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U.S. Chamber of Commerce Joins Chorus Pushing For Overhaul in SEC Enforcement Practices

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A recent report by the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce (Chamber Report) regarding the enforcement program of the Securities and Exchange Commission (SEC or Commission) identified weaknesses in that program, and made recommendations to remedy those weaknesses. The Chamber Report is only one of a chorus of voices criticizing the SEC's enforcement practices, and certain of the SEC's actions in the last few months suggest that it has begun to heed these calls for reform.

The recommendations of the Chamber Report, titled *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices*, include, among others: adopting procedures to limit the SEC's use of administrative proceedings; clarifying the SEC's policy on admissions of wrongdoing; streamlining the SEC's "long and costly" investigative process; and returning to, and codifying, certain "time-honored practices" in the Wells process. According to the Chamber Report, the SEC's adoption of the recommendations[1] would help "ensure clear, predictable, and efficient practices for market participants while eliminating unnecessary ambiguity" and serve the tripartite mission of the SEC to promote investor protection, competition, and capital formation.

The Chamber Report was based on a survey of more than 75 legal and compliance executives of public U.S. companies and 30 interviews with persons familiar with the Commission's enforcement processes and practices. Although unlikely to directly result in any immediate changes at the SEC, the Chamber Report joined other interested parties suggesting reforms, including members of the judiciary,[2] members of the Commission itself, [3] academics,[4] and federal legislators from both sides of the political divide.[5] Indeed, a number of developments since mid-July have only served to further underscore the importance of issues raised in the Chamber Report.

Reforming the SEC's Use of Administrative Proceedings

In recent years, the SEC's use of administrative law judges (ALJs) to hear its cases has faced growing criticism, as the SEC has increasingly opted to bring enforcement actions in administrative forums. According to an analysis cited in the Chamber Report, over the last 25 years, the SEC's Division of Enforcement (Enforcement Division) has "dramatic[ally] shift[ed]"—from bringing cases roughly equally as civil actions in federal court and administrative

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1 This *OnPoint* analyzes a selection of the recommendations of the Chamber Report. For a complete list of all recommendations, the full report is available here.

2 U.S. District Court Judge Jed S. Rakoff, of the Southern District of New York, through judicial decisions and public statements has addressed several issues that appear in the Chamber Report—in particular, his 2011 rejection of a settlement between Citigroup and the SEC in which the former admitted no wrongdoing, *SEC v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *reversed and remanded*, 752 F.3d 285 (2d Cir. 2014), and the Commission's use of "in-house" judges. *See* U.S. judge criticizes SEC use of in-house court for fraud cases (Nov. 5, 2014). Although Chair White denied that Judge Rakoff's *Citigroup* decision had any impact on the SEC's admissions policy, some disagree. *See, e.g.*, Overruled, Judge Still Left Mark on SEC Agenda (June 4, 2014).

3 *See, e.g.*, SEC Commissioner Michael Piwowar, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015) ("To avoid the perception that the Commission is taking its tougher cases to its in-house judges, and to ensure that all are treated fairly and equally, the Commission should set out and implement guidelines for determining which cases are brought in administrative proceedings and which in federal courts.").

4 *See, e.g.*, Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, Public Law and Legal Theory Research Paper Series 2015-40 (August 2015).

5 *See, e.g.,* Letter from Sen. Elizabeth Warren to Chair White, June 2, 2015, in which Senator Warren criticized the SEC for requiring admissions of guilt in "less than 4 percent" of cases settled since June 2013; Memorandum from Sen. Chuck Grassley, regarding Co-Director Ceresney and Chair White coming from same law firm, April 22, 2013, warning that the SEC "will have to ensure that cases don't fall by the wayside because of potential conflicts of interest and recusals."

proceedings before ALJs, to bringing dramatically more cases as administrative proceedings.[6] This increase has coincided with greater agency authority to impose civil penalties in cease-and-desist proceedings, granted by the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[7]

