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Will the Securities and Exchange Commission's Proposed Changes to Administrative Proceedings Quiet Critics?

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On September 24, 2015, the Securities and Exchange Commission (SEC or Commission) proposed amendments to its Rules of Practice governing the SEC's internal administrative proceedings. In announcing the proposed amendments, SEC Chair White stated, "The proposed amendments seek to modernize our rules of practice for administrative proceedings, including provisions for additional time and prescribed discovery for the parties."[1]

The proposals, which were unanimously approved by the Commission, include three primary categories of changes to the Commission's Rules of Practice:

(1) They adjust the timing of administrative proceedings, including by extending the time before a hearing occurs in appropriate cases;
(2) They amend the pre-hearing process including by permitting parties to take a limited number of depositions of witnesses as part of discovery;
(3) They require parties in administrative proceedings to submit filings and serve each other electronically, and to redact certain sensitive personal information from those filings.

I. Challenges to the SEC's Use of Administrative Proceedings

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) dramatically transformed SEC administrative courts by significantly expanding their jurisdiction and range of remedies. Prior to the statute, the SEC could only obtain monetary penalties in administrative proceedings if the respondent was either a regulated entity or an individual associated with one. Eliminating that historical limitation enabled the SEC to obtain monetary penalties from any entity or person found to have violated the securities laws, considerably increasing the SEC's reach in administrative proceedings. From the Commission's perspective, the benefits of pursuing enforcement actions administratively rather than through federal courts were compelling. Administrative proceedings offered the SEC streamlined procedures including limited discovery, liberal evidentiary rules as the Federal Rules of Evidence did not apply, no jury, and appeals to the Commission, which was familiar with the facts as it had authorized the enforcement action. In addition, the Commission, as has been reported, prevailed at a materially higher rate in administrative proceedings: in the year prior to September 29, 2014, the

Division won all six of its litigated administrative proceedings, but only eleven out of eighteen federal court trials.[2]

In 2014, when senior SEC officials began signaling that the agency would increasingly rely on administrative proceedings rather than federal court proceedings to enforce the federal securities laws, they merely confirmed an ongoing trend.[3] As recently as 2005, civil court cases brought by the SEC outnumbered administrative proceedings. In contrast, by 2012 there were nearly twice as many administrative proceedings as civil actions brought by the Commission. A senior leader in the Enforcement Division characterized the increased use of administrative proceedings as the "new normal."[4] And despite the procedural limitations noted above, the SEC's Division of Enforcement has said it would try cases administratively if they give the Commission a chance to define a complex or unsettled area of the law.[5] These statements sparked widespread criticism from bench and bar alike. Judge Rakoff, for example, decried that forum shift as enabling the SEC to "become a law unto itself."[6] Other critics also questioned the meaningfulness of appellate review, which would be conducted by the very Commission authorizing the enforcement proceeding.

In the wake of widespread criticism, the past year has witnessed the SEC already scaling back on its use of administrative proceedings. In the last quarter, the SEC referred only four out of thirty-six (or, eleven percent) of contested actions to administrative proceedings, in contrast to forty percent from the comparable period last year. That trend mirrors the overall pattern for the entire fiscal year (ending September 30), which has witnessed administrative proceedings filed in only 28 percent of contested cases versus 43 percent in the prior 2014 fiscal year.[7] Drawing inferences from any one year period is hazardous, but those statistics strongly suggest that the SEC has at least partially retreated from its increased administrative proceeding strategy.

Recent criticism of the SEC administrative forum has crystalized in a series of constitutional challenges to the post-Dodd Frank administrative process, potentially jeopardizing its enforcement strategy. Those challenges attack the SEC's revamped administrative proceedings under various theories. The most successful one to date, in terms of gaining traction with reviewing courts, focuses on the Appointments Clause in Article II, which provides that the President shall appoint "Officers of the United States," but that Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." The challengers contend that the current SEC Administrative Law Judges (ALJs)—all hired through the civil service process—have been improperly appointed since they were not named by the President, any court, or the Commission. Other constitutional challenges include claims that the current SEC administrative process violates: (1) the non-delegation doctrine of Article I, by allowing the Commission "unfettered" discretion to select its forum; (2) a respondent's Seventh Amendment right to a jury trial; and (3) separation of powers doctrine by preventing the President from exercising Executive power over "inferior officers" (that is, the ALJs).

