

Attys Ready To Pounce On SEC's Outdated Admin Rules

By **Stephanie Russell-Kraft**

Law360, New York (June 18, 2014, 7:00 PM ET) -- While defense attorneys continue to criticize the limitations they feel under the U.S. Securities and Exchange Commission's administrative proceedings, they are seeing a glimmer of hope in the agency's general counsel's remarks Tuesday that another look at the rules might be "reasonable," and are anxious to shape the possible changes.

Many defense attorneys are itching to revise the rules of administrative proceedings, which they say would benefit from increased discovery, a more robust motions practice and a far less strict timetable than the ones currently in place. The SEC, which has indicated in recent months that it plans to increase its use of administrative proceedings, particularly for insider trading cases, has so far denied claims that the forum gives them a significant home-court advantage.

But in what Dan Nathan of Morrison & Foerster LLP considered to be an "olive branch" to the defense bar, the SEC's Anne K. Small pointed out Tuesday that the commission was open to petitions on the issue.

"I think what the SEC may be saying is, 'We've heard all of the complaints, and before we even set pen to paper to draft a notice of proposed rule-making, let's hear what you think are the issues,'" Nathan said. "You know that a thousand attorneys are standing by to do just that."

Speaking on her own accord at an event hosted by the District of Columbia Bar, Small said it was fair for attorneys to question whether the SEC's rules for administrative proceedings were still appropriate, given the fact that the rules were last revised "quite some time ago," before the Dodd-Frank Act gave the SEC permission to try any type of case in its in-house forum.

A representative for the SEC declined to comment Wednesday beyond Small's remarks at the conference.

Nathan, who said he and many other defense attorneys were wary of the unfair circumstances they may soon have to face more often on the commission's home court, said the SEC's administrative forums should be revised to afford respondents many of the same due process rights they enjoy in federal court.

Three of the biggest obstacles, he said, are the expedited time frame of administrative proceedings, the imbalance of pretrial preparation and respondents' inability to toss certain claims before they even get to trial.

David Kornblau, a partner at Covington & Burling LLP who previously served as the SEC Enforcement Division's top trial lawyer, said that the current time frame for administrative proceedings doesn't give respondents enough time to sift through the "hundreds of thousands or millions" of documents the SEC's investigators are able to compile before they bring a case.

"The SEC can take years to gather and analyze evidence before filing a case," Kornblau said. "Yet, in an administrative proceeding, the rules give respondents at most only a few months to prepare for a hearing at which their careers may be at stake."

Once a case is brought, defendants have little opportunity to flesh out the facts and claims beyond what the SEC alleges, according to Matthew Rossi, a partner in Mayer Brown LLP's securities litigation and enforcement practice.

"The investigative file that the investigative staff puts together obviously reflects their view of the case and not necessarily the respondent's view of the case," he said.

Under the current rules of the SEC's administrative proceedings, respondents are entitled to receive transcripts of testimony taken during the agency's investigation, but they aren't allowed to take their own depositions or cross-examine existing witnesses before the trial begins, according to Eugene Goldman, partner at McDermott Will & Emery LLP.

"Serious consideration should be given to affording respondents the right to depose key witnesses in advance of the hearing, instead of just confronting them for the first time years after they testified, perhaps inaccurately, during the investigation," Goldman said.

Once a proceeding has begun, a more robust motions practice would also allow defendants to parse out less substantive claims earlier on, according to Nathan, who expressed frustration at the "notion of having to spend your time having to defend charges which you know are spurious rather than getting them dismissed out before trial."

Not all respondents will want to increase the length and complications of the SEC's administrative proceedings, however. In some cases, respondents may actually prefer the expedited track of an in-house case and the "quick justice" it offers, according to Steve Malina of Greenberg Traurig LLP.

"I wouldn't be surprised if the SEC came back and said, 'These rules protect you,'" Malina said.

While the SEC has neither taken an official position nor issued any formal request for comments on possible changes to the rules of its administrative proceedings, defense attorneys remain cautious in their optimism that some relief may come.

Goldman, who previously served as senior counsel in the SEC's Division of Enforcement, said he found it "refreshing" that Small might see the potential need for changes to the rules. Matthew Rossi said he was pleasantly surprised by the agency's potential willingness to review the rules.

"To the extent that you have senior staff expressing willingness to make changes, that's a positive development," Rossi said.

However, few attorneys expect the proceedings to look like federal court anytime soon. Given the

length of time the current rules have been on the books and the fact that the SEC has “a ton on their plate already,” Steve Malina said he isn’t waiting for a “soup-to-nuts review” of the agency’s in-house procedure.

“If anything, perhaps a dialogue will start,” he said.

--Additional reporting by Daniel Wilson. Editing by Elizabeth Bowen and Philip Shea.

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