



NEW JERSEY STATE BAR ASSOCIATION

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December 1, 2015

Via Electronic Mail

Mr. Brent J. Fields

Secretary

United States Securities and Exchange Commission

100 F Street N.E.

Washington, D.C. 20549-1090

Re: File No. S7-18-15

Release No. 34-75976

Proposed Amendments to the Commission's Rules of Practice

Dear Mr. Fields:

This letter is submitted on behalf of the New Jersey State Bar Association (“**NJSBA**” or the “Association”), in response to the request for comment by the U. S. Securities and Exchange Commission (the “**Commission**”) to the proposed rule amendments presented in the proposed release referenced above (the “**Proposed Amendments**”). The Commission has proposed amendments to its Rules of Practice to, among other items: (1) enlarge the timing of certain stages of an administrative proceeding; 2) allow parties in an administrative proceeding to take depositions and disclosure of experts and their written reports; 3) require a respondent to set forth in an answer all avoidance and affirmative defenses; and 4) modify the procedure for filing a petition for review of an initial decision by only requiring a summary statement of the issues presented.

The comments set forth in this letter (the “**Comment Letter**”) represent the views of the NJSBA.

The NJSBA appreciates the opportunity to comment on the Proposed Amendments. We strongly support those aspects of the Propose Amendments that provide respondents with a fairer forum to defend serious, complex and life altering allegations of securities fraud by the Commission. The NJSBA believes that although a good first step, the Proposed Amendments do not adequately address the unfairness that currently exists in favor of the Commission in its administrative adjudicative process.

The NJSBA recommends that the Commission's Rules of Practice for administrative proceedings reflect the well-established legal principles that have been articulated by the Article III courts. The NJSBA, therefore, has the following comments to the Proposed Amendments:

Enlarging the Timing of Certain Stages of an Administrative Proceeding.The Amendments to Rule 360¹ Should Be Adopted with Suggested Revisions

The Association supports the Commission's proposed amendments to Rule 360 of the Rules of Practice that modify the timing of four (4) defined stages or periods of an administrative proceeding, which are: the pre-hearing, the hearing, transcript review and brief submission, and the deadline for hearing officers' filing of the initial decision. The Association also agrees with the Commission's identification of certain "weaknesses" in the current Rule that impacts the parties and the hearing officer in preparing, conducting and ultimately deciding the administrative matter. The Association concurs with the Commission's view that using the date of service of the order instituting proceedings as the "trigger point" for establishing whether the initial decision is filed within 120, 210 or 300 days from service, pursuant to Section 12(j) of the Exchange Act, is an artificial and arbitrary construction, which is removed from the realities of the facts, witnesses, documentary evidence and issues of each case.

The Commission correctly assesses that in the most complex cases (300-day), the parties frequently request extension of times for hearing preparation and that pre-hearing motions also require the granting of time extensions. The potential for extension requests in 120 or 210-day matters also exists, and we recommend that the Commission consider modifying the time periods for those proceeding types.

The NJSBA supports the Commission's view that defining time limits for an administrative proceeding is a worthy goal. There exists a demonstrated record of substantial extensions of the current time-lines for 120, 210 and 300 day matters based on sanctions and type of securities law violations at the requests of the parties. Thus these timelines fail to allow respondents to properly prepare to defend the Commission's charges. With the challenges of nature of today's discovery such as the review and use of electronically stored information, the potential impact of the ability to take and defend depositions in administrative proceedings, as well as the increasing complexity of the cases being brought by the SEC, fundamental fairness to respondents mandates that the current Commission times fames by extended.

With respect to establishment of a range of time during which the administrative hearing must begin, we suggest that Rule 360 should extend the time for the parties to obtain hearing transcripts and submit post-hearing briefs to at least three (3) months rather than the proposed two (2) months. For example, depending on when the Order is served, the parties could be impacted by holidays, as well as the need to seek an extension to file post-hearing briefs based on the nature of the case. It should also be considered that certain cases may not require the submission of post-hearing briefs. It can be assumed that the more complex cases will more frequently utilize motions for time extensions.