Rewriting the Rules of Practice

While the Chamber Report suggests various reforms based on arguments about the constitutionality of the SEC's administrative proceedings (*see* Clarifying the Commission's Forum Selection Process, *infra*), its recommendation relating to the SEC's "Rules of Practice" (Rules) appears particularly prescient given the SEC's recent proposal in this area. On September 24, 2015, the SEC announced that, in an effort to "modernize" the Rules, the Commission had voted to propose for public comment amendments to the Rules that would, among other changes, provide more time and allow limited discovery for parties involved in SEC proceedings.[8]

The Rules govern practice in SEC administrative proceedings just as the Federal Rules of Civil Procedure (Federal Rules) govern practice in the federal courts. The Chamber Report suggests that the SEC should review the Rules in light of, among other considerations, the disparity in discovery rules between the Rules and the Federal Rules. Among other granular suggestions, the Chamber Report promotes limited use of written interrogatories and requests for admission. While almost certainly not a reaction to the Chamber Report, the SEC's proposed amendments to the Rules do appear to be responsive to recent calls for reform in this area—of which the Chamber Report was representative.[9]

The SEC's proposed amendments would effect three central changes to the Rules, including changes modeled on the Federal Rules.[10]

- ***Parties would be permitted to take depositions as a general part of the administrative proceeding discovery process.*** Under current Rule 233, parties are allowed to take depositions by oral examination "only if a witness will be unable to attend or testify at a hearing." Under the proposed amendment to Rule 233, all parties (any respondents, as well as the Enforcement Division) would be able to conduct a fixed number of depositions, depending on the type of case. For example, under the SEC's proposal, in a proceeding involving one respondent (called a "120-day case" in the proposal), both the respondent and the SEC's trial unit would be allowed to file deposition notices for up to three persons, and also to request that a hearing officer issue a *subpoena duces tecum* (*i.e.*, for documents) in connection with the depositions. The amended Rule 233 would also create "procedures for deposition practice that are consistent with the Federal Rules of Civil Procedure."[11]

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6 According to the Chamber Report, in 1988 the Enforcement Division brought 109 administrative proceedings and 142 civil injunctive actions; in 2014, on the other hand, the Division brought 610 administrative proceedings and 145 civil injunctive actions.

7 Before 2010, the SEC could bring cease and desist actions against any person, including unregistered persons, and could seek disgorgement in such proceedings. With the 2010 passage of the Dodd-Frank Act, however, the SEC gained the authority to impose civil penalties in cease and desist proceedings against unregistered persons.

8 SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015).

9 *See, e.g.,* SEC Administrative Case Rules Likely Out of Date, GC Says (June 17, 2014) (quoting SEC General Counsel Anne K. Small as saying criticism of the Rules was "entirely reasonable").

10 *See* Amendments to the Commission's Rules of Practice, Proposed Rules (Sept. 24, 2015), Release Nos. 34-75976 and 34-75977.

11 Another proposal would amend to Rule 222's existing expert witness procedures in order to be "consistent with the requirements for expert witness disclosures and expert reports in the Federal Rules of Civil Procedure and . . . [to] promote efficiency in both prehearing discovery and the hearing."

- ***The amount of time before a hearing occurs would be increased.*** Proposed amendments to Rule 360, which sets timing for the stages of an SEC proceeding, would: (i) calculate the deadline for a hearing officer to file his initial decision from the time of the conclusion of the post-hearing briefing stage, rather than the date of service of the order instituting proceedings; (ii) increase the length of the "pre-hearing period" to provide parties with more time to conduct deposition discovery under the new proposed Rules; and (iii) establish a procedure for lengthening the initial filing deadline by up to 30 days.

- ***Parties would be required to submit filings and serve each other electronically, and redact "sensitive personal information" from all filings.*** The proposed amendments to Rules 151 and 152 would require persons to make all filings in electronic format, unless they certify that they are unable to comply with the requirement. In addition, all "sensitive personal information"—including, among other items, a person's Social Security number, credit card or debit card number, and home address (other than city and state)—must be either excluded or redacted from any filing.