Respondents have had mixed success challenging the administrative forum in court.[8] Several judges have ruled that they lack jurisdiction over the constitutional claims, finding that respondents in the administrative proceeding must first avail themselves of review under the statutory scheme such that their claims are premature and not appropriate for immediate judicial review. Other courts have ruled in favor of respondents and have stayed administrative proceedings pending federal review of the claims relating to the Appointments Clause.

In addition to appealing these adverse decisions, the SEC rejected the constitutional attacks in two recent administrative proceedings, finding that, among other things, its ALJs were "mere employees" and not "inferior officers" subject to the Appointments Clause.[9] Against this backdrop, the SEC's proposed amendments, while styled as

procedural amendments, clearly attempt to address criticisms of the fairness of its administrative proceeding structure without conceding its constitutionality.

Regardless of how the SEC resolves the ongoing legal issues surrounding its administrative proceeding structure, the Commission has already sent one clear signal. Included in the current budget request pending before Congress for FY 2016 is a request by the Division of Enforcement to hire an additional fifty investigators and an additional twenty litigators.[10]

II. Key Changes Proposed to Administrative Proceedings

The most significant proposed rules change the current rules in the following respects:

A. Extending the Time Before the Hearing

Rule 360(a)(2) of the SEC Rules of Practice provides three timelines for administrative proceedings which are set by the Commission based upon the "nature, complexity, and urgency of the subject matter." The timeline selected by the Commission for each matter is set forth in the Order Instituting Proceedings (OIP), and is denominated as the date by which the ALJ shall issue an initial decision: 120, 210, or 300 days from the date of service of the OIP.[11] The rule sets forth that for the most complex matters, which are under the 300-day timeline, the ALJ shall schedule the hearing to occur within approximately four months of the Enforcement Division initiating proceedings; for the 210-day timeline, the ALJ must schedule the hearing to occur within approximately two and a half months; and for the 120-day timeline, the ALJ must schedule the hearing to occur within approximately one month of service of the OIP.[12]

The proposed amendments to Rule 360 relax and expand these deadlines, providing more flexibility to the ALJ. The amendments would allow the ALJ to schedule the hearing to begin "approximately four months (but no more than eight months)" from service of the OIP for the most complex matters, and expand the two-and-a-half month deadline to "no more than six months," and the one-month deadline to "no more than four months." The Commission's discussion explaining this change notes that the added flexibility and time will allow for the parties to conduct deposition discovery, described below, while still retaining a bounded time limit in order "to ensure the timely and efficient resolution of the proceeding."[13]

B. Deposition Discovery

Currently, Rule 233 permits a party to take a deposition only in the instance that a witness will be unavailable to testify at the hearing. The rule sets forth that a party seeking to take the deposition must make a motion setting forth, among other things, why the witness will be unable to attend the hearing and what matters the party expects to question the witness about. The ALJ or the Commission has the discretion to allow a deposition in these circumstances, upon a finding that the witness will likely give testimony material to the proceeding, and that it is likely that the witness will not be able to attend the hearing (for example because of age, infirmity, or imprisonment) or will be out of the United States.[14]

The proposed amendments to Rule 233 provide for limited deposition discovery in the most complex matters. Proposed Rule 233(a) details that in complex matters with one respondent, each side can subpoena for deposition a maximum of three people; and in matters where there are multiple respondents, each side (that is, the Enforcement Division on one hand, and the group of all respondents on the other) can depose up to five people.[15] Each deposition is limited to one day of six hours which includes "a reasonable amount of time for cross-examination" by the other side. The ALJ or Commission can expand the time allotted upon a showing, among other reasons, that more time is needed to "fairly examine the deponent."[16]

C. Motions to Quash

Currently, any person who receives a subpoena (to testify at the hearing or to produce documents)

may request that the subpoena be quashed if compliance with it would be "unreasonable, oppressive, or unduly burdensome."[17] The ALJ or the Commission can either quash the subpoena in its entirety, or modify it to impose conditions including that the person complying with the subpoena have "reasonable compensation" for the costs of compliance.