The Association supports the Commission's view that the current four (4) month pre-hearing time period is not adequate for respondents to prepare for an administrative hearing. The Commission proposes to double the time period for the pre-hearing to eight (8) months. It is the Association's position that the eight (8) month prehearing period in complex cases involving

¹ 17 CFR 200.360

voluminous electronic discovery, facts witnesses, investigative transcripts, as well as responding and taking of discovery in an administrative proceeding, will be insufficient and reflects the fundamental unfairness of an administrative proceeding when the Commission staff charges a respondent with securities fraud. It is the Association's suggestion that Administrative Law Judge ("ALJ") have the authority to extend the pre-hearing period, on good cause, up to 18 months.

Changing the "trigger point" for the deadline for filing the ALJ's initial decision to the completion dates of the post-hearing briefing or briefing of dispositive motions/defaults, rather than the service date of the order, incorporates a realistic extension of time that will be utilized by the hearing officers in their preparation of the initial decision. NJSBA also submits that this change would allow proceedings to progress in a manner that would be more acceptable to all parties, and could eliminate or reduce the need for extension requests. NJSBA disagrees with the Commission's assessment that this change of trigger point probably will not change the amount of time that the hearing officers have to prepare the initial decision. With this change, the commencement of the hearing officer's drafting of the initial decision would be better aligned with the completion of the hearing, potentially eliminating delays and allowing for greater efficiency in the administrative process and improvement in the hearing officer's decisions.

The Association supports the proposed amendment to the Rule 360 procedure that will allow the hearing officer to request an extension of time for up to a maximum of thirty (30) days from the Commission, based on his/her certification of case management needs. It appears that the hearing officer has the discretion to make the case management need certification based on his/her knowledge and oversight of the matter. The Association suggests that the certification should be issued at least 45 days, and perhaps 60 days, prior to the expiration of the initial decision deadline, rather than 30 days as proposed in the amendment. The Association further supports the amended Rule's retention of the provision allowing the Chief Law Judge to request an extension of any length of time from the Commission, which it assumes would also be based on case management requirements.

Finally, the Association suggests that the administrative process would benefit from the issuance of an order either granting or rejecting the proposed extension of time from the Commission within fourteen (14) days after receiving the hearing officer's certification. Such order adds certainty for the parties.

Discovery in Adjudicative Administrative Proceeding.

Proposed Rule 233 Amendments

Rule 233² currently permits parties to take depositions by oral examination only if a witness will be unavailable to attend or testify at a hearing. If a complex administrative proceeding involves a single respondent, the proposed amendment would allow the respondent and the Division to each depose three (3) persons. If a complex administrative proceeding involves multiple respondents, the proposed amendment would allow respondents to collectively depose five (5) persons and the Division to depose five (5) persons (i.e., a maximum of five (5) depositions per

² 17 CFR 200.233

side). The proposed amendment is intended to provide parties with an opportunity to develop arguments and defenses through deposition discovery, which may narrow the facts and issues to be explored during the hearing.

The Association supports the Commission's efforts to provide parties with increased access to deposition discovery, but believes that the proposed rule changes fall short of the Commission's stated goals and, more generally, with fundamental principles of fairness. In the Association's view, the number of depositions available to the parties should not be arbitrarily limited by the number of parties (single vs. multi-respondent) but rather should be dictated by the scope and complexity of the case. Under the proposed rule, ALJs would have no discretion to authorize additional depositions based on, *inter alia*, the complexity of the case, the number of respondents, the divergent interests among the respondents. The Association suggests Rule 233 provide ALJs with the authority to grant the taking of additional depositions in a manner similar to that found in the Federal Rule of Civil Procedure 30(a)(2). Specifically, a party could obtain leave of the ALJ and the ALJ must grant leave if the parties have not already stipulated to a deposition and (i) in a single respondent proceeding, the deposition would result in more than three (3) depositions being taken by the requesting party; or (ii) in a multiple respondent proceeding, the deposition would result in more than five (5) depositions being taken by the requesting party.

The Association recommends that ALJs should also be empowered to limit the number, frequency or extent of depositions otherwise allowed by Rule 233 in a manner similar to FRCP 26(b)(2)(C) when the ALJ determines that (i) the deposition sought is unreasonably cumulative or duplicative, or the information sought thereby could be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the requesting party has had ample opportunity to obtain the information sought thereby through discovery in the action; or (iii) the burden or expense of the proposed deposition outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the deposition in resolving the issues.

