The Investment Lawyer

Covering Legal and Regulatory Issues of Asset Management

VOL. 21, NO. 9 • SEPTEMBER 2014

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The Future of SEC Enforcement Actions: Negligence-Based Charges Brought in Administrative Proceedings?

By Mary P. Hansen and William L. Carr

"The mission of the U.S. Securities and Exchange Commission [SEC] is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[1] One of the ways the SEC fulfills its mission to protect investors is through its enforcement authority. While the number of enforcement actions varies, each year the SEC brings hundreds of actions against individuals and entities for violation of the securities laws. The SEC has the ability to prosecute misconduct ranging from outright fraud to rule violations. Moreover, the SEC has various options for holding violators accountable for their misconduct, including monetary sanctions as well as placing limitations on their ability to serve in various capacities in the securities industry. In recent years, the SEC Enforcement program has become more aggressive, more willing to investigate and bring non-scienter-based cases, and more willing to use civil administrative proceedings to pursue both individuals and entities. As discussed below, the SEC's increased enforcement efforts and use of administrative proceedings has significant implications for the investment advisory industry.

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I. The Use of Non-Scienter-Based Charges in SEC Actions

A. Background

In connection with its mission to protect investors, the SEC relies on its enforcement authority to hold those who commit fraud liable for their misdeeds. Section 10(b) of the Securities Exchange Act of 1934, Section 17(a) of the Securities Act of 1933, and Section 206 of the Investment Advisers Act of 1940 collectively form the anti-fraud provisions of the federal securities laws. Not all fraud, however, is equal. Section 10(b), Section 17(a)(1), and Section 206(1) are at the top of the fraud chain; they are typically viewed as the most serious types of fraud that the SEC charges, and they require the SEC to prove that violators acted with "scienter."[2] The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate or defraud."[3] Scienter encompasses intentional acts of misconduct as well as certain reckless conduct.[4] Reckless conduct is more than mere negligence "or even inexcusable negligence."[5] To satisfy the scienter standard, the SEC must show an "extreme departure from the standards of ordinary care."[6]

The SEC's reach extends beyond scienter-based fraud. Sections 17(a)(2) and (3) of the Securities Act and Sections 206(2), (3), and (4) of the Advisers Act allow the SEC to charge negligence-based fraud.[7] Historically the SEC has litigated few matters based solely on negligent conduct. To be sure, the SEC has always included negligence-based charges along with scienter-based charges in litigated cases, just in case it does not meet its evidentiary burden with respect to the scienter-based charges. Typically, however, the SEC has not filed actions that included only negligence-based charges. Settling to negligence-based rather than scienter-based charges has obvious advantages to those accused of violating the federal securities laws. Settlements involving negligent conduct may also be advantageous to the SEC. For one, the SEC may simply not have the evidence to support a scienter-based charge, but may view the misconduct as serious enough to justify an enforcement action. Settled actions are also important to the SEC because they conserve resources. Even if the SEC believes it has the evidence to charge a scienter-based violation, it may agree to negligence-based charges to save resources, especially if it is satisfied with the relief obtained, for example, disgorgement and civil penalties.

Settled cases also typically allow the SEC to deliver a "message" to the public more quickly and more efficiently than in litigated actions, which may take years to resolve. For example, the SEC has used negligence-based charges in the municipal securities area to bring "message" cases. In 2009, the SEC brought its first action against a state in a settled administrative proceeding. The SEC charged the State of New Jersey with violating Sections 17(a)(2) and 17(a)(3) for failing to fully disclose its obligations to certain state pension funds in 79 municipal bond offerings over the course of six years.[8] Since then, the SEC has filed a number of actions involving municipalities and most recently charged the City of Harrisburg, Pennsylvania, with violating Section 10(b) for its misleading public statements regarding its financial condition.[9]

B. Will the SEC Step Up Its Efforts to Enforce Negligence and Strict-Liability Violations Through Enforcement Actions?

While the settlement of non-scienter-based enforcement actions long predates Chair Mary Jo White's arrival, her recent remarks indicate a willingness to expend resources investigating and litigating non-scienter-based violations. Shortly after Chair White arrived at the SEC she announced that "investors do not want someone who ignores minor violations, and waits for the big one that brings media attention. Instead, they want someone who understands that even the smallest infractions have

victims, and that the smallest infractions are very often just the first step toward bigger ones down the road."[10] Chair White went on to discuss her "Broken Windows" theory of enforcement, explaining that "minor violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines."[11] Accordingly, Chair White believes "it is important to pursue even the smallest infractions."[12]

Recently, non-scienter-based violations have been the basis of several high-profile enforcement cases. For example, most of the "market structure" cases are brought under non-scienter-based rule violations. Prior to 2009, enforcement actions against exchanges were rare. Today, however, they seem almost commonplace. In October of 2011, the SEC sanctioned Direct Edge Electronic Exchanges for its failure to implement internal controls, which resulted in trading losses and systems outages.[13] Similarly, in June of 2014, the SEC brought a cease-and-desist proceeding against Wedbush Securities, Inc., for its failure to comply with SEC rules regarding safeguards and for its lack of risk management procedures that led to the violation of numerous SEC Rules.[14]

Even the New York Stock Exchange faced charges due its alleged failure to monitor its data feeds; its failure to monitor the feeds allowed its customers to get access to certain information before the public did—there was no evidence that the NYSE had engaged in fraud. Rather the enforcement action was based on SEC rule violations.[15] NASDAQ was fined $10,000,000 for its failure to ensure that its systems were able to handle the traffic associated with Facebook's IPO.[16] Finally, in June of 2013, the SEC charged the Chicago Board Options Exchange after its failure to engage in self-regulation prevented it from detecting numerous regulatory violations and allowed abusive short selling to occur.[17]

Moreover, in a highly publicized action, the SEC filed a settled administrative proceeding against JP Morgan Chase & Co. for failing to maintain effective internal controls over financial reporting and disclosure in violation of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-11, 13a-13, and 13a-15 thereunder.[18] The action arose out of the now-infamous London Whale trading debacle during which JP Morgan lost more than $750 million. Despite the fact that the SEC did not charge JP Morgan with fraud, and that there was no finding that JP Morgan acted with scienter, the SEC viewed the violation as so egregious as to require JP Morgan to admit wrongdoing and to pay a $200 million penalty for its conduct.[19] While books-and-records violations have become commonplace in connection with Foreign Corrupt Practices Act violations and accounting fraud cases, the SEC has rarely brought stand-alone books-and-records and internal-control violations. The SEC's willingness to require admissions and impose a $200 million settlement in an internal-controls action is an important reminder of the SEC's power to extract significant remedies even in the absence of fraud. Even if JP Morgan had not agreed to settle, in light of the size of the underlying losses and the fact that the SEC would not have to prove any intentional or even reckless conduct, the SEC likely could have easily proven the internal-controls violation against JP Morgan.