Clarifying the Commission's Forum Selection Process

The debate over the SEC's increased use of administrative proceedings has sharpened over the last few months, as federal courts have considered a series of constitutional challenges brought by respondents in SEC administrative proceedings.

A little more than a month before the release of the Chamber Report, Judge Leigh Martin May, a federal judge in Atlanta, Georgia, granted an injunction brought by an individual who had been subject to an SEC administrative proceeding, and declared the SEC proceeding "likely unconstitutional" in light of the SEC's method for choosing its ALJs.[12] Shortly after the Chamber Report's publication, Judge May enjoined another SEC administrative proceeding, accepting the same arguments by a different subject of SEC enforcement, that the SEC's administrative process violated the Appointments Clause of the U.S. Constitution.[13] A day later, New York federal judge Richard Berman—citing his Georgia colleague's recent opinions—enjoined the SEC's administrative proceeding against a former Standard & Poor's executive, based on his finding that the respondent executive "had demonstrated irreparable harm along with a substantial likelihood of success on the merits of her claim that the SEC has violated the Appointments Clause."[14] The SEC has sought interlocutory appeal of these decisions at the federal appeals courts for the Second Circuit and the Eleventh Circuit, respectively; in the meantime, both federal district court judges have refused to stay the injunctions, on the basis that the SEC is not likely to persuade the appellate courts that its use of ALJs in these instances is constitutional.[15] The Second Circuit's September 17, 2015 decision in *Tilton v. SEC* did nothing to undermine this conclusion; in a brief order, the court granted a stay of SEC administrative proceedings against an individual private equity adviser, Lynn Tilton, and her associated firms, pending the appeals court's review of Tilton's challenge to the constitutionality of those proceedings.[16] The Seventh Circuit, on the other hand, already heard—and

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12 *Hill v. SEC*, Civil Action No. 15-CV-1801 (N.D. Ga. June 8, 2015) (finding that ALJs are "inferior officers", whom the U.S. Constitution would require be appointed by the President, the Commission acting as the "department head" of the SEC, or the federal judiciary).

13 Gray Financial Group, et al, v. S.E.C., 15–CV–492 (N.D.Ga. Aug. 4, 2015).

14 *Duka v. U.S. S.E.C.*, No. 15 Civ. 357 (S.D.N.Y. Aug. 12, 2015). *But see Tilton v. S.E.C.*, No. 15-CV-2472 (S.D.N.Y. June 30, 2015), in which U.S. District Judge Ronnie Abrams ruled on a motion raising similar issues relating to the constitutionality of SEC administrative proceedings, and declined to issue an injunction against those proceedings, based upon a finding that federal district courts lack jurisdiction to consider the proceedings' constitutionality.

15 *See* Decision and Order, *Duka v. SEC*, No. 15-CV-357 (S.D.N.Y. Sept. 17, 2105) and Order, *Hill v. SEC*, No. 15-CV-1801 (N.D. Ga. Aug. 4, 2015).

16 *Tilton v. S.E.C.*, No. 15-2103 (2d Cir. Sept. 17, 2015).

in August 2015 rejected—nearly identical arguments by a respondent in an SEC administrative proceeding who sought a preliminary injunction of those proceedings based on arguments that the proceedings are unconstitutional.[17]

The above-mentioned federal court decisions, and pending decisions, makes likely a *judicial* resolution of certain issues relating to the SEC's use administrative proceedings overseen by ALJs. Nonetheless, the Chamber Report's recommendations offer potential *administrative* changes to improve the process. According to the Chamber Report, the Commission should be required to take the following steps in order to "proactively" alter the existing forum selection regime. First, the Commission should adopt a procedure for selecting a forum that is based upon "objective principles grounded in and consistent with its broad statutory mandate." The objective principles should, first and foremost, prevent the Commission from using administrative proceedings to "adopt new interpretations of the federal securities laws or to apply existing interpretations to new or unique factual circumstances." This attempts to ensure that such "significant legal decisions" will be rendered by "truly impartial" federal judges, rather than ALJs.[18]

