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THE SEC'S ADMINISTRATIVE LAW ENFORCEMENT RECORD

The SEC has been criticized for bringing more enforcement cases before its administrative law judges because it allegedly "wins them all" in that forum compared with a more mixed record in federal district court. The Commission has responded that administrative proceedings are a particularly efficient way to conduct its enforcement business. To evaluate these claims, the author assembles and examines the growth over time of administrative litigated cases, the Commission's win-loss record in such cases, and the time needed to move a case all the way through the administrative process.

By Christian J. Mixter *

The Securities and Exchange Commission ("SEC") can bring civil enforcement cases by filing actions in federal district court or by commencing administrative proceedings ("APs"). In 2010, the Dodd-Frank Act gave the SEC authority to use APs in more types of cases, specifically those involving claims for civil money penalties against non-regulated entities such as public companies and insider traders.[1] The past year has seen vastly increased attention to the SEC's administrative adjudication system, including attacks on the constitutionality of the appointment of the SEC's administrative law judges ("ALJs") and on the fairness of the administrative process to the respondents who must defend themselves there. The SEC has responded to those attacks,[2] and recently has proposed to soften some of the procedural harshness of the administrative system by permitting limited discovery depositions and by relaxing, somewhat, the time limits that it imposes on respondents' time to prepare for administrative hearings.[3] Meanwhile, legislation has been introduced to permit anyone sued in one of the APs newly authorized by Dodd-Frank to force the SEC to proceed in district court instead, and to raise the standard of proof required in *all* APs, whether or not newly

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010), § 929p, codified at 15 U.S.C. § 78u-3.

[2] *See, e.g., In the Matter of Timbervest, LLC, et al.*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520 (Sept. 17, 2015) and *In the Matter of Raymond J. Lucia Companies*, Securities Exchange Act Rel. No. 75837, 2015 WL 5172953 (Sept. 3, 2015), appeal pending, No. 15-01345 (D.C. Cir. filed Oct. 5, 2015).

[3] *Amendments to the Commission's Rules of Practice,* Exchange Act Rel. No. 34-75976 (Sept. 24, 2015).

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authorized by Dodd-Frank, from "preponderance of the evidence" to "clear and convincing evidence."[4]

The greater focus on APs would seem to call for a quantitative (as opposed to a purely anecdotal) assessment of the SEC's administrative process. Unfortunately, the most readily available data do not lend themselves to such an assessment. Commentators often use the numbers reported in the SEC's annual "*Select SEC and Market Data*" publication to show that APs are coming to dominate the SEC's enforcement caseload, without noting that those numbers include both litigated and settled cases.[5] If, as the SEC's Director of Enforcement has said, "[t]he vast majority of the uptick in the numbers of actions we have brought as administrative proceedings are settled actions,"[6] then those aggregate data don't tell us much about the likely experience of respondents in litigated cases.

Recent academic work also has criticized the SEC's published enforcement statistics for proliferating cases that represent a single enforcement result (for example, the "follow-on" APs that seek to suspend or bar regulated persons who have previously been sanctioned), and for bloating the system with cases brought under Section 12(j) of the Securities Exchange Act to deregister public companies that have stopped making their required annual and quarterly filings.[7] The follow-on cases and the 12(j) cases, which *must* be brought as APs, are included in the figures for "Matters Before the Administrative Law Judges" that appear in the Commission's semiannual Reports on Administrative Proceedings,[8] but are quite beside the point to whether the SEC is *choosing* to use APs for types of cases that previously were brought in district court. Thus, if one wishes to determine whether APs have played a larger role in the Enforcement program over time, the SEC's published statistics are not a good place to look.

The best information about litigated APs is found in the initial decisions that the ALJs render every year, each of which gets a sequential number and then — going back as far as the SEC's Fiscal Year 1996 — is published on the SEC's Website. By definition, the initial decisions all were generated in cases that were not settled when brought; as described below, the initial decisions also can be sorted to eliminate the "follow-on" APs and the delinquent filing cases. While it is true that the initial decisions are a lagging indicator — reflecting, as they do, charging decisions that were made over the preceding year as opposed to last week or last month — the year-to-year record of initial decisions lacks the potential volatility of comparatively small and short-term datasets like the number of contested APs brought in a given quarter.[9] A review of the initial decisions over time also permits us to draw some conclusions about the results of the cases for respondents, and about

[4] H.R. 3798, 114th Cong., 1st Sess. (introduced Oct. 22, 2015).

