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The SEC amends its administrative hearing rules: a Band-Aid not a cure

By David R. Chase, Esq.



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The Securities and Exchange Commission July 13 approved a series of amendments to its rules governing administrative proceedings that, in effect, will provide greater protections to those being sued by the agency in its in-house administrative forum. Among other changes, parties will now have more time to prepare their case prior to the final hearing (trial), and in certain situations will be allowed to take depositions. The changes are certainly a step in the right direction.

However, the critical question remains as to whether the SEC's new reforms go far enough in ensuring that a party will receive a fundamentally fair and impartial hearing when sued in an SEC administrative proceeding. The answer is no.

From the perspective of a former SEC enforcement prosecutor and now SEC defense attorney, I have no doubt that while the rule changes will help to somewhat level the playing field, they will not be sufficient to cure the core problem – namely, that the administrative law "judge" who rules on the case is an employee of, and paid by, the SEC, the very agency that investigated the case and initiated its prosecution.

This inherently conflicted judicial structure has been a source of tremendous criticism of the SEC, has generated gobs of bad press highlighting the SEC's too good-to-be true win-loss record in cases tried on its home-turf, and has spawned several challenges to its constitutionality in court (with little success to date). The SEC's reforms are clearly a recognition of, and a direct response to, this very legitimate concern.

The truth is that while the SEC can provide a party additional time to prepare his case, and the right to take depositions and other similar procedural benefits, it is all for naught if the trier of fact is not impartial or, at the very least, free from the appearance of partiality. That is precisely why the SEC's rule changes are truly a mere band-aid affixed to a very sick patient, and unfortunately not a cure.

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