Second, the Chamber Report proposes that respondents should be able to challenge the Commission's forum selection, by filing a motion for reconsideration within five days of receiving notice of the forum selection decision but prior to the beginning of that proceeding. Under the Chamber's proposal, the Enforcement Division would have a chance to reply within another five days. The Adjudication Group of the Office of General Counsel would review the parties' filings and recommend a decision to the Commission within 10 days of the Enforcement Division's filing of a reply. Similarly, the Chamber Report's third recommendation questions the SEC's existing policy in which the government's recommendation of a forum determines, finally, whether the accused receives a jury trial. The Commission should, according to the Chamber Report, permit any party named in an administrative proceeding who desires a jury trial to file a notice to remove the case to federal court.

A recent decision by the Commission suggests that while the agency is not backing down on this issue, it understands the likelihood of a judicial resolution.[19] On September 17, 2015, four members of the Commission (with Commissioner Luis A. Aguilar abstaining) found that an investment adviser and its four principals had violated the Investment Advisers Act of 1940, and imposed certain sanctions against the respondents, including industry bars and monetary disgorgement. As it did earlier in the month,[20] the Commission squarely rejected claims by the respondents that the SEC's administrative forum was unconstitutional.[21] However, in an unusual move, the Commission also ordered that the sanctions be stayed until either the deadline for respondents to appeal passes or a federal appeals court agrees to hear the appeal and makes a decision—whichever comes later. The stay of sanctions is almost certainly a response to a decision in the case by Judge May, issued in August 2015; although Judge May denied the respondents' request for an injunction, based upon the fact that the ALJ had already issued a decision in the case, she noted that, "if the SEC finds against [respondents] and refuses to stay its order notwithstanding the SEC's statements at the hearing, the Court would entertain a renewed motion for preliminary injunction following the final order."[22] Given Judge May's decisions in *Hill* and *Gray*—which resolved similar issues in favor of individuals

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17 *Bebo v. SEC*, No. 15-1511 (7th Cir. Aug. 24, 2015).

18 Notably, this suggestion runs directly contrary to a May 2015 memorandum from the Enforcement Division that indicated that administrative proceedings may be better suited to "facilitate development" of the federal securities laws through expert ALJs' first considering "unsettled and complex legal issues." *See* SEC Enforcement Div., Division of Enforcement Approach to Forum Selection in Contested Actions, (May 18, 2015).

19 *In the Matter of Timbervest, LLC, et al.*, Admin. Proc. File No. 3-15519 (Sept. 17, 2015).

20 In the Matter of Raymond J. Lucia Companies, Inc, et al., Admin. Proc. File No. 3-15006 (Sept. 3, 2015).

21 *Supra* n.20 (finding, *inter alia*, that "[SEC ALJs] are not 'inferior officers' covered by the Appointments Clause . . . the two layers of tenure protection that ALJs enjoy" are not unconstitutional impediments to the President's powers).

22 Order, *Timbervest, LLC v. SEC*, No. 1:15-CV-2106 (Aug. 4, 2015).

contesting the SEC's use of administrative proceedings—the SEC's stay of sanctions likely resulted in its avoidance of another loss in federal court.