Although not with the same enthusiasm, the SEC also touted its action against Scottrade, Inc., a registered broker-dealer, as a significant enforcement action. In January 2014, the SEC filed a settled administrative proceeding against Scottrade for failing to provide the SEC with complete and accurate information about trades done by the firm and its customers, that is, "blue sheet data."[20] The SEC uses blue sheet data for a number of investigative purposes, most importantly, in connection with insider trading and market manipulation. The SEC charged Scottrade with books-and-records violations under Section 17(a) of the Exchange Act and Rules 17a-4(j), 17a-25, and 17a-4(f)(3)(v) thereunder. Again, Section 17(a) and the charged rules do not require scienter. By failing to maintain blue sheet

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data and furnish it to the SEC, Scottrade engaged in violations. The reason Scottrade did not maintain or furnish the information to the SEC did not matter. Scottrade paid $2.5 million to settle the charges. Similar to an internal-control violation, the defenses to a books-and-records violation are limited, and the SEC likely could have proven its case against Scottrade if Scottrade had chosen to litigate.

The Foreign Corrupt Practices Act (FCPA) also provides the SEC with opportunities to bring enforcement actions without having to prove "scienter."[21] The FCPA provides for two sets of violations: the anti-bribery provisions and the accounting provisions. Generally speaking, the anti-bribery provisions prohibit the payment, offer of payment, or authorization of payment of "bribes," directly or indirectly, to foreign officials, for the purpose of obtaining or retaining business.[22] The FCPA requires that the payment be made with "knowledge" that all or a portion of the payment will be offered, given or promised to a foreign official.[23] Knowledge, however, includes not only actual knowledge but also willful blindness and deliberate ignorance.[24] The accounting provisions require that public issuers make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer.[25] Issuers are also required to devise and maintain a system of internal accounting controls.[26]

The SEC has long used the books–and-records and internal-control provisions to hold parent companies liable for unlawful payments of foreign-based subsidiaries. In the absence of having to prove any significant mental state, the SEC will rely on the fact that the subsidiary made unlawful payments and those unlawful payments were not accurately reflected in the subsidiary's books and records.[27] If the subsidiary's financial information is reflected in the parent's (the public issuer's) books and records, then the parent's books and records are also not accurate. The fact that the unlawful payments are permitted to be omitted or disguised in the subsidiary's books and records, will also lead to the conclusion that the parent did not have adequate internal controls over its financial reporting, hence the internal-control violation. Despite the lack of intention, books-and-records and internal-control violations in the FCPA area can result in substantial civil penalties.[28]

In addition to the books-and-records and internal-control provisions, in recent years the SEC has increasingly demonstrated its willingness to hold parent companies strictly liable for unlawful payments made by subsidiaries under the anti-bribery provisions by relying on an agency theory of liability.[29] For example, in *Smith & Nephew*, the SEC charged a U.K.-based parent company for unlawful payments made by the parent's U.S. subsidiary and German subsidiaries to Greek doctors.[30] The SEC alleged that the subsidiaries disguised the unlawful payments as "marketing services." The SEC also alleged that an officer at the U.S. subsidiary knew, or should have known, that the marketing services were disguised bribes. There was no evidence, however, that anyone at the U.K. parent was involved in the payments or had any knowledge of the payment. Liability for the unlawful payments rested solely on the U.K.'s general control of its U.S. and German subsidiaries. In addition to the bribery charges, the SEC also charged the U.K. parent with books-and-records and internal-control violations. To settle the charges, Smith & Nephew paid more than $5.4 million in disgorgement and prejudgment interest. Moreover, its U.S. subsidiary agreed to pay a $16.8 million fine as part of a deferred prosecution agreement with the Department of Justice.[31] The *Ralph Lauren* Non-Prosecution Agreement (NPA) demonstrates just how far the SEC is willing to push its theory of agency liability.[32] Ralph Lauren self-reported to the SEC certain unlawful payments of approximately $593,000 made by its Argentine subsidiary. According to the NPA, Ralph Lauren rendered substantial cooperation during the SEC's investigation and took meaningful steps to improve its FCPA compliance program after discovering the unlawful payments. While the SEC did not "charge" Ralph Lauren, it did hold Ralph Lauren liable through the NPA. Notably, the only

basis for holding Ralph Lauren, the parent company, liable for the subsidiary's conduct was the fact that the subsidiary's General Manager was an agent and employee of Ralph Lauren. There was no finding that anyone, other than the General Manager, who was located in Argentina, was involved with or even aware of the unlawful payments.

The SEC's FCPA enforcement actions provide important takeaways. First, the books-and-records and internal-control provisions are not limited to FCPA cases. If the SEC is looking for "strict liability" or non-scienter-based violations to use against public companies, these provisions may very well provide the opportunity. Second, the aggressive use of an "agency theory" of liability demonstrates the SEC's willingness to hold liable parties not directly involved in potential violations of the federal securities laws.