[5] For example, the "*Select SEC and Market Data Fiscal 2014*" publication reported 610 APs and 145 federal district court actions *(i.e.*, SEC's APs made up 81% of the total number of 2014 enforcement actions), whereas the same publication for Fiscal 2005 showed 294 APs and 335 federal district court actions (*i.e.*, APs made up 47% of the total number of 2005 enforcement actions).

[6] Andrew Ceresney, Keynote Speech at New York City Bar 4th Annual White Collar Institute at 6 (May 12, 2015) ("Ceresney Speech"), *available at* http://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html.

[7] Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics,*101 Cornell L. Rev. (forthcoming 2016). The SEC has acknowledged this criticism by changing its annual announcements of enforcement results to report

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separately on "Independent Enforcement Actions" (not, however, broken out between APs and district court cases), "Follow-on APs," and "Delinquent Filings" cases. SEC Press Rel. No. 2015-245 (Oct. 22, 2015), *available at* http://www.sec.gov;news/pressrelease/2015-245.html.

[8] *See, e.g., Report on Administrative Proceedings For the Period April 1, 2015 through September 30, 2015,* Exchange Act Rel. No. 76299 (Oct. 29, 2015).

[9] *Compare* Jean Eaglesham, "SEC is Steering More Trials to Judges It Appoints," Wall Street Journal (Oct. 21, 2014) *with* Jean Eaglesham, "SEC Cuts Use of Own Judges," *Wall Street Journal* (Oct. 12, 2015) (reporting a 75% decline in new contested APs in the fourth quarter of fiscal 2015 compared to the like period in fiscal 2014).

the time the SEC's AP process takes to reach those results.

ARE LITIGATED ENFORCEMENT APS ON THE RISE?

At first glance, the list of initial decisions suggests that the SEC's docket of litigated APs, after staying fairly stable from 2006 through 2013, exploded in the last two fiscal years:

Fiscal Year	No.
2015	207
2014	179
2013	35
2012	35
2011	30
2010	15
2009	32
2008	23
2007	14
2006	22

Most of the apparent activity in fiscal 2014 and 2015, however, stems from a change in the SEC's recordkeeping practices. In the first quarter of fiscal 2014, the agency began using initial decisions to record defaults in administrative proceedings, which previously were captured elsewhere under "ALJ Orders." Eliminating defaults — which, by definition, have no bearing on the experience of *litigating* an AP — from the initial decisions yields the following results:

Fiscal Year	No.	No. without Defaults
2015	207	59
2014	179	43
2013	35	35
2012	35	35
2011	30	30
2010	15	15
2009	32	32
2008	23	23
2007	14	14
2006	22	22

The "No. without Defaults" numbers above show an increase, but a much more modest increase, in AP activity in recent years. They fail, however, to distinguish among follow-on proceedings, those 12(j) proceedings that do not default, and the types of proceedings that the SEC could have brought in district court.

The next cut makes use of the SEC's 2003 decision to amend its Rules of Practice in an effort to deal with what it then termed "unnecessary delay" in APs. The 2003 rules amendments imposed a system under which the order instituting proceedings (OIP) in every AP that is not settled when brought 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.[10] The time limit given to each case provides a marker of the type of case that it is. As has long been apparent to practitioners, and as the SEC recently confirmed, 120-day proceedings are normally 12(j) cases, and 210-day proceedings are normally follow-on cases seeking suspensions or bars.[11] Because, as noted above, 12(j) cases and follow-on cases cannot be brought in district court, the cases that the SEC has *chosen* to bring administratively are to be found among the 300-day proceedings.

The numbers of 300-day cases that proceeded to an initial decision in FY2006-FY-2015 are shown in the last column below:

Fiscal Year	No. without Defaults	No. Deciding 300-day Proceedings
2015	59	27
2014	43	16
2013	35	11
2012	35	7
2011	30	9
2010	15	3
2009	32	9
2008	23	9
2007	14	6
2006	22	7

The number of 300-day APs decided in FY 2015 is triple (or more) the number decided in any year between FY 2006 and FY 2012. This increase amply confirms the anecdotal evidence that litigated Enforcement APs have been on the rise. While the absolute peak number of decisions involved — 27 — is fairly small, that

[10] These time limits (which include sub-limits on the length of the prehearing, transcript preparation, and decision-writing stages of the proceeding) have come under heavy criticism by the defense bar for hampering respondents' ability to prepare for the hearing, and the SEC has proposed relaxing them somewhat in future proceedings. Amendments to the Commission's Rules of Practice, Exchange Act Rel. No. 34-75976, at 3-6 (Sept. 24, 2015).