A Need for Clarity: SEC Policy on Seeking Admissions of Wrongdoing

Throughout its history, the SEC has permitted respondents to settle cases while neither admitting nor denying the Commission's findings and allegations. In 2012, Director Robert Khuzami of the Enforcement Division announced that any individual convicted criminally would not have this option in settling concomitant SEC civil or administrative proceedings.[23] A year later, SEC Chair Mary Jo White announced that the Commission was revising its policy still further, making clear that admissions of wrongdoing would be insisted upon on a "case-by-case basis."[24] The five-member Commission never formally voted on whether to revise the existing policy.[25] However, in a move that industry observers understood as reflecting the implementation of the revised policy, the Commission in July 2013 rejected a proposed settlement of lawsuits against hedge fund adviser Philip Falcone and his hedge fund, Harbinger Capital Partners LLC (Harbinger Capital), in which Falcone and Harbinger Capital would have paid $18 million but admitted no wrongdoing. [26] A month later, the SEC announced that it had reached a settlement in which Falcone and Harbinger Capital Partners agreed to pay $18 million and admit wrongdoing.[27] In various forums, Chair White and others have informally offered hints at when a case may trigger this requirement, but no clear criteria have been established.[28]

Since the SEC revised its position on admissions of wrongdoing in 2013, the SEC has reached 40 settlements in which respondents have admitted facts alleged by the SEC, violations of securities laws arising out of the SEC's factual allegations, or a combination of both[29]—and the Commission's fondness for the practice seems to be growing. Since June 1, 2015, the SEC has settled at least four cases in which defendants admitted some wrongdoing.[30] However, as the Chamber Report observes, it remains unclear to the entities and individuals subject to investigation by the SEC under what circumstances the Staff of the Enforcement Division (Enforcement Staff) seeks such admissions, and whether the Enforcement Staff is applying the SEC's revised admissions policy consistently and appropriately.

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23 Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012).

24 SEC Seeks Admissions of Fault (June 18, 2013).

25 *See generally* Jason E. Siegel, Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects, 103 Geo. L.J. 433, 435-442 (2015).

26 SEC Drops Falcone's $18M Fraud Deal (July 19, 2013).

27 Philip Falcone and Harbinger Capital Agree to Settlement (Aug. 19, 2013).

28 In a June 2013 internal memo, Division Co-Directors Ceresney and George Canellos stressed three instances that could increase the likelihood that the Staff will seek admissions of wrongdoing: (1) misconduct harming large numbers of investors or placing investors or the market at risk of serious harm; (2) egregious intentional misconduct; or (3) unlawful obstruction of SEC investigative processes. *See* What To Expect From SEC's Admission Of Wrongdoing Policy (July 11, 2013). In March 2015, Director Ceresney described similar, but not identical, factors, adding: (4) where an admission can send an important message to the markets; and (5) where the wrongdoer poses a particular future threat to investors or the markets. *Oversight of the SEC's Division of Enforcement: Hearing Before the Subcommittee on Capital Markets and Government-Sponsored Enterprises*, (Mar. 19, 2015).

29 Letter from Chair White to Sen. Elizabeth Warren, July 10, 2015, noting that "In a vast majority of our admissions cases, we have required the settling party to admit to the relevant facts and acknowledge that the admitted conduct violated the federal securities laws."

30 In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corporation, Release No. 75083 (June 1, 2015); In the Matter of OZ Management, LP, Release No. 75445 (July 14, 2015); In the Matter of James R. Holdman, Release No. 75462 (July 15, 2015); In the Matter of Chih Hsuan "Kiki" Lin, Release No. 75483 (July 17, 2015).

In order to ensure that the Enforcement Staff is consistently and fairly applying the revised admissions policy, the Chamber Report recommends that a clear statement of its scope be added to the Commission's *Rules on Informal and Other Procedures*. This "clear statement" must "articulate meaningful standards" governing when the SEC will require admissions. Furthermore, the Chamber Report indicates that the SEC should regularly review the policy with reference to the experience it develops through applying the policy over the years, and also look to similar policies of other government agencies. Lastly, the Commission should issue guidance regarding how the possibility of required admissions will be incorporated into settlement negotiations.

