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BY E-MAIL

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Amendments to Commission's Rules of Practice – File No. S7-18-15

Dear Mr. Fields:

I write in response to the Securities and Exchange Commission's request for comments on proposed amendments to the Rules of Practice governing administrative proceedings.[1]

There is no firm rule governing which cases get brought in the SEC's home court and which get brought in federal court. But, after Dodd-Frank, the consequences of an administrative decision are virtually indistinguishable from those that flow from a verdict in federal court. Given that reality, one might expect that the due process protections would be the same or similar as well.

It has been well-documented, though, that respondents almost always lose before the SEC's ALJs, and lose substantially more frequently than do defendants in federal court.[2] This is unsurprising, given that the Commission's own ALJs are both judge and jury, and they know that the very Commission that approved bringing the cases also constitutes the first layer of appellate review.[3]

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[1] I submit these comments in my personal capacity. They are necessarily informed by my experience as a white collar defense attorney and by my previous service as an Assistant United States Attorney in the Southern District of New York. They are, however, entirely my own, and I do not here speak for my clients or for any other person or entity.

[2] *See* Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J., May 6, 2015, *available at* http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

[3] The Commission's chief ALJ commented as she declined to grant a defense pre-hearing motion: "So for me to say I am wiping it out, it looks like I am saying to these presidential appointee commissioners, I am reversing you. And they don't like that." Jean Eaglesham,

The Commission has nonetheless tried to portray the due process protections in the administrative system as substantially similar to those in federal court. For example, according to the Commission's website, its ALJs "conduct public hearings at locations throughout the United States *in a manner similar to non-jury trials in the federal district court*s. Among other actions, they issue subpoenas, hold prehearing conferences, and rule on motions and the admissibility of evidence. . . . The administrative law judge prepares an initial decision that includes factual findings, legal conclusions, and, if appropriate, orders relief."[4]

It is against this background that the Commission has put forward the proposed amendments to the rules, and has publicized them as a modern reform. But even as amended, the rules put undue constraints on the time that respondents have to prepare to defend themselves, on their opportunity to develop a defense case, and on the protections that they have against incompetent evidence. And they do not address the real issue: that when the Commission chooses to go administrative, it gets to play prosecutor, judge, jury and first-level appellate court.

The proposed rules do not go far enough to protect the rights of respondents.

1. Time Limits Under Proposed Amended Rule 360

The Commission proposes, via an amendment to Rule 360, to enlarge the time allotted to various phases of an administrative proceeding. Although an increase in the time allowable for pre-hearing discovery and preparation in complex cases is necessary, a system of rigid deadlines is not appropriate. Instead, there should be a case-by-case approach that allows for enough time, every time.

Rule 360 limits the time between service of the order instituting proceedings ("OIP") and the administrative law judge's initial decision to 300 days. Putting an outer limit of 300 days for even the most complex cases is unnecessary and often puts the ALJs' understandable desire to have ample time to write the decision at odds with respondents' need to have enough time to develop their defense case and to prepare for trial. The Commission proposes to disaggregate these deadlines. Under the new rule, the time for filing an initial decision would run from the completion of post-hearing briefing (or the briefing on dispositive motions or motions for default), instead of from the date of service of the OIP.[5]

The proposed amendments still require respondents in complex cases to operate in what can be an artificially compressed timeframe. Under the amended Rule 360, the hearing would be

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Fairness of SEC Judges Is in Spotlight, WALL ST. J., November 22, 2015, *available at* http://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970.

[4] *See* http://www.sec.gov/alj (emphasis added).

[5] *See* Proposing Release at 5, 54. The proposing release is available at https://www.sec.gov/rules/proposed/2015/34-75976.pdf.

scheduled to begin "approximately four months (but no later than eight months) from the date of service" of the OIP.[6] In complex cases, the time would often remain unduly short.

I know from experience that even picking through the one-sided investigative file produced in discovery once the OIP has been filed can take weeks or even months to do properly. This is particularly true in recent years, given the growth in the size of investigative files accumulated in this age of electronically stored data. Moreover, understanding the investigative record the staff assembles is just the beginning of preparing a vigorous defense. There are documents that respondents at long last have the power to subpoena, witnesses whom they can attempt to interview (and under the proposed new rules, to depose), experts to consult, and expert reports to prepare. All of those things take time, particularly in complex cases.