[11] *Id.* at 4.

number could have a considerable knock-on effect on the Division's settlement expectations if, compared to district court actions, the Division is experiencing a very high rate of success in APs, and particularly if the Division is able to run many APs through the system in a short time. We look at those two variables below.

OUTCOMES IN LITIGATED ENFORCEMENT APS

Those who criticize the SEC for bringing more enforcement cases administratively often accuse the agency of forum shopping because the SEC allegedly "wins them all" in enforcement cases that are brought as APs, but has a more mixed record in federal district court.[12] The SEC Staff, for its part, is fond of pointing to the speed with which APs proceed to a hearing.[13] The relatively small absolute number of initial decisions makes it relatively easy to evaluate both propositions.

Measuring whether the SEC wins all (or at least a very high percentage of) APs requires us to spend some time thinking about the appropriate numerator and denominator of the fraction that generates the percentage. To begin with, including types of APs that the Division never loses in the population of cases being considered will lead to a distorted result in any test period that one might select (except a period in which the Division loses no APs, because 100% is always 100%). In fact, as a practical matter, the 12(j) (120-day) and follow-on (210-day) proceedings[14] are never lost by the Division. Thus, the discussion that follows will continue to focus only on the 300-day cases.

Another question is what to consider a "win" or "loss" for the Division of Enforcement. The analysis below classifies an initial decision as a "loss" for the Division if, and only if, the ALJ dismissed the entire case.[15] Admittedly, this approach makes the Division of Enforcement look more successful than a more nuanced calculation that tries to gauge whether the Division of Enforcement "got everything it wanted" — as measured by, for example, comparing the ALJ's routine recitation of the relief that the Division sought in an initial decision against the relief that the ALJ decided to grant. Some academic work of the latter type has been undertaken.[16] However, the Division "ask" recited in the initial decision may well be an inflated litigating position. In contrast to that uncertainty, we know for sure that every respondent wishes to have the proceeding against him or her dismissed altogether, and we know for sure that such a dismissal is a loss for the Division of Enforcement.[17]

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[12] *See, e.g.*, Jean Eaglesham, "SEC is Steering More Trials to Judges It Appoints," Wall Street Journal (Oct. 21, 2014) (contrasting a reported 100% SEC win rate in administrative hearings between October 2013 and September 2014 with its 61% (11/18) win rate in federal district court during that same period) (as noted below, the Division actually lost one administrative hearing in FY 2014). The task of tracking the SEC's record in federal district court is complicated by the fact that the SEC does not consistently issue litigation releases when it loses cases in that forum. *Compare* Lit. Rel. Nos. 22924 (Feb. 11, 2014) (announcing loss to Peter Jensen and Thomas Tekulve, Jr.), 22918 (Feb. 4, 2014) (announcing loss to Steven Kovzan), and 22855 (Oct. 23, 2013) (announcing loss to Mark Cuban) *with SEC v. Graham*, 21 F. Supp.3d 1300 (S.D. Fla. 2014) (dismissing SEC claims on statute of limitations grounds; no accompanying SEC litigation release announcing dismissal) and *SEC v. Schvacho*, 991 F. Supp. 2d 1284 (N.D. Ga. 2014) (dismissing SEC case following bench trial; no accompanying SEC litigation release announcing dismissal).

[13] *See, e.g.*, Ceresney Speech, *supra* note 6 at 8.

[14] The overwhelming majority of 12(j) cases predictably result in defaults. Although delinquent filers sometimes will appear and argue for additional time to become current in their filings,

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those pleas have fallen on deaf ears, at least since *In the Matter of Diatect Int'l Corp.,* I.D. Rel. No. 344 (Jan. 30, 2008) (dismissing proceeding because filer had become current and public interest did not favor deregistration), Finality Order, Exchange Act Rel. No. 57438A (March 6, 2008). Since then, only two Initial Decisions have dismissed 12(j) cases. One was *In the Matter of Arrin Corp., et al.,* I.D. Rel. No. 861 (Aug. 18, 2015), in which the delinquent filer program tried to deregister Liberty Petroleum Corp., to whom the SEC had granted an exemption from filing. Liberty Petroleum protested and the case against it was dismissed. The second was *In the Matter of Vikonics, Inc., et al.,* I.D. Rel. No. 405 (Oct. 22, 2010), in which one of the respondents, VoiceIQ, Inc., had deregistered voluntarily but the Division of Enforcement nevertheless tried to press on with the case, forcing the ALJ to dismiss the proceeding because the Division had already received the only relief that she was empowered to grant. Dismissals of 12(j) cases based on voluntary deregistration now are handled by Commission orders rather than ALJ Initial Decisions. *See In the Matter of Ruby Creek Resources, Inc.*, Exchange Act Rel. No. 76060 (Sept. 30, 2015).