The proposed amendments to Rule 232 add that a subpoena (for depositions, trial witnesses, or documents) can be quashed by the ALJ or the Commission if compliance with it would "unduly delay the hearing."[18] In addition, the proposed amendments state that the ALJ or the Commission shall quash a deposition subpoena unless the deponent "was a witness of or participant in any event, transaction, occurrence, act or omission that forms the basis for any claim … or defense," or is a designated expert witness, or has custody of documents or data relevant to claims or defenses of any party.[19] The proposed rule explicitly carves out personnel from the Enforcement Division or anyone whose knowledge of the facts derives only from the Enforcement Division's investigation.[20]

D. Admissibility of Evidence

Currently, all evidence is admissible in administrative proceedings under Rule 320 unless it is "irrelevant, immaterial, or unduly repetitious." In fact, Rule 320 states that the ALJ "may" receive relevant evidence, but "shall" exclude irrelevant, immaterial, or unduly repetitious evidence.

The proposed amendments to Rule 320 add "unreliable" to the list of evidence that the ALJ shall exclude, but do not add that the ALJ must exclude hearsay. Instead, Proposed Rule 320(b) specifically states that hearsay may be admitted if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair." The Commission noted, in the discussion concerning Proposed Rule 320(b), that these amendments are consistent with the Administrative Procedure Act.[21] Proposed Rule 320(b) also cites to Rule 235 which, in its existing form as well as amended form, allows a party to introduce a statement of a witness not present at the hearing as permitted by the ALJ because the witness is outside of the United States or is unable to attend the hearing due to imprisonment, age, infirmity, or other disability.[22] Proposed Rule 235(b) also allows a party to use "for any purpose" the deposition, investigative transcript, or any sworn statement of a party or anyone who was at the time of making the statement or giving testimony, "the party's officer, director, or managing agent."

E. Experts

Currently, Rule 222 requires that a party calling an expert witness must provide a brief summary of the expert's expected testimony,[23] as well as a "statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert."

The proposed amendments to Rule 222 limit the required list of other proceedings in which the expert has provided expert testimony to the previous four years, and the list of publications authored or co-authored by the expert to the previous ten years. However, the more significant changes in Proposed Rule 222(b) concern the provision of an expert report, prepared and signed by the expert. The Proposed Rule details what is required to be in the report: "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; and (iv) a statement of the compensation to be paid for the study and testimony in the case."[24] The Proposed Rule explicitly protects from disclosure all drafts of the report, and communications between a party's attorney and the expert except to the extent they relate to the expert's compensation, or facts and data provided by the attorney or assumptions provided by the attorney and relied upon by the expert. (Proposed Rule 222(b)(2)) The Commission's notes to these proposed amendments state that they would bring expert disclosure

and reporting practices in line with those in the Federal Rules of Civil Procedure, and have already been required by ALJs in hearings before them.

As the proposed amendments do not provide separately for expert witness depositions, the deposition of any expert is one of the three or five depositions allowed in Rule 233.

F. Appellate Process

The proposed rules also amend other timing touchpoints and revise the appeal process in noteworthy respects:

1. Settlement talks toll the clock

Under current Rule 161, an ALJ shall stay the proceeding as to settling respondents or, in her discretion, as to all respondents, when the Commission Staff and one or more respondents file a joint motion to the effect that they have reached an agreement to settle on all major terms. Under the current rule, while such a stay halts the proceeding, it does not toll the deadlines for an ALJ to issue a decision. Under the proposed amendment to Rule 161, an ALJ may stay a proceeding pending the Commission's consideration of offers of settlement, and this stay will also toll the deadlines for an ALJ to issue the initial decision.[25]

2. Timing of ALJ decision

The proposed amendments also revise the deadlines for an ALJ to issue the initial decision. As discussed above, under the current rule, the clock for the ALJ's initial decision begins to run from the time the OIP is served on the respondent, and requires a decision within 120, 210, or 300 days.