Instead of requiring ALJs to start a hearing within eight months of service of the OIP, the Commission should allow for a flexible approach more consistent with what would take place if a complaint were filed in federal court, a forum increasingly focused on "early and active judicial case management."[7] In federal court, the parties appear promptly for an in-depth pretrial conference at which they discuss the timing of certain disclosures, the extent of necessary discovery, the trial dates, and the dates for various motions and additional pretrial conferences, among other things.[8] In the administrative context, the schedule should likewise allow for sufficient time for respondents to prepare, taking into account the circumstances specific to each case. Anything less than that is inconsistent with basic notions of due process. If the Commission is presenting its ALJs as able to administer justice in a manner equivalent to that of federal judges, then surely the Commission can trust its ALJs to manage the schedule of a case with the same flexibility that a federal judge has.

2. Depositions Under Proposed Amended Rule 233

The Commission proposes to allow the parties to take a limited number of depositions. The current rule allows for depositions only when a witness will be unable to testify at a hearing. Under the proposed amended rule, a respondent charged individually could depose up to three witnesses, and the Division of Enforcement could do the same.[9] If the action involves multiple respondents, the respondents could collectively depose up to five witnesses, and so could the

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[6] *Id.* at 54. Note that shorter time periods would govern actions deemed less complicated by the Commission "after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest." *Id.*

[7] Excerpt from the September 2014 Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 13, *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014.

[8] *See* Federal Rule of Civil Procedure 16.

[9] Proposing Release at 7, 44.

Division.[10] Incorporating depositions into the discovery process is a positive step, but the proposed change does not go far enough.

Commission investigations often span many years (almost five years for one case in which I am counsel). During this time, the Commission's enforcement staff has the ability to subpoena anyone in the nation for testimony and documents. The staff can do this without the participation or even the knowledge of the future respondents. Unfortunately, the staff rarely, if ever, uses this opportunity to explore the defenses that might be available to the future respondents.

The result is that many dozens of transcripts can reflect no meaningful exploration of important areas – or, to put it colloquially, the other side of the story. In other instances, the staff has used its ability to persuade witnesses, who often work for entities that are regulated by the Commission and/or require their employees to cooperate fully with requests from the Commission, to sit for informal interviews for which there is no transcript at all. The staff knows what these witnesses will say at trial, but all that the respondents have, at best, are whatever handwritten notes the staff has chosen to jot down during the interviews.

There is no need for rigid limits on the number of depositions respondents can take. Instead, the rules should allow respondents to take up to ten depositions as of right and allow them the opportunity to seek leave to take more if the case justifies it. That is consistent with Federal Rule of Civil Procedure 30, which empowers federal judges to tailor the number of depositions to the particular circumstances of each case.

Unlike what happens in federal court, though, the number of permissible depositions should not be symmetrical across the caption. The Commission investigation is supposed to be done before charges are brought. Under Rule 230(g), "The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings."

There is no reason for symmetrical post-charge deposition practice when the pre-charge opportunity to compel testimony and production of documents is completely asymmetrical. Instead, the Division should be permitted to depose only respondents' experts and perhaps to seek leave to depose certain other defense witnesses about whom it was unable to know during the investigation.

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[10] *Id.* More specifically, depositions are allowed only in cases proceeding under a 120-day timeframe. In these cases, the Commission has given the hearing officer 120 days to file his or her initial decision – the longest period allowed under the proposed rules – after considering the "nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors." *Id.* at 44, 54.

3. Evidence Under Proposed Amended Rule 320

The Commission proposes to tighten the standard for the admission of evidence under Rule 320, which provides that the "Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." It proposes to add "or unreliable" to the end of that list of prohibited forms of evidence.[11] This is a positive and necessary change.

The Commission also proposes, however, to add Rule 320(b), which states that "hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair."[12] If the SEC's administrative proceedings aspire to the level of fairness of federal court, then hearsay should be admitted only under the circumstances enumerated in the Federal Rules of Evidence. There is no convincing reason to have a lesser standard in SEC administrative proceedings. The Federal Rules of Evidence are designed to ensure that justice is done in the courts of the United States. Their application to SEC administrative proceedings would not complicate or prolong such proceedings, but rather would expedite proceedings by sparing the parties and the ALJs from having to debate and ponder what evidence is "unreliable."

* * *

When it chooses the administrative forum, the Commission is able to stack the deck in its favor by having its cases adjudicated by its own judges and reviewed on first-level appeal by itself. Although the proposed amendments to the rules inch in the right direction, they do not go nearly far enough.

The proper approach would be for the Commission to bring all but its most routine cases in federal court, where there are appropriate due process protections.

Very truly yours,

/s/ Susan E. Brune

[11] *Id.* at 53.

[12] *Id.*