[15] This also is the method of counting used by SEC Enforcement Director Ceresney in a recent speech. Ceresney Speech, *supra* note 6 at n.2.

[16] *See, e.g.*, David T. Zaring, *Enforcement Discretion at the SEC* (Aug. 26, 2015), Texas L. Rev. (forthcoming).

[17] A closer question is whether a Division "loss" should require that the case be dismissed against *every* respondent who is the subject of a given initial decision, or whether the dismissal of

It also follows from the "total dismissal" yardstick that certain 300-day proceedings in which a total dismissal was impossible should be excluded from both the numerator and the denominator. These would include proceedings in which the respondent had settled with the SEC on liability but was contesting only financial issues such as the amount of penalties or disgorgement, as well as initial decisions that were issued on remand from the full SEC or on reconsideration, where only one initial decision should be counted.[18]

Using the foregoing approach, the Division of Enforcement has enjoyed an 87% average success rate before the ALJs in 300-day proceedings decided during the past 10 fiscal years; as shown in Appendix I, the Division's record (86% and 93%, respectively) during the last two years of increased AP activity has not strayed far from that average.[19]

Any discussion of ALJ dismissals of 300-day enforcement proceedings would, of course, be incomplete if it did not take into account what happened to the dismissed cases on review by the Commissioners, who retain the right to *de novo* review of every ALJ initial decision and thus can put quite a heavy hand on the scales of administrative justice. As shown in Appendix II, during FY 2006-FY 2015, the Commissioners reversed four of the 12 ALJ initial decisions that had dismissed 300-day proceedings. In that same period there were three ALJ dismissals of 300-day proceedings that were affirmed by the Commission, three in which no review was sought, and two in which a petition for review is pending and the result therefore unknown. This equates to a 60% "survival rate" on review by the Commission for all ALJ dismissals issued in the past 10 fiscal years. Giving weight to the Commissioners' actions with respect to ALJ dismissals boosts the Division's success rate in 300-day APs over the past 10 fiscal years from 87% (82/94) to about 91% (84/92).[20]

It is interesting to note that in each of the four reversals described in Appendix II — *Hatfield*, *Flannery*, *Sodano*, and *Amanat* — the Commission differed with the ALJ mainly about whether the relevant securities law covered the conduct, or the respondent, at issue. *See also In the Matter of Joseph C. Ruggieri*, Securities Act Rel. No. 9985 at 2 (Dec. 10, 2015) (denying summary affirmance of a recent ALJ dismissal because "[t]his appeal raises issues *as to which we have an interest in articulating our views* and important matters of public interest, including insider trading law and the personal benefit requirement" [emphasis added]). From the defense point of view, one of the more worrisome aspects of a trend toward more enforcement APs is the prospect of having the scope of liability under the securities laws construed by an adjudicator — the SEC — whose interest lies in the expansion of that liability.

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one respondent will suffice. *See, e.g., In the Matter of Thomas R. Delaney II and Charles W. Yancey*, I.D. Rel. No. 755 (March 18, 2015) (issuing a cease and desist order and a civil money penalty against Delaney but dismissing the proceeding against Yancey), *finality order*, Exchange Act Rel. No. 74843 (April 29, 2015). Recognizing that any answer to this question will be somewhat arbitrary, this article takes the former approach. That said, one of the virtues of using the 300-day initial decisions as the population is that their number makes it fairly easy for anyone who wishes to go back over that population and add up the fractional Division "wins" and "losses." That sort of respondent-by-respondent approach is taken, for example, in the press articles cited in note 9 above, as well as Jean Eaglesham, "SEC Wins with In-House Judges," Wall Street Journal (May 6, 2015), which reported a 90% SEC win rate against respondents between October 2010 and March 2015. That 90% figure, compared with the 87% reported below for FY 2006-FY 2015, suggests that the finer points of counting methodology don't affect the broader conclusion that the SEC does very well indeed when it brings enforcement cases administratively.

[18] Thus, Appendix I adjusts downward the yearly totals for 300-day proceedings to exclude I.D. Rel. Nos. 888, 869, 822, 815, and 753 (all from FY 2015), 599 and 540 (FY 2014), 496 and 494 (FY 2013), and 410 (FY 2011).

[19] Although an 87% success rate for the Division is not comforting to prospective respondents, it is not as though there was an earlier time when respondents had an even chance in APs. In FY 1996-FY 2000, with follow-on proceedings excluded (and 12(j) proceedings nonexistent), the Division prevailed in 46 of 62 APs for a 74% success rate before the ALJs. Christian J. Mixter, A Client's-Eye View of Outcomes in the SEC's Administrative Adjudication System, 15 Insights 14, 15 (Jan. 2001).