C. The SEC's Willingness to Bring Non-Scienter-Based Enforcement Actions Could Have Significant Implications for Investment Advisers

The SEC's willingness to bring non-scienter-based charges is especially significant for investment advisers who are subject to the Investment Advisers Act of 1940. The SEC made clear its intention to hold investment advisers liable for "strict liability" violations on September 17, 2013, when it filed enforcement actions against 17 firms for violations of Regulation M.[33] Rule 105 of Regulation M prohibits short selling of equity securities during a "restricted period" prior to a public offering and then purchasing the subject securities in the offering. The SEC adopted Rule 105 to "safeguard the integrity of the capital raising process and protect issuers from manipulative activity that can reduce issuers' offering proceeds and dilute security holder value."[34] According to the SEC, the Rule is designed to "prevent manipulative short selling just prior to the pricing of a follow-on or secondary offering and to facilitate pricing based upon natural market forces of supply and demand." Notably, despite its lofty goal of preventing "manipulative trading," Rule 105 prohibits the conduct irrespective of the short seller's intent in effectuating the short sale.[35] In other words, the SEC does not have to prove any bad intent on behalf of a short seller to prove a violation of Rule 105. Despite the lack of any requirement to show bad intent to prove the violation, the consequences of a Rule 105 violation can be substantial. The SEC will seek injunctive relief, disgorgement of any profit made on such a short sale, and a civil monetary penalty from a short seller who violates Rule 105. In fact, the enforcement actions filed on September 17, 2013, resulted in more than $14.4 million in monetary sanctions.

Moreover, the SEC has promulgated a host of rules pursuant to Section 206(4) to set forth specific conduct that it deems as "fraudulent" or "deceptive." Rules under 206(4) provide the Enforcement Staff with additional opportunities to assert non-scienter-based charges against advisers. In addition, there are a host of "rules" in the Advisers Act that are the focus of SEC examinations. Whereas in the past, the Exam Staff may have been willing to resolve some of those rule violations through the deficiency letter process, today, the Enforcement Staff, especially the Asset Management Unit (AMU), is working very closely with the Exam Staff and have demonstrated a willingness to charge, non-scienter-based and sometimes strict-liability rule violations in enforcement actions.

In 2011, the AMU announced an "initiative" targeted to identify registered investment advisers who failed to adopt or implement an adequate compliance program after being previously warned in a prior examination. Rule 206(4)-7 under the Advisers Act, otherwise known as "the Compliance Rule," requires investment advisers to adopt and implement written policies and procedures that are reasonably designed to prevent securities law violations and to review those policies and procedures at least once a year to ensure that they are adequate and effective.[36] To date, the AMU has brought six settled actions against investment advisers for Compliance Rule violations.[37] While the SEC found that these

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advisers had been "warned" in previous examinations, it is noteworthy that there was little way for the advisers to defend against these charges.

The SEC has also added "Compliance Rule" violations to other settled actions. For example, in March 2013, the SEC charged Oppenheimer Asset Management and Oppenheimer Alternative Investment Management in a settled administrative proceeding with violations of Sections 17(a)(2) and 17(a)(3) as well as of Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 in connection with certain allegedly misleading quarterly reports and marketing materials.[38] The SEC's charges focused on disclosures that the Oppenheimer investment advisers made regarding the valuation of certain holdings of the private equity funds that they held in other private equity funds. The SEC found that the portfolio managers of the private equity funds were adding a significant mark-up to underlying managers' valuations, thereby distorting the Oppenheimer funds' performance. Oppenheimer settled the charges, without admitting or denying the SEC's findings. Notably, the SEC not only focused on the disclosures themselves but also found that the Oppenheimer investment advisers violated Rule 206(4)-7 by failing to have written policies and procedures reasonably designed to ensure that marketing materials provided to prospective and existing investors were presented in a manner consistent with written representations to investors and investors and prospective investors. The Rule 206(4)-7 violation appears to be solely based upon the fact that the SEC found disclosure violations.

Recent actions taken by the SEC against investment advisers for violations of the "Custody Rule" provide more examples of the SEC enforcing non-scienter-based rules. In October 2013, the SEC sanctioned three registered investment advisers for various violations of the Custody Rule including failing to arrange for annual surprise examinations to verify fund assets and failing to arrange for a qualified custodian to send out quarterly statements.[39]

Most recently, the SEC demonstrated its willingness to enforce the newly enacted "Pay-to-Play" rule in the absence of scienter or even a "*quid pro quo*."[40] Rule 206(4)-5 was designed to address "pay-to-play" abuses involving campaign contributions made by advisers or their covered associates to government officials who are in a position to influence the selection of advisers to manage government client assets, including public pension assets.[41] More specifically, Rule 206(4)-5 prohibits investment advisers from providing "investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate." The SEC explained, in the Adopting Release, that Rule 206(4)-5 was "closely drawn" to "accomplish its goal of preventing *quid pro quo* arrangements while avoiding unnecessary burdens on the protected speech and associational rights of investment advisers and their covered employees."[42] The SEC went on to explain, "[O]ur rule is not a general prohibition or limitation, but rather is a focused effort to combat *quid pro quo* payments by investment advisers seeking governmental business."[43] In the first filed action under the rule, the SEC filed settled charges against TL Ventures, an investment adviser to venture capital funds, with violating the rule by virtue of two contributions made by an associated person over 10 years after two governmental entities invested in TL Ventures–sponsored funds.[44] Despite the SEC's statements in the Adopting Release, the SEC expressly found in the settled Order, that Rule 206(4)-5 does "not require a showing of quid pro quo or actual intent to influence an elected official or candidate."[45] In essence, the SEC held the investment adviser strictly liable for the contributions of its associated person.

Certainly the action that the SEC filed, and later settled, against independent and disinterested directors of several Morgan Keegan funds is of significance for investment advisers and boards of mutual funds. The enforcement action clearly sent a message to investment advisers and boards of mutual

funds regarding the SEC's increased enforcement efforts in the asset management industry.[46] The action also called attention to Section 38a-1 of the Investment Company Act—another source of non-scienter-based violations. Section 38a-1 requires that investment companies "adopt and implement written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws by the fund, including policies and procedures that provide for the oversight of compliance by each investment adviser, principal underwriter, administrator, and transfer agent of the fund." The SEC found that the independent directors had failed to satisfy their responsibilities under Rule 38a-1 by delegating their fair valuation responsibility to a valuation committee without providing adequate substantive guidance on how fair valuation determinations should be made. The directors settled the SEC's charges without admitting or denying the SEC's findings. The SEC did not impose any monetary sanctions upon the directors in connection with the settlement.

