

CLIENT ALERT

The SEC Issues Guidance on Forum Selection in Response to Home Court Advantage Critics

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The SEC has increasingly pursued administrative enforcement actions ever since the Dodd-Frank Act of 2010 expanded the jurisdiction of the SEC's administrative forum. This trend has drawn criticism, including a well-publicized rebuke from District Court Judge Jed Rakoff, and scholars who have noted the SEC's extraordinary success rate in the administrative forum and dubbed it the SEC's "home court" because the prosecutors are SEC staff, SEC judges preside over the cases, and the Commission itself decides all appeals in the first instance. In response, on Friday, May 8, 2015, the SEC's Division of Enforcement released staff guidance titled, "Division of Enforcement Approach to Forum Selection in Contested Actions" (the "Release"), which includes some factors that the staff may consider when choosing an administrative forum over a federal district court.

The Release stated that the overriding consideration is to select "the forum that will best utilize the Commission's limited resources to carry out its mission" and cautioned that its list of factors was non-exhaustive and "[n]ot all factors will apply in every case and, in a particular case, some factors may deserve more weight than others, or more weight than they might in another case." In other words, the SEC retains discretion to consider what it wants to achieve and where it wants to achieve it.

After noting that certain claims can only be resolved in one of the forums, such as "failure to supervise" charges and certain actions against registered persons and entities, which must be pursued administratively, versus emergency relief such as asset freezes, which can only be pursued in a federal district court, the Release stated the key factors for forum selection:

- **Cost Effectiveness:** The Release noted that costs and availability of pre-trial discovery in each forum differs. In administrative proceedings, the SEC has *Brady* and *Jencks* production obligations, but on the other hand, depositions are generally unavailable.
- **Resource Allocation:** The SEC's ability to should obtain relief against multiple defendants in a single proceeding impacts resource-effectiveness, as does the likelihood of summary dispositions, which are more frequently and broadly granted by district courts.
- **Time to Verdict:** The Release noted that administrative hearings are resolved faster than claims brought in federal district court. According to the Staff, this impacts the "freshness" of a testifying witness's recollection and allows for "a more timely public airing" of the conduct at issue. This signals that, all other things being equal, older conduct is more likely to be litigated in an administrative hearing.
- **Fairness, Consistency and Securities Law Expertise:** The Release noted that the SEC's Administrative Law Judges (and the Commission itself) have expertise concerning securities industry practices, thus implying that they are better suited to preside over complex securities law claims than federal district court judges and better equipped to facilitate the consistent development of federal securities jurisprudence. Finally, the Release implied that fairness to similarly situated and charged parties may weigh in favor of a similar forum.

The full text of "Division of Enforcement Approach to Forum Selection in Contested Actions" [is available here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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