standards which assure that judicial process is not being abused by the enforcement of administrative subpoenas. This topic lies outside the scope of this article, which deals with the question of whether a target should receive notice of the SEC's third party administrative subpoenas. As part of this discussion, however, the author has assumed the validity of the Supreme Court's long-standing *Powell* decision as the basis for determining the validity of any subpoena issued by the SEC during the course of the SEC's administrative investigation. The focus of this article has been to identify the competing concerns of the SEC and administrative targets that surface in connection with the decision to impose a notice requirement. Future litigation, likely to be instituted by SEC administrative targets who have received informal notice of the SEC's third party subpoenas, will have to deal with the underlying question of
nate enough to receive informal notice of the issuance of an SEC third party subpoena, will be afforded the opportunity to intervene and challenge this subpoena for failure to satisfy the Powell criteria. But with respect to those targets who do not receive informal notice, the Court’s ruling results in unequal treatment because these targets will be wholly unaware of the opportunity to assert the SEC’s failure to satisfy the Powell standards. This unequal treatment of SEC administrative targets is one of the most unsettling aspects of the Court’s opinion in O’Brien because the conflicting interests which prompted the targets in O’Brien to seek notice are not resolved, but rather are exacerbated by the Supreme Court decision. Therefore, a legislative approach to the problem is required.

APPENDIX A—PROPOSED STATUTE

Special Procedures for Third Party Summonses

(a) Notice.

(1) In General. If any summons described in subsection (b) is served on any person and the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons, then notice of the summons shall be given to any person so identified within three days of the day on which such service is made. Such notice shall be accompanied by a copy of the summons which has been served.

(2) Sufficiency of Notice. Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section — [relating to service of summons] upon the person entitled to notice, or is served upon the person entitled to notice in accordance with the provisions of section — [relating to procedures for service by mail] and a proof of service by mail is prepared in accordance with the procedures of section — [relating to preparation of proof of service of notice by mail].

(3) Exceptions. Paragraph (1) of this subdivision shall not apply to any summons

(A) served on a person who is identified in the caption of that formal order of investigation pursuant to which the summons is issued; or

whether the Powell standards, or any standards, should be applied to determine the validity of administrative subpoenas.
(B) issued to determine whether or not records of the business transactions or affairs of an identified person have been made or kept; or

(C) described in subsection (d).

(4) Nature of Summons. Any summons to which this subsection applies shall identify the person to whom the requested records pertain and shall provide such other information as will enable the person summoned to locate the records required to be produced under the summons.

(b) Summons to Which This Section Applies.


(2) Records and Certain Related Testimony. For purposes of this section

(A) the term “records” includes books, papers, or other data;

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records; and

(C) a summons requiring the giving of testimony relating to the business transactions or other affairs of the person who is identified in the description contained in the summons shall be treated as a summons requiring the production of such records.

(c) Restriction on Examination of Records. No examination of any records or any person required to be produced under a summons as to which notice is required under subsection (a) may be made before the close of the twenty-third day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2).

(d) Additional Requirement in the Case of a John Doe Summons. Any summons described in subsection (b) which is issued pursuant to a formal order of investigation which does not identify the party or parties under investigation may be served only after a district court proceeding in which the Securities Exchange Commission (the Commission) establishes that

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons;

(2) there is a reasonable basis for believing that such person or
group or class of persons may fail or may have failed to comply with any provision of the federal securities laws; and

(3) the information sought to be obtained from the examination of the records (including the identity of the particular person or group or class of persons who are the subject of the Commission's investigation) is not readily available from other sources.

(e) Special Exception for Certain Summonses. In the case of any summons described in subsection (b), the provisions of subsection (a)(1) shall not apply if, upon petition by the Commission, the district court determines that

(1) the investigation being conducted is within the lawful jurisdiction of the Commission;
(2) there is reason to believe that the records sought are relevant to a legitimate administrative investigation; and
(3) there is reason to believe that the giving of such notice will result in

(A) endangering life or physical safety of any person;
(B) flight from prosecution;
(C) destruction of or tampering with evidence;
(D) intimidation of potential witnesses; or
(E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

An application made pursuant to this subsection must be made with reasonable specificity.

(f) Jurisdiction of District Court; etc.

(1) Jurisdiction. The United States District Court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear any proceeding brought under subsection (d) or (e). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special Rule for Proceedings Under Subsection (d) or (e). The determinations required to be made under subsections (d) and (e) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(3) Priority. Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under subsections (d) and (e) of this section, and appeals, takes precedence on the docket over all other cases and
shall be assigned for hearing and decided at the earliest practicable date.

(g) Sanctions.

(1) If the person to whom the required records pertain, upon receipt of such notice as is required under subsection (a), seeks to intervene in any proceeding instituted by the Commission to enforce such third party subpoena, or otherwise seeks to restrain compliance with the Commission's administrative subpoena and the district court determines that any such actions taken by such person were taken without good cause or substantial justification, the district court shall have the power to impose reasonable money sanctions payable to the Commission. This power shall not apply to advocacy of counsel before the district court. For purposes of this subsection only, the term "person to whom the required records pertain" includes such person or such person's attorney or both.

(2) Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers, or on the district court's own motion, after notice and opportunity to be heard.

(3) An order imposing sanctions pursuant to this section shall be in writing and shall recite in detail the conduct or circumstances justifying the order.