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SEC ADMINISTRATIVE ENFORCEMENT LITIGATION IN FY 2008

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The Securities and Exchange Commission has authority to bring civil enforcement cases by filing an action in federal district court or by commencing an administrative proceeding (“AP”). Because it relies upon a fixed panel of four long-serving administrative law judges (“ALJs”) operating under a single set of scheduling rules, the SEC’s administrative enforcement docket is generally more amenable than its district court docket to numerical analysis of both outcomes and timeliness. In fiscal year 2008 the SEC’s ALJs decided 23 cases. Two of those proceedings were dismissed altogether by the ALJs, slightly below the average rate for such dismissals in fiscal years 1996 through 2008. From the standpoint of timeliness – a major focus of the revised AP scheduling rules that the SEC promulgated in 2003 -- the average time from institution of an AP through the initial decision (ID) by the ALJ rose from 184 days in FY 2007 to 221 days in FY 2008.

Timeliness of APs at the ALJ Level

The Commission amended its Rules of Practice, effective July 17, 2003, in an effort to deal with “unnecessary delay” in APs. The 2003 rules amendments impose a system under which the order instituting proceedings (OIP) in every contested proceeding will state whether the ALJ must issue his or her initial decision within 120, 210, or 300 days from the date of service of the order, and also to adhere to sublimits on the length of the prehearing, transcript

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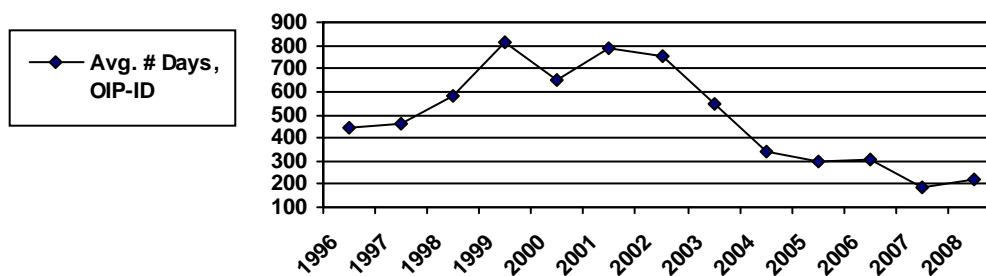
preparation, and decision-writing stages of the proceeding. Modifications to these time limits may only be granted by the Commission with the consent of the Chief ALJ. The Commission also amended Rule 161(b) to state that in deciding whether to extend time limits or grant other extensions, “the Commission or the hearing officer should adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case.” A more relaxed standard applies if one or more respondents offer to settle and wishes for the proceeding to be stayed while the Commission considers his or her settlement offer (see Rule 162(c)).²

Between the effective date of the amended rules and the end of FY 2008, 99 APs authorized with time limits for completion under the new rules progressed to an initial decision by the ALJ – one in FY 2003, thirteen in FY 2004, 29 in FY 2005, nineteen in FY 2006, fourteen in FY 2007, and 23 in FY 2008. 33 were 300-day proceedings, 43 were 210-day proceedings, and 23 were 120-day proceedings. 21 of the 23 120-day cases were Exchange Act Section 12(j) proceedings aimed at suspending or revoking the registration of a stock offering where the issuer had failed to file annual or periodic reports – a type of administrative action in which little serious resistance by the respondent normally would be expected (although one such case also named an individual officer of the issuer as a “cause” of the non-filing violation); the two exceptions were Rule 102(e) bar proceedings initiated after the respondent sought relief from a suspension from practicing before the Commission. All but one of the 43 IDs in 210-day cases were issued in “follow-on” APs, in which the respondent already has been criminally convicted

² For a more detailed discussion of the 2003 scheduling rules and some of their ramifications, see Christian J. Mixer, “The SEC’s New Administrative Proceedings Rules,” 17 INSIGHTS 2 (Sept. 2003).

or civilly enjoined for violating the law, and the only issue is whether a suspension or bar from a regulated activity is also in the public interest; the outlier was a stop order proceeding, initiated with a suspension, aimed at a registration statement. The “default” category for all other APs appears to be the 300-day schedule.³

The FY 2008 decisions suggest that the SEC’s new rules continue to have the desired effect on the average time taken to process the cases at the ALJ level. As shown by the chart below, that average remains very low by historical standards, and now hovers around the 210-day benchmark that accounts for the median, and largest, cohort of proceedings:



One factor that is helping to push down the length of proceedings is the ALJs’ increasing use of summary disposition procedures in lieu of a hearing. In FY 2008, fifteen of the 23 cases that resulted in initial decisions were decided without a hearing. This trend, in turn, has been fueled by a shift in the types of administrative cases brought, toward “follow-on” proceedings and Section 12(j) proceedings aimed at revoking the registrations of delinquent corporate filers, and away from proceedings in which liability is seriously contested and for which summary

³ To address delays at the SEC “appellate” level, the Commission also shortened from eleven to seven months the unenforceable time limit that it gives itself under Rule 900 to decide petitions for review. Amended Rule 900(a)(1)(iii) requires the Commissioners to make findings if these self-imposed limits are to be exceeded. If decision of a petition for review is to take more than seven, but less than eleven, months, the Commission apparently must find that “unusual complicating circumstances” exist. If the case is to remain pending for more than eleven months, the Commission must determine that “extraordinary facts and circumstances of the matter so require.”

adjudication is less suited. As an illustration, fourteen of the 23 FY 2008 initial decisions were purely follow-on proceedings or 12(j) proceedings, compared to four of the twenty initial decisions rendered in FY 2002. Small variations in the average length of proceedings from year to year, such as the slight uptick between FY 2007 (184 days) and FY 2008 (221 days), will occur as the mix of cases changes, and as individual proceedings are impacted by stays and interlocutory appeals.

The Merits: Statistical Recap of Initial Decisions by the ALJs

The 23 initial decisions in administrative enforcement cases that the SEC released in FY 2008 were slightly above the average of 20 decisions per year for FY 1996-2008, which is notable because the current roster of four ALJs is less than the five ALJs who served during much of that time. Twelve of the FY 2008 decisions were issued in original APs (in which the ALJ was called upon to decide liability as well as sanction), and eleven decided follow-on proceedings (which the Division of Enforcement never loses altogether). The ALJs dismissed the Division of Enforcement's case in two FY 2008 decisions – the same absolute number as in FY 2007, but below the average for 1996-2008.

The Division's historical failure rate in hearings in original proceedings (defined as the number of ALJ dismissals divided by the number of original proceedings decided) now stands at 23% for fiscal 1996-2008.⁴ The judge-by-judge dismissal data over those years varies considerably, as follows:

⁴ This figure focuses purely on dismissals by the ALJs, and does not take into account the comparatively rare circumstance in which the Commission dismisses a proceeding in which the ALJ has found liability and ordered a sanction, such as *In the Matter of James T. Patten*, Exchange Act Rel. No. 54710 (Nov. 3, 2006).

ALJ	Dismissal Rate in Original APs
Chief Judge Brenda P. Murray	6 percent (2/36)
Judge James T. Kelly	10 percent (3/29)
Judge Robert G. Mahony	29 percent (9/31)
Judge Carol Fox Foelak	33 percent (11/33)

The “survival rate” on review by the Commission for all ALJ dismissals issued in the past thirteen fiscal years is 61%, computed as follows:

7 (Dismissals Affirmed by SEC) plus 16 (Dismissals Where No Review Was Sought)
40 (Total Dismissals) minus 2 (Dismissals Where Petition for Review Is Still Pending) = 61%