Finally, the SEC has also demonstrated its willingness to hold investment advisers liable for the bad acts of its employees. In the most notable recent example, the SEC charged CR Intrinsic, an unregistered investment adviser and affiliate of SAC Capital, with violating Section 10(b) on the basis of a portfolio manager's receipt and use of material nonpublic information.[47] CR Intrinsic settled the SEC's charges without admitting or denying the allegations. Accordingly, the issue of holding CR Intrinsic liable for the acts of the portfolio manager was not litigated. CR Intrinsic agreed to pay $274,972,541 in disgorgement, $51,802,381 in prejudgment interest and a $274,972,541 civil penalty. Similarly, on the same day, Sigma Capital Management, another SAC-affiliated unregistered investment adviser, settled charges that it had engaged in insider trading based on nonpublic information obtained through one of its analysts.[48] Sigma agreed to pay disgorgement of $6.425 million, prejudgment interest of $1.094 million, and a civil penalty of $6.425 million.

II. The Increased Use of Administrative Proceedings

The increased willingness of the SEC to use non-scienter-based and even strict liability-based statutes and rules to bring enforcement cases is even more alarming in light of the SEC's stated intention to use administrative proceedings to try cases. The lack of judicial protections and procedure is admittedly not a concern in settled administrative proceedings, but as discussed below, the litigation risks associated with trying administrative proceedings makes the SEC's renewed focus on non-scienter-based violations even more significant for the investment advisory industry.

A. Recent Statements

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 granted the SEC more authority to impose penalties in its own administrative proceedings,[49] but the SEC has only recently ramped up the use of administrative proceedings.

According to the Director of the Enforcement Division, Andrew Ceresney, who spoke during a D.C. Bar event in June 2014, the increased use of administrative proceedings is partially because sufficient time has passed for the SEC to build up cases that involve post-Dodd-Frank conduct.[50] In addition to Mr. Ceresney's comments regarding the timing of new investigations and cases, the increase also seems to reflect the SEC's more aggressive enforcement strategy under Chair White.[51] Chair White has said that the SEC will be prosecuting more actions and seeking stronger penalties across the board, which would require the use of administrative proceedings. Despite the statements from SEC officials, many see the trend as a reaction to recent high-profile losses by the SEC in federal courts,[52] a notion that the agency has emphatically denied.[53]

Whatever the reasoning may be, the SEC is clearly preparing for the administrative proceedings to take a more active role in enforcement. Mr. Ceresney was recently quoted as saying, "Our expectation is that we will be bringing more administrative

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proceedings given the recent statutory changes … but we evaluate the appropriate forum in each case and make the decision based on the particular facts and circumstances."[54] This sentiment was echoed this past February by Charlotte Buford, Assistant, Office of Chief Counsel in Enforcement, who stated that the SEC intended to use the administrative proceeding forum more frequently and in a wider variety of enforcement actions.[55] According to Ms. Buford, a number of factors go into the decision whether to bring an action in federal court or administrative proceeding, including the speed at which the matter will proceed, whether the facts or circumstances of the case require the regulatory expertise of an administrative law judge, whether the SEC requires the broader discovery available in district court, the likelihood of settlement, and the relief being sought by the SEC.[56]

The SEC is not just speaking about the strategy shift; it is also actively bolstering its administrative court to meet the rising demand. Last month, the SEC announced that it would be hiring two new judges and three new lawyers for its administrative court, a move that will effectively double its administrative law staff.[57] Administrative proceedings are even being used to pursue high-profile cases, including the recent action brought against hedge fund adviser Stephan A. Cohen for failure to supervise his employees.[58]

B. Comparison of Administrative Proceedings to Federal Court Proceedings

Some have argued that SEC administrative proceedings are a more favorable forum for the agency that severely disadvantage defendants.[59] A single administrative law judge (ALJ) presides over SEC administrative proceedings, which are governed by the SEC's Rules of Practice.[60] Unlike in the federal district courts, there is no right to a jury trial in these administrative proceedings.[61] On the other hand, an ALJ cannot impose "three-times" penalties in insider trading cases—a remedy that is available to federal court judges.[62]

One notable difference between the SEC administrative proceedings and federal court proceedings is timing. An administrative proceeding moves much more quickly than a normal action in district court. In an SEC administrative proceeding, the ALJ has a maximum of 300 days from service of the complaint to render an initial decision.[63] In this 300-day timeframe, a hearing would be scheduled approximately four months after the initiation of the proceeding, with briefing due two months after the hearing, and an initial decision would be issued about four months after that.[64] This expedited processing usually presents defendants with a much shorter time than a federal court proceeding does to go through the investigation files and craft a defense.[65]

Discovery is also handled differently in an administrative proceeding than in a federal district court proceeding. After initiating administrative proceedings, the SEC is required to turn over all investigation files, except those that (1) are privileged, are internal memorandum, or are work product; (2) identify a confidential source; or (3) are otherwise irrelevant.[66] Exculpatory *Brady* material must always be disclosed under the rules.[67] Interestingly, most courts have held that the SEC does not have *Brady* obligations in civil actions filed in federal court.[68]

Subpoenas for the production of documents prior to the hearing or to provide testimony at the hearing can be served on third parties nationwide.[69] Depositions, however, are largely unavailable, with limited exceptions.[70] Litigants may be forced to rely more heavily on informal discovery means in an administrative procedure than they otherwise would in district court.[71] Related motion practice is extremely limited in the administrative proceeding. Dispositive motions prior to the hearing are almost nonexistent.[72]

The rules surrounding evidence are also different in an administrative proceeding. Like the Federal Rules of Evidence, the SEC Rules of Practice prohibit the entry of evidence that is irrelevant, immaterial, or unduly repetitious.[73] The definition of relevancy under the SEC rules, however, is much

broader than that of the Federal Rules of Evidence.[74] Moreover, courts have previously instructed ALJs to resolve all doubts of relevancy in favor of admissibility.[75] Even hearsay can be admissible in an administrative proceeding. [76] In essence, in an administrative proceeding, anything that could "conceivably throw any light upon the controversy at hand should be admitted."[77]