Under the amendments to Rule 161, the deadline for the ALJ to file the initial decision would run from the time that the post-hearing briefing or briefing of dispositive motions is completed. Thus, the ALJ's timeframe for issuing an initial decision would not be adversely affected by settlement discussions, as discussed above, or by the expanded discovery process.

3. Three-page limit on notice of appeal

Under Rule 410, an ALJ's initial decision may be appealed to the Commission by filing a petition of review. "The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception."[26] The filing of this petition is a prerequisite to further judicial review in the federal appellate courts under Section 704 of the Administrative Procedure Act.[27] Unlike federal appellate review, the Commission's review of an ALJ's initial decision is essentially a de novo review, and the Commission "may make any findings or conclusions that in its judgment are proper and on the basis of the record."[28] At the federal appellate level, the reviewing court may review a Commission decision and set aside findings or conclusions it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," as well as those found to be unconstitutional, in excess of statutory jurisdiction or authority, or made "without observance of procedure required by law."[29]

However, parties are not guaranteed an appeal from the ALJ's initial decision for all types of proceedings, and the proposed rules do not change that basic principle.[30] In administrative proceedings, petitioners only have an appeal as of right for a narrow subset of administrative proceedings, as detailed in Rule 411. Petitioners seeking to appeal an ALJ decision are only entitled to Commission review as a matter of right for initial decisions that (i) deny a request for action under three discrete provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 concerning the effectiveness of registration statements and amendments; (ii) suspend trading in a security; or (iii) pertain to a case where the agency has issued an order but was not required to do so on the record after notice and opportunity for a hearing. [31] Nevertheless, in exercising its discretion whether to hear an appeal, the Commission must consider certain factors in assessing the petition for review.[32] These factors include whether a "prejudicial error was committed in the

conduct of the proceeding," or whether the ALJ's initial decision was clearly erroneous or constitutes "an exercise of discretion or decision of law or policy that is important and that the Commission should review."[33] Thus, while for the majority of the causes of action that are subject to administrative proceedings, there is no appeal as a matter of right, there is a required analysis the Commission must undertake before declining to review an ALJ's initial decision. The proposed rules leave unaltered the distinction between mandatory review and discretionary review, but as a practical matter the Commission generally grants review of ALJ initial decisions when asked to do so.

The proposed rules do change the method for a party to seek review by the Commission. Currently, under Rule 410, appealing parties must set forth all specific findings and conclusions of the initial decision to which they take exception in their petition for review, and do so within 21 days of the ALJ's decision. Proposed Rule 410(b) would instead require a three-page "summary statement of the issues presented for review,"[34] and would not permit incorporation of pleadings or filings by reference.

The rule release explains the rationale for the amendment to Rule 410 as an attempt "to address timing issues and potential inequities in the number of briefs each party is permitted to submit to the Commission."[35] Because an appealing party has only 21 days from the date of the decision in which to file a notice of appeal, the Commission aims for the shorter, summary statement to both help an appealing party narrow the issues for review and avoid the risk of waiving a potential ground for appeal by omitting it in its petition for review, as is the case under the current rule.[36]

The rule release also addresses certain "briefing inequities" currently at play. The release takes the view that petitioners essentially get two bites at the apple: an initial petition for review and an opening brief limited to 14,000 words.[37] Since under the current rule, "petitions for review often have exceeded the length of opening briefs filed later in support of a petition for review," the proposed three-page summary would correct that imbalance.[38] The proposed rule would not change the limitation of the opposition brief to 14,000 words. While the Enforcement Division has appealed ALJ initial decisions to the Commission,[39] it seems far more likely that petitioners would tend to be respondents appealing an unfavorable initial decision. In these instances, where the Commissioners are presumably more familiar with the Enforcement Division's version of the facts, since the Commission must authorize an enforcement action, the respondent may face a real challenge to re-cast the facts and reasons for appeal in a mere three-page summary for discretionary review.