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[20] The above analysis focuses purely on dismissals by the ALJs and does not take into account the comparatively rare circumstance in which the Commission dismisses a 300-day 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).

HOW EFFICIENT ARE APS?

As noted above, the SEC is fond of claiming that administrative proceedings are a particularly efficient way to conduct its Enforcement business. The discussion that follows evaluates that claim.

Because we are still concerned with the cases that the SEC *chose* to bring administratively, as opposed to the 120 or 210-day cases for which the SEC was obliged to use the administrative forum, we return to our FY 2006-FY 2015 population of 300-day initial decisions, again adjusted to remove the decisions on remand and the decisions that only adjudicated remedies following partial settlements, both of which would skew the results. The below table shows the average number of days that elapsed between the issuance of the order instituting proceedings and the initial decision in those cases by year:[21]

Fiscal Year	Avg. Days
2015	339
2014	386
2013	335
2012	324
2011	433
2010	330
2009	434
2008	368
2007	255
2006	377

In three of the last four years (including FY 2015, with its record number of initial decisions), the average time needed to take a 300-day AP through to a decision has been less than a year.[22]

Less than one year from filing to decision no doubt sounds good from the prosecutorial point of view, but it is too good to be true, for two reasons. The first is the agency's recent recognition that the 2003 time limits in its AP rules can be too harsh and should be extended in some cases. If adopted, these revisions likely would add several months to the time needed to reach an initial decision in the average AP, including (and perhaps especially) 300-day APs.[23]

The second, and much more significant, problem for the Commission is its own review process, which must be taken into account in any comparison with district court proceedings.[24] Commission review can add years to the time needed to move an AP all the way through the administrative process. Commission-level delays were last addressed in the 2003 rules amendments, when the Commission shortened from 11 to seven months the unenforceable time limit that it gives itself under Rule 900 to decide petitions for review after those petitions have been filed. Rule 900(a)(1)(iii) now 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 11, months, the Commission apparently must find that "unusual complicating circumstances" exist. If the case is to remain pending for more than 11 months, the Commission must determine that "extraordinary facts and circumstances of the matter so require."

The SEC's own statistics show that these self-imposed "guidelines" have been ineffective. The SEC's semiannual Report on Administrative Proceedings publishes the median age at decision of every Commission decision reviewing an ALJ matter that was rendered during the previous six months. The following chart shows those numbers for each six-month period

[21] The measure used in the above table (days elapsed between the *issuance* of the order instituting proceedings and the initial decision) is different from that used in the SEC's time limits (days elapsed between the *service* of the order instituting proceedings and the initial decision). The latter date is not always apparent from the initial decisions, whereas the date of the OIP is almost always recited in the initial decision or can be readily obtained from the SEC's Website. Because the above measure is different from that used in the SEC's rules, it cannot be used to grade the SEC's adherence to its time limits for initial decisions.

[22] FY 2014, the exception to this statement, was adversely impacted by the fact that the SEC's staff of ALJs — typically, five in number — dwindled to three in 2013 and rose back only to four in 2014. The stress imposed by a reduced number of

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ALJs and an increased number of APs in FY 2014 is evidenced by the more than a dozen orders that the Commission issued in that year extending the ALJs' time to issue initial decisions. With the number of ALJs now back up to five, it seems likely that even with an increased caseload, the SEC's 2003 scheduling rules would continue, on average, to produce initial decisions in 300-day cases in less than a year.

[23] Amendments to the Commission's Rules of Practice, Exchange Act Rel. No. 34-75976, at 3-6 (Sept. 24, 2015).

[24] Commission decisions, and not ALJ initial decisions, are procedurally comparable to district court decisions in that the next step after both a Commission decision and a district court decision is review by a federal court of appeals.

from the most recently-reported period ending on September 30, 2015, back through FY 2006:

Period	Median Days
4/1/15-9/30/15	270
10/1/14-3/31/15	399
4/1/14-9/30/14	524
10/1/13-3/31/14	600
4/1/13-9/30/13	539
10/1/12-3/31/13	328.5
4/1/12-9/30/12	321
10/1/11-3/31/12	484
4/1/11-9/30/11	201
10/1/10-3/31/11	245
4/1/10-9/30/10	266
10/1/09-3/31/10	407
4/1/09-9/30/09	211
10/1/08-3/31/09	418
4/1/08-9/30/08	374
10/1/07-3/31/08	419
4/1/07-9/30/07	210
10/1/06-3/31/07	281
4/1/06-9/30/06	334
10/1/05-3/31/06	227

In 17 of the 20 semesters shown above, the SEC failed to meet its seven-month guideline; in 10 of the 20 semesters, the SEC failed even to meet the 11-month guideline.