Finally, the appeal process from an ALJ's decision does not ever include a *de novo* trial in federal court. Any appeal of an ALJ's decision must first be reviewed by an SEC panel.[78] The SEC may make any findings or conclusions that are proper and on the basis of the record and may exercise *de novo* review.[79] While this can include rejecting credibility determinations or findings of fact made by the ALJs, the SEC is usually deferential.[80] After the SEC appeal is resolved, an appeal may be taken in the U.S. Court of Appeals for the District of Columbia or in the U.S. Court of Appeals in the circuit where the defendant resides or has its principal place of business.[81]

The SEC's factual findings, if they are supported by substantial evidence, "are conclusive."[82] The court of appeals does not take additional or new evidence; instead, "[i]f either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the SEC, the court may remand the case to the SEC for further proceedings, in whatever manner and on whatever conditions the court considers appropriate."[83] Once the additional evidence is heard by the SEC, "it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order."[84] The court of appeals has the ability "to affirm or modify and enforce or to set aside the order in whole or in part."[85]

The SEC Rules of Practice are viewed by many as outdated and prejudicial to defendants. Recently, SEC General Counsel Anne Small, speaking only for herself, acknowledged that it was fair for attorneys to question whether the rules were still appropriate.[86] Ms. Small, however, did not identify any specific rules that may or may not be outdated or prejudicial to defendants. Fueled by these comments, a number of defense attorneys hope to—at the very least—begin a dialogue about changing the rules to more closely mirror the Federal Rules of Civil Procedure.[87]

C. SEC Record in Administrative Proceedings

It is difficult to get an accurate measure of the SEC's overall trial record, as the agency does not keep a public record of its success rates at trial.[88] The New York Times reported that the SEC won 88 percent of the cases that went before an ALJ in 2011, though it is unclear exactly what dataset the New York Times used.[89] Another report indicates that between October 2010 and March 2012, respondents achieved no dismissals in administrative proceedings and were successful in lowering penalties in only 28.6 percent of cases, which suggests that the SEC has been very successful in its administrative proceedings.[90] The same report notes that from October 2007 to September 2010, however, respondents were slightly more successful, with roughly 25 percent achieving dismissal.[91] Together, these reports indicate that the SEC has enjoyed a good amount of success over the last several years in nearly all cases brought before administrative proceedings, if only slightly more than in federal court over the same period.[92]

Even without knowing the SEC's exact win/loss ratio in administrative proceedings, it is clear that the SEC has been successful in administrative proceedings. Despite the SEC's recent high-profile losses in federal court, the threat of administrative action is still an effective bargaining tool for the SEC.[93] Mr. Ceresney stated in June that "[t]here have been a number of cases in recent months where we had threatened administrative proceeding... and they settled."[94] Given this reality and the agency's bolstering of its administrative law staff, defendants can expect more and more cases of all types to be brought in SEC administrative proceedings.

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D. Challenges to Administrative Proceedings

Notwithstanding the streamline procedures applicable to administrative proceedings, constitutional challenges, for example, due process and equal protection, to such proceedings are rare, and successful constitutional challenges are even rarer.

One notable exception is *Gupta v. SEC*, No. 11 Civ. 1900 (S.D.N.Y. 2011), in which defendant Rajat Gupta claimed that the SEC violated his equal protection rights by pursuing its claims against him in an administrative action while it filed federal complaints against 28 individuals based on the same series of transactions.[95] Gupta claimed he was deprived of full discovery, the ability to assert counterclaims or third-party claims for indemnification and contribution, and the right to a jury trial.[96] The SEC promptly filed a motion to dismiss the claims, but Judge Jed S. Rakoff denied the motion, saying that singling out Gupta seemed like an "exercise in forum-shopping."[97] Judge Rakoff emphasized that the SEC's claims against Gupta were not materially different from those in the complaints in the 28 other related actions filed in federal court.[98] Judge Rakoff also noted that "there [was] already a well-developed public record of Gupta being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why this should be so."[99] Shortly after Judge Rakoff's ruling, Gupta agreed to dismiss his complaint in exchange for an agreement by the SEC to bring any future proceedings against Gupta on the basis of the factual allegations in the Order Instituting Proceedings in the U.S. District Court for the Southern District of New York, which it would designate as related to the other 28 cases already pending.[100]

Just recently, Judge Rakoff again called into question the SEC's use of administrative proceedings. In connection with his approval of the SEC's settlement with Citigroup Global Markets Inc., Judge Rakoff noted the Second Circuit's recent decision "invit[ing] the SEC to avoid even the extremely modest review it leaves to the district court by proceeding on a solely administrative basis."[101] Judge Rakoff asked, but did not answer, the question: "from where does the constitutional warrant for such unchecked and unbalanced administrative power derive?"[102] It remains to be seen what, if any, headway defendants may make in the challenge to the SEC's use of administrative proceedings. But rest assured, as the SEC's use of administrative proceedings increases, so, too, will defendants' challenges to those proceedings increase.

III. Conclusion

The SEC has demonstrated over the last few years that it is willing to devote resources to investigating and prosecuting not only individuals and entities that commit fraud, but also those that engage in less egregious conduct. Given the SEC's heightened focus on non-scienter-based and strict-liability violations, the limited defenses available to individuals and entities charged with such less egregious conduct, and the fact that the SEC is likely to bring more cases in administrative proceedings, it has never been more important for investment advisers to ensure that they have robust compliance programs in place. It is also imperative for advisers to take care in responding to concerns raised by the SEC examination Staff during routine examinations.

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a blog, *SECuritiesLawPerspectives.com*, where they regularly comment on SEC enforcement activity.

NOTES

1 The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, available at *http://www.sec.gov/about/whatwedo.shtml*.

2 Section 10(b) prohibits fraud in connection with the purchase and sale of securities. Section 17(a) prohibits fraud in connection with the offer and sale of securities. 15 U.S.C. § 78(j). In simple terms, § 17(a) applies to new offerings of securities, while § 10(b) applies to secondary market transactions. *Compare* 15 U.S.C. §78(j), *with* 78 U.S.C. § 77(q).