Finally, the proposed changes to Rules 151 and 152 also would modernize the filing procedures so that documents filed and served in connection with administrative proceedings would be filed and served electronically, rather than in paper form. The rule release contemplates a 90-day "phase-in" period, where parties would file and serve documents in both paper and electronic form.[40]

III. Conclusion

The proposed amendments leave many unanswered questions as to how the new rules would work, and address only some of the limitations to the administrative process. Broadly speaking, the proposed rules appear to attempt to align the process of an administrative proceeding with the Administrative Procedure Act, and provide for some discovery with references to the Federal Rules of Civil Procedure. Nevertheless, the changes will not eliminate the due process concerns that have been raised. For instance, the proposed rules only provide for extremely limited deposition discovery (especially in the case of multi-respondent proceedings), and explicitly do not disallow hearsay in administrative proceedings.

Among the many unknowns with the proposed changes is how the new discovery rules will actually work in practice, including the mechanics of how and when the parties will notice their limited

depositions and how expert discovery will fit into the still-compressed discovery schedule. This is especially true given the need in many cases for respondents to first digest the voluminous investigatory file from the Enforcement Division.[41] Discovery disputes, such as how the standard for a motion to quash will be applied, are also worth watching. For example, under the proposed rules, deposition subpoenas shall be quashed unless the deponent "was a witness of or participant in any event . . . that forms the basis for any claim or defense." Yet, as noted above, hearsay is also explicitly permitted in a proceeding. So, in the event a deponent is prepared to offer reliable and relevant hearsay, would such a subpoena for testimony be quashed?

It also is unsure how the SEC will assign cases to the one month to four month timeline, two-and-a-half to six month timeline, and four to eight month timeline. As described earlier, the SEC has traditionally reserved the 120-day timeline for proceedings in which there is little serious resistance by most respondents, the 210-day timeline for follow-on proceedings, and all others to the 300-day timeline under the existing rule. As the SEC enhanced discovery procedures are available only in the cases deemed most complex by the agency, it will be interesting to see whether the SEC maintains its traditional classification, or whether it will designate more matters as less complex in order to complete more matters more quickly.

It also remains to be seen how the Commission handles the backlog of appeals from administrative proceedings, at a time when the administrative proceeding caseload appears to be increasing.[42] The Commission noted in the rule release relating to Proposed Rule 410(b) that allowing for a summary petition would not only cut down on voluminous and duplicative filings by parties appealing to the Commission, but is consistent with the Federal Rules of Appellate Procedure, which require mere notice filing in instances where the petitioner may appeal as of right.[43] But, the Proposed Rule 410(b) actually allows for less advocacy than that allowed in the Federal Rules of Appellate Procedure, which for discretionary review, require that the court receive "the facts necessary to understand the question presented," the question presented, relief sought, and "reasons why the appeal should be allowed and is authorized by a statute or rule," among other things.[44] While the Commission notes this discrepancy in a footnote,[45] it does highlight the question as to whether the Commission's past statements that it "has long had a policy of granting petitions for review"[46] necessarily guarantees the continuing grant of such petitions which it has done without exception for the last five years.[47]

Given the recent high-profile challenges to the administrative proceeding forum, it will be interesting to see whether any court will weigh the perceived judicial efficiency that the administrative proceeding promises in theory, with the reality of the delays[48] at the Commission's appellate level, especially given the longer time from the institution of proceedings until initial decision permitted in the proposed amendments. In the meantime, however, these changes do provide an opportunity for respondents to develop a meaningful defense and challenge to the Enforcement Division's case in an administrative proceeding.

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NOTES

1 SEC Press Release, "SEC Proposes to Amend Rules Governing Administrative Proceedings," Sept. 24, 2015; available at *http://www.sec.gov/news/pressrelease/2015-209.html*; *Proposed Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 75976, 80 FR 60091 (Oct. 5, 2015) [hereinafter *Rule Release*]; *Proposed Amendments to the Commission's*

Rules of Practice, Exchange Act Release No. 75977, 80 FR 60082 (Oct. 5, 2015) [hereinafter *E-Filing Rule Release*].