The Association believes the changes suggested to the proposed rules effectively address respondents' concerns with the artificial limitation of the number of depositions while addressing the SEC's concern for the public interest in resolving administrative proceedings promptly and efficiently.

Hearsay

Currently, Rule 320³ prohibits the introduction of evidence that is "irrelevant, immaterial or unduly repetitious." Proposed Rule 320 would also exclude "unreliable" evidence. The Proposed Rule, however, makes clear that hearsay evidence "may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." By mandating some restriction on hearsay evidence, the Proposed Rule is an improvement, but it does not go far enough.

³ 17 CFR 201.320

Proposed Rule 320 clearly incorporates a lesser standard of admissibility than the “Residual Exception” of Fed. R. Evid. 807. There is no reason that the SEC should be allowed to prosecute “in house” a case dependent upon unreliable hearsay evidence when the same case would be dismissed in federal court.

Pleading Affirmative Defenses by Respondents.

The Proposed Amendments seek to amend Rule 220⁴ that presently requires a respondent to plead defenses of *res judicata*, statute of limitations or any other matter constituting an affirmative defense. The Proposed Amendments would apparently clarify that respondents are required to plead theories of avoidance that may not be technical affirmative defenses. FRCP Rule 8(c) similarly requires that a defendant must affirmatively state any avoidance or affirmative defenses. Nonetheless, the Proposed Amendments further provide examples of the Commission’s view of an avoidance defense required to be pled in a respondent’s answer.

The Association believes that the Commission’s general view of an avoidance defense is improper and does not reflect the status of the law that interprets FRCP Rule 8(c). For instance, Proposed Amendments, at footnote 28, suggests that the “reliance on counsel” is a theory of avoidance and must be raised in the respondent’s answer. However, the law does not support the Commission’s view, and reliance on counsel is not a defense required to be raised in an answer, but simply goes to the evidence of whether a respondent acted in good faith. See Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004). Moreover, a broad interpretation of avoidance by the Commission would be prejudicial to a respondent, and also infringe on the attorney work product doctrine⁵.

In Article III courts, the Commission’s view of avoidance would not be sustained.⁶ Furthermore, it would be subject to criticism that it is a back-door approach to obtaining an attorneys’ trial strategy and provide a further unfair advantage to the Commission staff in administrative proceedings. Therefore, to the extent that the proposed amendment reflects an improper view by the Commission regarding an avoidance defense, the Association respectfully does not support the Proposed Amendments relative to Rule 220.

Amendment to the Appeal Procedure of an ALJ Initial Decision.

The Proposed Amendments seek to amend Rule 410(b)⁷ which requires that a notice of appeal of a decision by the ALJ set forth specific findings and conclusions that a petitioner seeks the Commission’s review. The Association supports the amendment to Rule 410(b) that would adopt a notice standard for filing appeals with the Commission to require a summary statement of the issues presented on appeal. The Association concurs with the Commission’s view that the notice standard allows a party to focus its efforts on developing the issues in the appeal brief for the Commission’s consideration.

⁴ 17 CFR 201.220

⁵ Hickman v. Taylor, 329 U.S.495 (1947)

⁶ Eagle – Picher Indus., Inc. v. U.S., 11 Cl.Ct. 452, 462 (1987) Shelton v. American Motors Corp., 805 F2nd 1323, 1329 (8th Circ. 1986)

⁷ 17 CFR 201.410(b)

The Association is concerned, however, that that limiting the notice of appeal to three (3) pages may not be sufficient to accurately describe the issues - even in a summary format. Although three (3) pages for the summary notice may seem adequate, the notice will provide for a caption and other identifying information. The Association therefore suggests that the Commission increase the page limit to at least five (5) pages.

In summary, the NJSBA supports the Commission's Proposed Amendments to the extent that the proposals reflect the well-established principles of fairness that are reflected in Article III Courts and the Federal Rules of Civil Procedure. The Commission's Proposed Amendments to its Rules of Practice are a step in the right direction. But the Association believes that the Proposed Amendments do not adequately address the inadequacies of the Commission's "in-house" administrative proceedings.

The Association appreciates the opportunity to comment on the Proposed Amendments, and respectfully requests that the Commission consider these recommendations and suggestions. The Association is available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Miles S. Winders, III", followed by three horizontal lines.

MILES S. WINDERS, III
President