3 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

4 *See*, *e.g.*, Rosenzweig v. Azurix Corp., 332 F.3d 854, 866 (5th Cir. 2003).

5 *Id.*

6 GSC Partners CDO Fund v. Washington, 368 F.3d 228, 239 (3d Cir. 2004).

7 *See* Aaron v. SEC, 446 U.S. 680, 697 (1980) (holding that the SEC does not have to prove scienter under §§ 17(a)(2) or 17(a)(3) of the Securities Act); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) (holding a violation of §206(2) many rest on a finding of simple negligence); SEC v. Steadman, 967 F.2d 636, 647 (2d. Cir. 1992) (noting that a violation of §206(4) does not require that the defendant acted with scienter).

8 *In re State of New Jersey*, Sec. Rel. No. 9135, A.P. File No. 3-14009 (Aug. 18, 2010), available at *http://www.sec.gov/litigation/admin/2010/33-9135.pdf*. The SEC also brought similar settled charges against the state of Illinois. *See In re State of Illinois*, Sec. Rel. No. 9389, A.P. File No. 3-15237 (Mar. 11, 2013), available at *http://www.sec.gov/litigation/admin/2010/33-9135.pdf*.

9 *In re The City of Harrisburg, Pennsylvania*, Exchange Act Rel. No. 69515, A.P. File No. 3-15316 (May 6, 2013), available at *https://www.sec.gov/litigation/admin/2013/34-69515.pdf*.

10 *See* Remarks at the Securities Enforcement Forum, available at *http://www.sec.gov/News/Speech/Detail/Speech/1370539872100* (Oct. 9, 2013).

11 *Id.*

12 *Id.*

13 *See, e.g.*, *See* "SEC Sanctions Direct Edge Electronic Exchanges and Orders Remedial Measures to Strengthen System and Controls," Press Rel. No. 2011-208 (Oct. 13, 2011), available at *http://www.sec.gov/news/press/2011/2011-208.htm*.

14 *Wedbush Sec. Inc.*, Exchange Act Release No. 72340 (June. 6, 2014).

15 *See* "SEC Charges New York Stock Exchange for Improper Distribution of Market Data," Press Rel. No. 2012-189 (Sept. 19, 2012), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484740*.

16 *See* "SEC Charges NASDAQ for Failures During Facebook IPO," Press Rel. No. 2013-95 (May 29, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575032*.

17 *See* "SEC Charges CBOE for Regulatory Failures," Press Rel. No. 2013-107 (June 11, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575348*.

18 *In re JP Morgan Chase & Co.*, Exchange Act Rel. No. 70458 (Sept. 19, 2013), available at *http://www.sec.gov/litigation/admin/2013/34-70458.pdf*.

19 *See* Statement on SEC Enforcement Action Against JP Morgan by George Canellos (Sept. 19, 2013), available at *http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1307539820148.*

20 *In re Scottrade, Inc.*, Exchange Act Rel. No. 71435 (Jan. 29, 2014).

21 Exchange Act § 30A.

22 15 U.S.C. §78dd-1.

23 *See* Exchange Act §30A(a)(3).

24 *See* United States v. King, 351 F.3d 859, 867 (8th Cir. 2003).

25 15 U.S.C. § 78m.

26 *Id.* § 78m(b)(2)(B).

27 *See, e.g, In re Koninkijke Philips Electronics N.V.*, Sec. Exchange Act Rel. No. 69327, A.P. File No. 3-15265

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(Apr. 5, 2013) (ordering parent company to pay disgorgement of $3.1 million and prejudgment interest of $1.4 million); *Allianz SE*, Exchange Act Rel. No. 68448, A.P. File No. 68448 (Dec. 17, 2012) (ordering parent company to pay disgorgement of $5.3 million, prejudgment interest of $1.8 million and a civil penalty of $5.3 million); SEC v. Oracle Corp., No. 3:12-cv-4310 (N.D. Cal. Aug. 16, 2012) (imposing $2 million civil penalty on parent company); *SEC v. Pfizer Inc.*, No. 1:12-cv-01303 (D.D.C. Aug. 7, 2012) (requiring parent company to pay $16 million in disgorgement and $10 million in prejudgment interest).

28 *Id.*

29 *See* Larry A Breur and Robert S. Khuzami, *SEC/DOJ FCPA Resource Guide* at 27-28 (2012) ("[A] parent may be liable for its subsidiary's conduct under traditional agency principles. The fundamental characteristic of agency is control. Accordingly, DOJ and SEC evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether the subsidiary is an agent of that parent.").

30 SEC v. Smith & Nephew plc, 12-cv-00187 (D.D.C. Feb. 2, 2012); "SEC Charges Smith & Nephew PLC with Foreign Bribery," Press Rel. No. 2012-25 (Feb. 6, 2012), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171486478*.

31 U.S. v. Smith & Nephew, Inc. 1:12-cr-0030-RBW (D.D.C. Feb. 6, 2012).

32 *See* "SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct," Press Rel. No. 2013-65 (Apr. 22, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780*.

33 *See* "SEC Charges 23 Firms with Short Selling Violations in Crackdown on Potential Manipulation in Advance of Stock Offerings," Press Rel. No. 2013-182 (Sept. 17, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539804376*.

34 *See Short Selling in Connection with a Public Offering*, Exchange Act Rel. No. 56,206 (Aug. 10, 2007), available at *http://www.sec.gov/divisions/marketreg/tmcompliance/regmrule105-secg.htm*.

35 *Id.*

36 Rule 206(4)-7

37 *See* "SEC Sanctions Three Firms Under Compliance Program Initiative," Press Rel. No. 2013-226 (Oct. 23, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540008287*; "SEC Penalizes Investment Advisers for Compliance Failures," Press Rel. No. 2011-248 (Nov. 28, 2011), available at *http://www.sec.gov/news/press/2011/2011-248.htm*.

38 *In re Oppenheimer Asset Mgmt, Inc. and Oppenheimer Alternative Investment Mgmt., LLC*, Sec. Rel. No. 9390, A.P. File No. 3-15238 (Mar. 11, 2013), available *at http://www.sec.gov/litigation/admin/2013/33-9390.pdf*.