[2] House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises, Hearing on Oversight of the SEC's Division of Enforcement (March 19, 2015); Jean Eaglesham, "SEC Is Steering More Trials to Judges It Appoints," *Wall St. J.* (Oct. 21, 2014), available at *http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590*. However in a rare loss, an ALJ recently dismissed an insider trading action brought in the administrative proceeding setting, after the ALJ found that the agency had not proven that the alleged tipper received any benefit in return for the information he allegedly tipped. *In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, Initial Decision Release No. 877, Admin. Proceeding File No. 3-16178 (Sept. 14, 2015), available at *https://www.sec.gov/alj/aljdec/2015/id877jsp.pdf*. SEC Enforcement Staff have appealed the initial decision to the Commission. *In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, The Division of Enforcement's Petition for Review of Initial Decision (Oct. 5, 2015).

[3] *See, e.g.*, Andrew Ceresney, Remarks to the American Bar Association's Business Law Section Fall Meeting, Nov. 21, 2014, available at *http://www.sec.gov/News/Speech/Detail/Speech/1370543515297*.

[4] Jean Eaglesham, "SEC Is Steering More Trials to Judges It Appoints," *Wall St. J.* (Oct. 21, 2014), available at *http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590*.

[5] "Division of Enforcement Approach to Forum Selection in Contested Actions," May 8, 2015, available at *http://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf*.

[6] Jaquelyn Lamb, "Judge Rakoff Warns About SEC's Move to More Administrative Proceedings," *Securities Regulation Daily* (Nov. 5, 2014), available at *http://www.dailyreportingsuite.com/securities/news/judge_rakoff_warns_about_sec_s_move_to_more_administrative_proceedings*.

[7] Jean Eaglesham, "SEC Trims Use of In-House Judges," *Wall St. J.* (Oct. 11, 2015), available at *http://www.wsj.com/articles/sec-trims-use-of-in-house-judges-1444611604*.

[8] *See, e.g.*, Bebo v. SEC, No. 15-1511, 2015 WL 4998489 (7th Cir. Aug. 24, 2015); Tilton v. SEC, No. 15-CV-2472 (RA), 2015 WL 4006165 (S.D.N.Y. June 30, 2015); Spring Hill Capital Partners, LLC v. SEC, No. 15-CV-4542, Dkt. 23 (S.D.N.Y. June 29, 2015). However, some judges have exercised jurisdiction and ruled in favor of the plaintiffs. Notably, in Hill v. SEC, No. 1:15-CV-1801-LMM, 2015 WL 4307088 (N.D. Ga. June 8, 2015), US District Judge Leigh May held that Hill had shown a substantial likelihood of success on the merits of his Appointments Clause claim and preliminarily enjoined the SEC's administrative proceeding against him. Likewise, on August 4, 2015, Judge May held that Gray Financial Group (Gray) had shown "a likelihood of success" on the merits of this Appointments Clause claim and preliminarily enjoined the SEC's administrative action against Gray. The SEC then moved the court to stay the injunction pending appeal, which Judge Leigh May denied. Gray Financial Group v. SEC, 1:15-CV-492-LMM (N.D. Ga. Sept. 24, 2015). Federal courts in the Second Circuit also are grappling with the issue. Recently, US District Judge Richard Berman preliminarily enjoined proceedings on the same grounds with respect to the Appointments Clause. Duka v. SEC, 15 Civ. 357 (RMB) (SN) slip op. at 4-5 (S.D.N.Y. Aug. 12, 2015). Judge Berman also denied the SEC's motion to stay the district court's preliminary injunction and permit the administrative case to proceed. Duka v. SEC, 15 Civ. 357 slip op. at 3-4 (S.D.N.Y. Sept. 17, 2015). That same day, the Second Circuit stayed the SEC's administrative action against Lynn Tilton, pending her appeal of the administrative forum. Tilton v. SEC, No. 15-2103 (2d Cir. Sept. 17, 2015).