Because the median numbers that the SEC reports do not portray total elapsed times for any individual cases and also mask extreme cases, it is instructive to look at the timeliness of the Commission's seven decisions reviewing ALJ dismissals that are described in Appendix II: *Hatfield* (299 days OIP-ID, plus 451 days to Commission decision; 750 total days); *Flannery* (393 days OIP-ID, plus 1144 days to Commission decision; 1537 total days); *Urban* (324 days OIP-ID, plus 505 days to Commission decision; 829 total days); *Hall* (698 days OIP-ID, plus 699 days for Commission decision; 1397 total days); *Sodano* (151 days OIP-ID, plus 490 days to Commission decision; 641 total days); *Monson* (263 days OIP-ID, plus 381 days for Commission decision; 644 total days); and *Amanat* (316 days OIP-ID, plus 316 days for Commission decision; 632 total days). On average, the seven cases took 919 days (2.5 years) to proceed from Order Instituting Proceedings to decision by the Commission, with Commission review accounting on average for 569 of those days (1.6 years). The median number of days for the seven cases through SEC decision was 750. *Flannery*, the slowest-moving of them, took 4.2 years to work its way through the AP process;[25] *Amanat*, *Monson*, and *Sodano*, at roughly 1.75 years apiece, were the swiftest, but also are the oldest, suggesting that the trend is toward longer rather than shorter elapsed times for APs when Commission review is considered.

Moreover, the Commission's recent proposal to amend its AP rules augurs a review process that will move yet more slowly in the future. That proposal would tweak the length of the Rule 900 "guideline" times slightly (from seven months/11 months to eight months/10 months) but, far more significantly, would delay the start of those guideline times to a later point (completion of briefing on review, rather than the filing of the petition for review), and thus would provide the Commission with several additional months within which to conduct its part of the administrative adjudication process.[26]

The author is not aware of any publicly available statistics, equivalent to those discussed above for APs, on the speed with which enforcement cases litigated in district court proceed from the filing of the complaint to final judgment after trial, although it is difficult to imagine that the average district court case would be decided much more quickly than the roughly 2.5- year average for an AP to progress through Commission

[25] Respondents' search for vindication in the First Circuit consumed almost another year. *Flannery v. SEC*, 2015 WL 8121647, Nos. 15-1080, 15-1117 (1st Cir. Dec. 8, 2015).

[26] *See* Amendments to the Commission's Rules of Practice, Exchange Act Rel. No. 34-75976, at 24-25.

review. However, it is clear from the above discussion that the time spent in litigating APs is not negligible, and that the SEC's pending rule revisions, if adopted, would slow and not speed the process.

CONCLUSION

Viewed over time through the lens of ALJ initial decisions, the SEC has increased its use of APs in cases that could have been brought in federal court. At 87%, the agency's success rate, measured by dismissals avoided, has been as high as commentators have suggested, and rises even higher, to 91%, when the Commission's own review process is taken into account. At roughly 2.5 years, however, the time needed to litigate an AP through Commission review is considerable and may not afford the substantially swifter outcomes that the SEC Staff has touted. ■

APPENDIX I

Division of Enforcement AP Wins and Losses

Fiscal Year	No. w/o Defaults	No. Deciding 300-day Proceedings	Adjusted No. Deciding 300-day Proceedings *	No. Dismissed by ALJs	No. of Div. Wins	% of Div. Wins
2015	59	27	22	3	19	86%
2014	43	16	14	1	13	93%
2013	35	11	9	1	8	89%
2012	35	7	7	1	6	86%
2011	30	9	8	0	8	100%
2010	15	3	3	1	2	67%
2009	32	9	9	0	9	100%
2008	23	9	9	1	8	89%
2007	14	6	6	2	4	67%
2006	22	7	7	2	5	71%
2006-2015			**94**	**12**	**82**	**87%**

***Adjusted per note 19, *supra*.**

APPENDIX II

Subsequent History of the ALJ Dismissals in FY 2006-FY 2015

- *In the Matter of Gregory T. Bolan, Jr., and Joseph C. Ruggieri,* I.D. Rel. No. 877 (Sept. 14, 2015). ALJ Patil dismissed an insider trading case brought against Ruggieri, a trader at a broker-dealer, whom the Division of Enforcement alleged to have received tips from Bolan, a research analyst at that same broker-dealer who had previously settled with the Commission. The law judge, citing *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), cert. denied, ___ U.S. ___ (Oct. 5, 2015), found that the Division had not shown a "personal benefit" to Bolan from providing the tip, which meant that Ruggieri could not be liable as Bolan's tippee. On December 10, 2015, the Commission denied Ruggieri's motion for summary affirmance, granted the Division's petition for review (as well as Ruggieri's conditional cross-petition), and set a briefing schedule. *In the Matter of Joseph C. Ruggieri,* Securities Act Rel. No. 9985.