39 "SEC Charges Three Firms With Violating Custody Rule," Press Rel. No. 2013-230 (Oct. 28, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540098359*.

40 *See In re TL Ventures, Inc.*, Advisers Act Rel. No. 3859 (June 20, 2014), available at *http://www.sec.gov/litigation/admin/2014/ia-3859.pdf*.

41 *See Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41018 (July 14, 2010) (Adopting Release), available at *http://www.sec.gov/rules/final/2010/ia-3043.pdf*.

42 Adopting Release at 22.

43 *Id.* at 23, n.68; *see also id.* at 24, n.75 ("[W]e believe we have made clear that the rule's time out provisions, which are designed to eliminate *quid pro quo* arrangements . . . .").

44 *See In re TL Ventures Inc.*, Advisers Rel. No. 3859 (June 20, 2014), available at *http://www.sec.gov/litigation/admin/2014/ia-3859.pdf*.

45 *Id.* at ¶2.

46 *See In re J Kenneth Alderman et al.*, Inv. Co. Act Rel. No. 30300, A.P. File No. 3-15127 (Dec. 10, 2012); *In re J Kenneth Alderman et al.*, Inv. Co. Act Rel. No. 30557, A.P. File No. 3-15127 (June ,13 2013).

47 SEC v. CR Intrinsic Investors, LLC, 12 cv 8466 (S.D.N.Y Mar. 15, 2013), available at *http://www.sec.gov/litigation/complaints/2013/comp-pr2013-41.pdf*. The portfolio manager, Matthew Martoma was later

found guilty in a parallel criminal action. *See* Patricia Hutardo, "SAC's Martoma Faces Up to 20 Years at June 10 Sentencing," Bloomberg (Feb. 8, 2014), available at *http://www.bloomberg.com/news/2014-02-08/sac-capital-s-martoma-faces-up-to-20-years-at-june-10-sentencing.html*,

48 SEC v. Sigma Capital Mgmt, LLC *et al.*, 13 cv 1740 (S.D.N.Y. Mar. 15, 2013), available at *http://www.sec.gov/litigation/complaints/2013/comp-pr2013-42.pdf.*

49 *See* Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

50 Yin Wilczek, "SEC to Pursue More Insider Trading Cases In Administrative Forum, Director Says," *Bloomberg BNA*, June 13, 2014, available at *http://www.bna.com/sec-pursue-insider-n17179891282/*, last accessed July 25, 2014.

51 Mary Jo White, Chair, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013) (transcript available at *http://www.sec.gov/News/Speech/Detail/Speech/1370539872100*, last accessed July 25, 2014). Chair White said the agency is implementing a "broken windows" enforcement policy in which no violation is too small for prosecution. She explained, "minor violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines. And so, I believe it is important to pursue even the smallest infractions." *Id.*

52 *See* Gretchen Morgenson, "At the S.E.C., a Question of Home-Court Edge," *The New York Times*, October 5, 2013, at BU1, available at *http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html?pagewanted=all&_r=0*, last accessed July 25, 2014; *see also* Jean Eaglesham, "SEC Takes Steps to Stem Courtroom Defeats," *The Wall Street Journal*, Feb. 13, 2014, available at, *http://online.wsj.com/news/articles/SB10001424052702304703804579381310253258646*, last accessed July 25, 2014 (discussing recent slip in SEC's win rate in federal district courts).

53 Wilczek, *supra* n.50 at n.3. Mr. Ceresney stressed that the increased use of administrative proceedings, occurring in all types of cases, was not a reaction to recent trial losses, which were nearly all insider trading cases. *Id.*

54 Morgenson, *supra* n.52 at n.52.

55 *See* Vedder Price, *Highlights from SEC Speaks 2014* (February 24, 2014), available at *http://www.vedderprice.com/highlights-from-sec-speaks-2014*, last accessed July 25, 2014.

56 *See* Perkins Coie, "The SEC Speaks in 2014: Enhanced Statutory Regime Combined with Data Analytics Tools Results in Enforcement 2.0" (February 24, 2014), available at *http://www.perkinscoie.com/news/pubs_detail.aspx?op=updates&publication=4731*, last accessed July 25, 2014.

57 Press Release, SEC, "SEC Announces New Hires in the Office of Administrative Law Judges," Press Rel. No. 2014-129 (June 30, 2014), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542202073*, last accessed July 25, 2014; Sarah Lynch, "U.S. SEC Beefs Up Administrative Court to Meet Rising Demand," *Reuters*, June 30, 2014, available at *http://www.reuters.com/ article/2014/06/30/sec-court-hires-idUSL2N0PB18H20140630*, last accessed July 25, 2014.

58 "SEC Charges Steven A. Cohen with Failing to Supervise Portfolio Managers and Prevent Insider Trading," Press Rel. No. 2013-129 (July 19, 2013), available at *http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539726923*, last accessed July 25, 2014.

59 *See generally* Morgenson, *supra* n.52 at n.5.

60 SEC Rules of Practice (2006), available at *http://www.sec.gov/about/rulesprac2006.pdf*, last accessed July 25, 2014.

61 Luke T. Cadigan, "Litigating an SEC Administrative Proceeding," *Boston Bar Journal* 58:1 (Winter 2014), available at *http://bostonbarjournal.com/2014/01/07/litigating-an-sec-administrative-proceeding*, last accessed July 25, 2014.

62 Wilczek, *supra* n.50 at n.3.

63 SEC R. Prac. 360.

64 *Id.*

65 Stephanie Russell-Kraft, "Attys Ready to Pounce On SEC's Outdated Admin Rules," *Law 360*

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(June 18, 2014), available at *http://www.law360.com/articles/549549/attys-ready-to-pounce-on-sec-s-outdated-admin-rules*, last accessed July 25, 2014.