[9] *In the Matter of Raymond J. Lucia Companies, Inc.*, Admin. Proc. File No. 3-15006, Exchange Release No. 75837 (Sept. 3, 2015); *In the Matter*

of Timbervest LLC, et al., Admin. Proc. File. No. 3-15519, Investment Advisers Act Release No. 4197 (Sept. 17, 2015). On October 22, 2015, the Commission partially stayed its Order Imposing Remedial Sanctions on Raymond J. Lucia Companies, Inc. and Raymond J. Lucia pending resolution of Respondents' appeal to the D.C. Circuit. The Commission stayed the civil monetary penalties imposed on the entity and the individual, but refused to stay the other remedial aspects of the order, finding that Respondents were not likely to succeed on the merits and that "financial detriment does not amount to irreparable harm." *In the Matter of Raymond J. Lucia Companies, Inc.*, Admin. Proc. File No. 3-15006, Exchange Release No. 76241 (Oct. 22, 2015). In its order, the Commission expressly distinguished *Raymond J. Lucia* from the stay it issued in *Timbervest* based on "case-specific considerations that are absent" in *Raymond J. Lucia*. *Id. See also* In the Matter of Timbervest LLC, *et al.*, Admin. Proc. File. No. 3-15519, Investment Advisers Act Release No. 4198 (Sept. 17, 2015) (staying remedial measures *sua sponte* pending resolution of appeal).

10 House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises, Hearing on Oversight of the SEC's Division of Enforcement (March 19, 2015); US Securities and Exchange Commission FY 2016 Budget Request by Program at 63, available at *http://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf*.

11 To date, the SEC has largely reserved the 120-day track for proceedings aimed at suspending or revoking the registration of stock where the issuer had failed to file annual or periodic reports. The 210-day track has thus far been reserved for follow-on Administrative Proceedings. All other proceeding are assigned to the 300-day track.

12 While the current rule provides some flexibility to the ALJ to schedule the hearing by including the word "approximately," the timeline for the ALJ to issue a decision (*i.e.*, the 300, 210, or 120 days from service of the OIP) does not have flexibility. Since the ALJ must allow time for post-hearing briefing, which also is mandatory under the rule, there is, in reality little flexibility under the current rule for the ALJ to postpone the hearing significantly. As discussed below, the proposed amendments would set the deadline for the ALJ's initial decision from the end of the hearing instead of from the initiation of proceedings. *See Timing of ALJ Decision* below.

13 *Rule Release* at 60092.

14 SEC Rules of Practice, Rule 233(b).

15 The proposed amendments explicitly preserve the ability of a party to seek to depose a witness who will be unavailable to testify at the hearing for the reasons set forth above. *See* proposed Rule 233(b), *Rule Release* at 60102. Those depositions, which would have to be granted by the ALJ, would not count against the three or five depositions provided for in the amended Rule 233(a).

16 Proposed Rule 233(j)(1), *Rule Release* at 60103.

17 SEC Rules of Practice, Rule 232(e).

18 Proposed Rule 232(e)(2), *Rule Release* at 60093.

19 Proposed Rule 232(e)(3), *Rule Release* at 60102.

20 *Id.*

21 *Rule Release* at 60095.

22 SEC Rules of Practice, Rule 235(a).

23 Rule 222 requires a brief summary of expected testimony to be provided for each witness – not just expert witnesses – a party intends to call.

24 *Rule Release* at 60101.

25 *Rule Release* at 60095.

26 SEC Rules of Practice, Rule 410(b).

27 "Any agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

28 SEC Rules of Practice, Rule 411(a).

29 5 U.S.C. § 706.

30 *See* Rule 411(b)(1)-(2) listing standards for granting review for decisions that fall under mandatory review or under discretionary review.

[31] Following petition for review, the Commission "shall review any initial decision that (i) denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933 … or the first sentence of Section 12(d) of the Exchange Act....; (ii) suspends trading in a security pursuant to 12(k) of the Exchange Act; or (iii) is in a case of adjudication … not required to be determined on the record after notice and opportunity for a hearing (expect to the extent there is involved a matter described in 5 U.S.C. 554(a)(1) through (6)." Rule 411(b)(1).