- *In the Matter of Judy K. Wolf,* I.D. Rel. No. 3-16195 (Aug. 5, 2015). Concluding that any sanction in the case would be "overkill," ALJ Elliot dismissed a proceeding in which the Division of Enforcement had alleged violations of the books and records provisions of the Exchange Act and the Investment Advisers Act by Wolf, a former compliance officer, who altered a document memorializing her review of certain trading by a registered representative at her firm. On September 23, 2015, the Commission issued a finality order in which it noted that no petition for review the ALJ's decision had been filed, that it had not chosen to review the Initial Decision, and that the proceeding was dismissed. Exchange Act Rel. No. 75969.

- *In the Matter of The Robare Group, Ltd., et al.*, I.D. Rel. No. 806 (June 4, 2015). ALJ Grimes ruled in this case that the Division had not shown that the respondents violated Investment Advisers Act Sections 206(1), 206(2), and 207 by allegedly failing to disclose on Robare Group's Form ADV financial incentives that they had to favor particular mutual funds over other mutual funds in making recommendations to clients. The Division of Enforcement has petitioned for Commission review of the case, and on August 12, 2015 the Commission denied respondents' motion for summary affirmance, granted the Division's petition for review, and set a briefing schedule. Exchange Act Rel. No. 75686.

- *In the Matter of Miguel A. Ferrer and Carlos J. Ortiz,* I.D. Rel. No. 513 (Oct. 29, 2013). Chief Administrative Law Judge Murray dismissed a proceeding alleging that the respondents had misrepresented and omitted material information about certain closed-end mutual funds whose shares were sold to investors by the broker-dealer that had employed them. The Commission issued a finality order in the case on December 17, 2013. Exchange Act Rel. No. 71101.

- *In the Matter of S.W. Hatfield, CPA and Scott W. Hatfield, CPA,* I.D. Rel. No. 504 (Sept. 10, 2013). ALJ Foelak ruled that the respondents, an accounting firm and its principal, had not engaged in primary violations of Section 10(b) of the Exchange Act and Rule 10b-5 when public company audit clients of the firm filed financial statements containing the firm's audit reports during periods when the firm's state CPA license had expired. No secondary liability was alleged in the OIP, and without the foundation of any primary violations the ALJ dismissed the Division's Rule 102(e) claims, which were premised on the alleged securities law violations. In Exchange Act Rel. No. 73763 (Dec. 5, 2014), the Commission found that the law judge's legal conclusions were incorrect because, in its view, an accountant who issues an audit report implicitly represents that he is qualified, under state law, to do so. The Commission permanently barred the respondents from practicing before the

- Commission, and ordered them to cease and desist from further violations of Section 10(b) and Rule 10b-5, to disgorge their audit fees, and to pay a civil money penalty.

- *In the Matter of John P. Flannery and James D. Hopkins*, I.D. Rel. No. 438 (Oct. 28, 2011). Chief ALJ Murray dismissed a proceeding in which the Division of Enforcement alleged that the respondents, former employees of a bank and trust company, had misled investors about the extent of subprime mortgage-backed securities in a collective trust fund, in violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5. Chief Judge Murray concluded, in essence, that neither respondent was responsible for, or had ultimate authority over, the allegedly false and misleading documents at issue, and that the documents in any event were not materially false or misleading. On review, the Commission ruled to the contrary based in large part on the Commission's very expansive reading of liability for "non-speakers" under Section 10(b), Rule 10b-5, and Section 17(a), suspended each respondent for one year from association with any investment adviser or investment company, issued cease and desist orders, and ordered the respondents to pay civil money penalties. *See* Exchange Act Rel. No. 73840 (Dec. 15, 2014). On review, the U.S. Court of Appeals for the First Circuit reversed the Commission's decision, finding the evidence of respondents' alleged violations to have been insufficient. *Flannery v. SEC*, 2015 WL 8121647, Nos. 15-1080, 15-1117 (1st Cir. Dec. 8, 2015). Showing that a defense "win" before the ALJ counts for something even if the SEC later sets that "win" aside, the First Circuit observed that where an agency overrules its own hearing officer who actually observed the witnesses, the court's standard of review is "slightly" less deferential to the agency than it otherwise would be. 2015 WL 8121647 at *7.