66 SEC R. Prac. 230(a)-(b).

67 SEC R. Prac. 230(b)(2).

68 *See*, *e.g.*, SEC v. Pentagon Capital Mgmt., No. 08-3324, 2010 WL 4608681, at *1 (S.D.N.Y. Nov. 12, 2010) ("In this district, the application of Brady to SEC enforcement actions has been flatly rejected."); SEC v. Reyes, No. 06-4435, 2007 WL 528718, at *4 (N.D. Cal. Feb. 13, 2007) (denying defendant's request for exculpatory material under Brady and Giglio because "this is a civil enforcement action, not a criminal prosecution").

69 SEC R. Prac. 232; 15 U.S.C. § 78u(b) (2010).

70 SEC R. Prac. 233, 234.

71 *See* Cadigan, *supra* n.61 at n.14.

72 SEC R. Prac. 250 cmt., 60 Fed. Reg. 32738, 32768 (June 23, 1995) (stating "the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare").

73 SEC R. Prac. 320.

74 *In re* City of Anaheim, 54 S.E.C. 452, 454 (1999) (stating administrative agencies, like the SEC, are "more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries").

75 Multi-Med. Convalescent & Nursing Ctr. v. NLRB, 550 F.2d 974, 978 (4th Cir. 1977) ("[W]e strongly advise administrative law judges: if in doubt, let it in.").

76 *In re* Harry Gliksman, 54 S.E.C. 471, 480 (1999) (observing that hearsay has been repeatedly held admissible in administrative proceedings).

77 *In re* Jesse Rosenblum, 47 S.E.C. 1065, 1072 (1984) (internal quotations omitted).

78 SEC R. Prac. 410.

79 SEC R. Prac. 411; *see also* Kenneth Winer & Laura Kwaterski, "Assessing SEC Power In Administrative Proceedings," *Law 360*, March 24, 2011, available at *http://www.law360.com/articles/ 233299/assessing-sec-power-in-administrative-proceedings* (discussing *de novo* review by the SEC).

80 *See* Winer & Kwaterski, *supra* n.79 at n.31 (discussing deferential treatment); *but see* In re Kenneth R. Ward, No 3-9327, 2003 SEC LEXIS 3175, at *11 n.16 (March 19, 2003) (discrediting findings of the law judge based on testimony in the record).

81 15 U.S.C. § 78y(a)(1) (1990); 15 U.S.C. § 77i (1987).

82 15 U.S.C. § 78y(a)(4); *see also* 15 U.S.C. § 77i(a).

83 15 U.S.C. § 78y(a)(5); *see also* 15 U.S.C. § 77i(a).

84 15 U.S.C. § 78y(a)(5); *see also* 15 U.S.C. § 77i(a).

85 15 U.S.C. § 78y(a)(3); *see also* 15 U.S.C. § 77i(a).

86 Daniel Wilson, "SEC Administrative Case Rules Likely Out of Date, GC Says," *Law 360* (June 17, 2014), available at *http://www.law360.com/articles/548907/sec-administrative-case-rules-likely-out-of-date-gc-says*.

87 Russell-Kraft, *supra* n.65 at n.18.

88 Max Stendahl, "SEC Trial Team Faces Reckoning Amid Losses," *Law 360*, June 9, 2014, available at *http://www.law360.com/articles/546024/sec-trial-team-faces-reckoning-amid-losses* (noting the SEC doesn't publicly keep a "running tally of wins and losses" but instead discloses each verdict on its website). Stendahl then notes, "According to data supplied by the SEC, the agency won around 80 percent of its trials during the 2011, 2012 and 2013 fiscal years. However, that number includes nonjury administrative proceedings before SEC administrative judges." *Id.*

89 Morgenson, *supra* n.52 at n.5. The New York Times article states that the SEC won seven of eight cases brought in administrative courts in 2011. As the article is focused mainly on insider training, it is unclear whether this data is limited to insider trading cases or reflective of the agency's success more generally.

90 Brian Rubin & Jae Yoon, "Stepping Into the Ring Against the SEC and FINRA: Sometimes It Pays to Duke it Out Against the Regulators," *Sec. Reg. L.J.*, Winter 2012, at 487–88, available at *http://www.sutherland.com/NewsCommentary/Articles/76493/Stepping-Into-the-Ring-Against-the-SEC-and-FINRA-Sometimes-It-Pays-to-Duke-It-Out-Against-the-Regulators*. From October 2010 to September 2012,

only seven respondents litigated in front of ALJs. None was successful in dismissing the charges.

91 *Id.* Twenty-three of 91 claims were dismissed by ALJs during this period. *Id.* The authors also note that between October 2008 and September 2010, half of all civil penalties were reduced in some amount. *Id.*

92 Eaglesham, *supra* n.52, at n.5. According to *The Wall Street Journal*, prior to this year, the SEC had enjoyed a roughly 75% to 85% success rate in federal court.

93 *See* Stendahl, *supra* n.88, at n.36.

94 Lynch, *supra* n.57, at n.10.

95 *See* Complaint at 1, Gupta v. SEC (1:11-cv-01900) (S.D.N.Y. 2011 Mar. 18, 2011).

96 *Id.* at 8-9.

97 Gupta v. SEC, 796 F. Supp. 2d 503, 506 (S.D.N.Y. 2011) (allowing civil suit to proceed).

98 *Id.* at 507 ("Indeed, even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational.").

99 *Id.* at 514.

100 *See* Joint Stipulation of Dismissal, Gupta v. SEC (1:11-cv-01900) (S.D.N.Y. Mar. 1, 2011).

101 SEC v. Citigroup Global Mkts. Inc., Civil Action. No. 11-cv-7387, slip op. at 3 n.8 (S.D.N.Y., Aug. 5, 2014) (*citing* SEC v. Citigroup Global Mkts. Inc., 752 F.3d 285, 297 (2d Cir. 2014)). The Second Circuit vacated Judge Rakoff's order refusing to approve a settlement between the SEC and Citigroup on the basis that Judge Rakoff had abused its discretion by requiring the SEC to "establish the 'truth' of the allegations against a settling party as a condition for approving the consent decrees." *Id.* at 21.

102 *Id*. at 3 n.8.

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September 2014, Volume 21, Number 9, pages 1 and 4-17. Reprinted with permission of CCH, Inc.
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