[32] SEC Rules of Practice, Rule 411(b)(2)(i)-(ii).

[33] *Id.*

[34] *Rule Release* at 60096.

[35] *Id*.

[36] *Id*.

[37] *See Rule Release* at 60096 ("Essentially, petitioners are afforded two opportunities under the current rule to brief the issues in the case, while under current Rule 450, the opposing party typically may only submit a brief in opposition that is limited to 14,000 words.")

[38] *Rule Release* at 60096.

[39] *See, e.g., In the Matter of The Robare Group, Ltd., et al.*, Admin. Proceeding File No. 3-16047, Division of Enforcement's Petition for Review (June 26, 2015), and Order Denying Motion for Summary Affirmance, Granting Petition for Review, and Scheduling Briefs (Aug. 12, 2015). *See also In the Matter of Theodore W. Urban*, Administrative Proceeding File No. 3-13655, Division of Enforcement's Petition for Review (Sept. 29, 2010), in which the Commission ultimately upheld the initial decision and dismissed the proceeding. Order Dismissing Proceeding (Jan. 26, 2012).

[40] *E-Filing Rule Release* at 60083.

[41] Unlike in the federal civil context, in an administrative proceeding, Enforcement Staff will provide respondents with *Brady* and *Jencks* evidence, in addition to prior witness testimony, among other things.

[42] Consider that in 2014, the average time for the Commission to issue a decision from the date of appeal was 732.8 days. In 2013, it took on average 510.7 days. Between 2011 and 2014, the Commission decided between 14 and 18 appeals annually. In the first six months of 2015, the Commission issued 12 decisions. Based in part on this data, one recent study found that while the Commission's pace of releasing opinions is fairly stable, the length of time between appeal and opinion has grown. Ed Beeson, "SEC Admin Court Appeals Languish Under White," Law360 (July 24, 2015). *See also U.S. Securities & Exchange Commission Report on Administrative Proceedings for the Period October 1, 2104 through March 31, 2015*, Exchange Act Release No. 74850 (April 30, 2015) (indicating a greater number of matters pending before ALJs and the Commission at the end of the period than at the beginning for the past two six-month periods).

[43] *Rule Release* at 21; Federal Rule of Appellate Procedure 3(c).

[44] Federal Rule of Appellate Procedure 5.

[45] The *Rule Release* signals Federal Rule of Appellate Procedure 5 as different but sufficiently analogous to lend support. *Rule Release* at 60096 n.36 ("*c.f.* Federal Rule of Appellate Procedure 5…").

[46] *Proposed Amendments to the Rules of Practice and Related Provisions*, Exchange Act Release No. 48832, 68 FR 68185, 68191 (Dec. 5, 2003) ("In the Commission's experience, the utility of such oppositions has been quite limited, given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision.").

[47] *See generally* List of Commission Opinions and Adjudicatory Orders, 2010-2015, available at *https://www.sec.gov/litigation/opinions.shtml*. The Commission has denied review of its decisions in which it denied third parties the opportunity to depose members of the Commission or its Staff. *See, e.g.*, *In the Matter of Anwar v. Fairfield Greenwich Limited*, No. 09 Civ. 00118 (S.D.N.Y), Exchange Rel. No. 70120 (August 5, 2013).

It is unclear what recourse would be available to respondents should the Commission begin denying discretionary review, as the appellate framework seems to lead to the conclusion that, under 15 U.S.C. 78y(a), the federal appellate court would be limited to reviewing the Commission's order denying review of the

initial decision, which in most cases would be within the Commission's discretion to deny. 15 U.S.C. 78y(a)(4)-(5) sharply limits what the appellate court can consider ("The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive") and actions it can take ("the court may remand the case to the Commission for further proceedings").

[48] The most extreme recent example of this within the past few years is the Commission's opinion in *In the Matter of John P. Flannery and James P. Hopkins*, Admin. Proc. File No. 3-14081, Exchange Act Release No. 73840 (Dec. 15, 2014), in which the Commission took 1,120 days from the date of appeal to render a decision.