Trimming the SEC's Investigative Process

As industry insiders attest, companies and individuals facing an SEC investigation can expect the process to be time-consuming and expensive. According to a survey conducted by FTI Consulting on the Chamber's behalf, being the subject of an informal investigation—the vast majority of which do *not* result in an enforcement action—typically costs a company more than $600,000 over the months or years it lasts; facing a (typically multi-year) formal investigation, meanwhile, costs a company more than $4 million.[31] The prime culprit of this costly, drawn-out process, according to the Chamber Report, is the "avalanche of data" that is typically produced during the average investigation—in some cases, tens of millions of documents.[32] The Chamber Report recommends that the Commission respond to this surfeit of information by adopting a framework similar to the "initial disclosures" procedures and early discovery conferences used by federal courts.

According to the Chamber Report, the SEC's information management efforts should involve greater transparency regarding the Enforcement Staff's topics of interest, and such transparency should be delivered as early as possible in the investigative process. Specifically, the Chamber advocates that the SEC implement the following recommendations, among others, to narrow and focus its "discovery" process:

- The Enforcement Staff should notify investigation subjects (whether companies or individuals) as soon as possible that the Staff is interested in investigating certain subjects, and request that the subjects implement "information preservation measures" in order to protect potentially relevant documents or other information. The Enforcement Staff should require ongoing assurances throughout the investigation that the measures have been, and remain, in place.

- Early on in the investigation, the Enforcement Staff should "engage in dialogue" with counsel for subpoena recipients, which encourages investigation subjects to: (i) describe categories of documents the subjects deem most relevant to the SEC's inquiry; and (ii) identify individuals and entities they believe have information or knowledge relevant to the SEC's inquiry.

- Document production should be managed so that: (i) access to information is prioritized over formal production of information to the SEC; (ii) procedures for investigated entities to make rolling productions become formalized; and (iii) document demands or subpoenas take into account the real costs of producing the information.

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31 According to the Chamber Report, nearly three-quarters of informal investigations never progressed to the formal investigation phase.

32 According to the FTI survey, the average SEC subpoena requests documents for a period of 6.3 years, a time frame that could easily include millions of documents.

The SEC's Broken "Broken Windows" Policy

In a 2013 speech to the Securities Enforcement Forum, Chair Mary Jo White argued that the "Broken Windows" theory of policing—in which fixing a broken window shows that "disorder will not be tolerated—could, and should, be applied to the securities markets:

> I believe it is important to pursue even the smallest infractions. Retail investors, in particular, need to be protected from unscrupulous advisers and brokers, whatever their size and the size of the violation that victimizes the investor. That is why George Canellos and Andrew Ceresney, our co-directors of the Division of Enforcement, are working to build upon the strength of the division by ensuring that we pursue all types of wrongdoing.[33]

The Chamber Report does not object to the Commission's attention to "even the smallest infractions," but rather to the costly, time-consuming methods it uses to resolve these minor infractions. According to the Chamber Report, "the Commission will never have sufficient resources to pursue every infraction, large or small," and use of the SEC's resources to do so "will diminish [its] capacity to investigate and enforce major infractions." Rather than suggesting the Commission abandon its focus on "Broken Windows" enforcement, the Chamber Report recommends the SEC use informal, remedial methods that it either has employed in the past, or are being used in different contexts today.

In order to resolve identified minor deficiencies speedily and with less cost, the Chamber Report suggests that the SEC employ in the enforcement process deficiency letters like those used by the SEC's Office of Compliance Inspections and Examinations (OCIE) to inform inspected entities of minor deficiencies, and to which recipients would be expected to respond in order to explain how the deficiencies would be resolved. Alternatively, the SEC could use a remedy from "past decades"—in which it released Reports of Investigations that resolved matters without formal findings of violations or sanctions, and which were carefully negotiated by the Enforcement Staff and investigated entities.[34]

