

CLIENT ALERT

SEC Adopts Amendments to Rules of Practice for Administrative Proceedings

July 18, 2016

On Wednesday, July 13, 2016, the U.S. Securities and Exchange Commission adopted several amendments to its Rules of Practice governing administrative proceedings. According to the SEC, "[t]he amendments are intended to update the rules and introduce additional flexibility into administrative proceedings, while continuing to provide for the timely and efficient resolution of the proceedings." These amendments take on more significance given the SEC's stated intention to commence more enforcement actions through the administrative process than in federal court and the Commission's expanded jurisdiction to utilize administrative actions to impose substantial civil monetary penalties following Dodd-Frank.

Perhaps the most significant rule changes are those related to time periods and discovery rights. Specifically, an amendment to Rule 360 will extend the length of the prehearing period from the current rule's time of four months to a maximum of ten months for the cases designated with the longest timeline (120 days). The SEC noted that "[t]he longer prehearing period is intended to provide parties, in appropriate cases, additional time to review the investigative record, conduct depositions under amended Rule 233, and prepare for a hearing." With respect to discovery, the amended Rule 233 will allow parties to notice depositions in cases designated for the 120-day timeline. The amendment provides for the right to notice three depositions per side in single-respondent cases and five depositions per side in multi-respondent cases, with the right to request an additional two depositions. As a result of this rule change, a multi-respondent administrative proceeding could involve up to fourteen depositions.

The SEC also adopted a notable amendment to Rule 220, which will require a respondent to disclose in its answer whether the respondent is asserting any "reliance" defense, *i.e.*, reliance on the advice of counsel, accountants, auditors, or other professionals in connection with any claim, violation alleged, or remedy sought. The amended rule states that a respondent's failure to assert a reliance defense in its answer may be deemed a waiver.

Although the SEC's amendments attempt to address certain complaints (*e.g.*, depositions and prehearing time periods) and appear to provide additional protections for respondents, the defense bar should remain wary of the SEC's home-field advantage. Indeed, Wednesday's rule changes do not include any amendments regarding forum selection, meaning that the SEC retains the power to choose whether to bring a case in federal court, where defendants have the right to a jury trial, or through its own administrative process. According to one study, during the SEC's fiscal year 2014, the Commission won 100 percent of its in-house administrative hearings, compared to a win-rate of only 61 percent in federal-court trials. The 2010 Dodd-Frank Act increased the penalties the SEC can seek in administrative cases, further encouraging the Commission to bring its actions in-house.

Overall, the result of these amendments is a mixed bag as it gives some ammunition to both sides. While some of the rule changes attempt to address the perception that the administrative process is biased in favor of the SEC, respondents in SEC proceedings will continue to face significant challenges in "away games" played at the Commission, *e.g.*, forum selection, burden of proof, discovery protections, etc. In response to the SEC's announcement of the final rules, Rep. Scott Garrett (R – N.J.),

Chairman of the Financial Services Subcommittee on Capital Markets and Government-Sponsored Enterprises, described the amendments as "a Band-Aid on a wound that requires stitches."

The amended rules will become effective 60 days after publication in the Federal Register and will apply to all proceedings initiated on or after that date. Click to access a [PDF of the adopting release with the text of the amendments](#).

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