- *In the Matter of Theodore W. Urban*, I.D. Rel. No. 402 (Sept. 8, 2010). Chief ALJ Murray's Initial Decision ruled that Urban, the general counsel of a broker-dealer, could be held liable for failing to supervise a line broker who did not report to him because Urban had involved himself in the firm's efforts to corral the broker's activities. However, Judge Murray went on to find that in the circumstances, Urban had discharged his "supervisory" responsibilities in a reasonable way, and dismissed the proceeding. Both the Division of Enforcement and Urban petitioned for review by the Commission, which issued an order dismissing the proceeding because three Commissioners were recused and the remaining two were evenly divided on whether the allegations in the Order Instituting Proceedings had been established. *See* Exchange Act Rel. No. 66259 (Jan. 26, 2012).

- *In the Matter of Kevin Hall, CPA and Rosemary Meyer, CPA*, I.D. Rel. No. 341 (Jan. 15, 2008). ALJ Foelak ruled that Hall and Meyer had not engaged in improper professional conduct in their 1999 audits or their second quarter 2000 interim review of the financial statements of US Foodservice, Inc. and thus had not violated Rule 102(e). The Commission granted the Division of Enforcement's petition for review but then, on the merits, agreed that Rule 102(e) had not been violated and that the proceeding should be dismissed. Exchange Act Rel. No. 61162 (Dec. 14, 2009).

- *In the Matter of Salvatore F. Sodano*, I.D. Rel. No. 333 (Aug. 20, 2007). ALJ Robert Mahony, who is no longer with the SEC, dismissed a proceeding alleging that respondent Sodano, formerly the CEO of the American Stock Exchange, should be censured under Securities Exchange Act Section 19(h)(4) for failing to enforce compliance by the AMEX with the Exchange Act, the rules and regulations thereunder, and the AMEX's own rules. Judge Mahony determined that the Commission lacked power to discipline an Exchange official under Section 19(h)(4) after the official had left office. On review, the Commission ruled that its power to censure under Section 19(a)(4) continued after the respondent left office and remanded the case to the ALJ. Exchange Act Rel. No. 59141 (Dec. 22, 2008). Ultimately the Commission issued a settled order that did not censure Sodano, but found that he had failed, without reasonable justification or excuse, to enforce compliance with the Exchange Act and the applicable rules. Exchange Act Rel. No. 61562 (Feb. 22, 2010).

- *In the Matter of Scott G. Monson*, I.D. Rel. No. 331 (June 15, 2007). ALJ Mahony dismissed a cease and desist proceeding alleging that the general counsel of a broker-dealer had "caused" the broker-

- dealer's late trading of mutual fund shares in violation of Investment Company Act Rule 22c-1. On review, the Commission agreed that the respondent had not acted even negligently with respect to the underlying violations by the broker-dealer, and that the proceeding should be dismissed. Investment Company Act Rel. No. 28323 (June 30, 2008).

- *In the Matter of Paul A. Flynn*, I.D. Rel. No. 316 (Aug. 2, 2006). In another late trading/mutual fund market timing case that came before ALJ Mahony, the Law Judge ruled that the Division's evidence did not support the charge that a bank officer had aided and abetted, and caused violations by Security Trust Company and two hedge fund clients of the anti-fraud and anti-late trading provisions. No petition for review was filed and the Commission issued a finality order in the case. Exchange Act Rel. No. 54390 (Aug. 31, 2006).

- *In the Matter of MarketXT, Inc. and Irfan Mohammed Amanat*, I.D. Rel. No. 304 (Dec. 22, 2005). ALJ McEwen, who like Judge Mahony is no longer with the Commission, ruled that respondent Amanat neither violated Section 10(b) and Rule 10b-5, nor aided and abetted, or caused violations by MarketXT, in connection with a scheme to obtain market data rebates from Nasdaq by executing wash trades and matched orders through an automated trading program that Amanat had designed, based in part on the fact that the wash sales and matched orders were not aimed at manipulating the market prices of the securities, and in part on the ALJ's finding that Amanat lacked scienter. On review, the Commission disagreed with both conclusions, barred Amanat from association with a broker or dealer with a right to reapply in five years, imposed a cease and desist order, and fined Amanat. Exchange Act Rel. No. 54708 (November 3, 2006). On appeal, the Third Circuit upheld the Commission's decision. *Amanat v. SEC*, No. 06-5209, slip op. (3d Cir. March 5, 2008).