Strengthening and Formalizing the Wells Process

Over 40 years ago, the Wells Committee—named for Chairman John A. Wells—issued its *Report of the Advisory Committee on Enforcement Policies and Practices*. Since then, the SEC's process for conducting investigations and enforcement activities (Wells process) has gradually, but significantly, evolved—often through informal decisions by the SEC or the Enforcement Staff. As a result, the Wells process, by which the Commission sends a Wells notice to indicate the substance of charges that it plans to bring against the recipient, and the recipient is afforded the chance to submit a statement to address why such an enforcement proceeding should not begin, has changed *in practice* even as the Commission has not incorporated certain "unwritten but well-established methods" into its *Rules on Informal and Other Procedures*.[35]

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33 Chair White, Remarks at the 2013 Securities Enforcement Forum (accessed Aug. 5, 2015)

34 Exchange Act Section 21(a) gives "authority and discretion [to the SEC] to investigate violations."

35 Under Rule 5(c) of the Informal Rules, "[p]ersons who become involved in . . . investigations may . . . submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation." Furthermore, "[u]pon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the [SEC] for the commencement of an administrative or injunction proceeding."

Typical practice now generally holds that, prior to issuance of a Wells notice, Enforcement Staff and defense counsel have a chance to reach an agreement under which the Enforcement Staff "engages in [a] substantive dialogue" regarding the matter under investigation, and the investigated party has the opportunity to make a "pre-Wells submission." Because of the informal nature of this "pre-Wells" process, both parties to the conversation are permitted to act very differently than if the formalized, rule-bound Wells process had begun. For example, a respondent company may reasonably decide that a pre-Wells notice does not trigger any public disclosure requirement, given the informal, preliminary state of the process. Similarly, the Enforcement Staff may choose to submit to the Commission an action memorandum including recommendation for enforcement action (Action Memorandum), without also submitting a respondent/defendant's pre-Wells submission. Another informal, but central, aspect of the Wells process is the white paper process, through which counsel for a party being investigated by the SEC may choose to submit a paper answering a specific, significant legal or factual question in order to narrow the Commission's investigation.

In order to return the Wells process to its "time-honored practices" and codify reasonable changes that have been made to that process, the Chamber Report recommends the Enforcement Division adopt the following changes:

- Institute a policy that the Commission always receives any Wells submission at the same time that the Enforcement Staff provides its Action Memorandum, and clarify if, and when, pre-Wells submissions and white papers will be submitted to the Commission;
- Establish a "presumption of access" to Enforcement Division investigative files, to ensure that respondents may submit a "meaningful response" to any request for a white paper or a Wells Notice; [36]
- Prior to initiating the white paper or Wells submission process, fully present the Division's case (including supporting evidence) to potential respondents; and
- Formally adopt a policy that, prior to filing an enforcement action, the Enforcement Division will provide "reasonable advance notice" to any party that has made a Wells submission or requested such advance notice.

Conclusion

Given the depth of empirical data and qualitative research that supports the Chamber's extensive recommendations, its express reference to certain topical legal and regulatory disputes, as well as the Chamber's history of garnering attention for its observations in this area,[37] the Chamber Report should be considered a useful guide to potential policy changes over the next few years. This is especially true in light of recent developments—such as the SEC's proposed amendments to its Rules of Practice—that appear to be, if not directly responsive to the Chamber Report, certainly indicative of the Chamber Report's thoroughness in summarizing "hot-button" issues for the SEC and its Division of Enforcement.

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[36] As part of the Dodd-Frank Act, the Enforcement Staff must file an action, or provide notice to the Division's Director that it will *not* file an action, within six months of providing a written Wells notification to any person. According to the Chamber Report, the Division treats the white paper process and the pre-Wells process separately from the Wells notification referenced by the Act; unsurprisingly, then, anecdotal evidence suggests that the use of white papers and pre-Wells submissions have increased since the passage of the Dodd-Frank Act.

[37] *See, e.g.*, Chamber of Commerce hits at 'too harsh' SEC (Mar. 9, 2006) (discussing the Chamber's 2006 report on the Division of Enforcement).

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