

December 3, 2015

VIA EMAIL

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549-1090

Re: File Number S7-18-15 - Proposed Amendments to Rules of Practice

Dear Mr. Fields:

I write in response to the Securities and Exchange Commission's request for comments on proposed amendments to the Rules of Practice.

I have represented respondents in the Commission's administrative process. My experience has been that current procedures give the Enforcement Division significant advantages over respondents. To begin, the Enforcement Division enjoys seemingly limitless time to investigate and prepare a case against respondents, while respondents receive very little time to prepare a defense. The Enforcement Division also has extensive tools with which to conduct that investigation, including near-limitless power to depose witnesses. Respondents, on the other hand, are ordinarily not allowed to depose anyone at all. Given these disparities, it is no surprise that respondents almost always lose in the administrative process, more often than their counterparts in federal court do.

The proposed amendments would provide much-needed relief from this imbalance. As such, the changes should apply to cases that are currently pending before the Commission, to the extent that doing so is "just and practicable."

Although the amendments are necessary, they are not sufficient to ensure that respondents receive due process. I agree with Susan E. Brune about the necessity for the changes listed in her letter of November 23, 2015, providing comments on the proposed amendments. In addition to those proposed changes, I respectfully submit that the proposed amendments should (a) apply to pending cases where "just and practicable," (b) ensure that respondents receive preparation time that equals at least 50% of the time the Enforcement Division had to prepare a case against respondents, with a default cap of one year, and (c) at least give ALJs discretion to allow respondents to take more depositions than what is currently proposed.

1. Effective Date of the Proposed Rule Changes

The Commission proposes that its amended Rules of Practice govern proceedings that are commenced after the effective date of those amended rules. But for administrative respondents who have not had an evidentiary hearing before an SEC Administrative Law Judge, a prospective application of the amended rules would be unjust. Instead of implementing a uniform prospective application, the Commission should instead adopt the approach taken with amendments to procedural rules in federal judicial proceedings. That is, the amendments should apply to pending cases “insofar as just and practicable.” *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994); Order Amending Federal Rules of Civil Procedure (Apr. 29, 2015) (stating that amendments are applicable to pending cases “insofar as just and practicable”).

The United States Supreme Court has noted that “[c]hanges in procedural rules may often be applied in suits arising before their enactment[.]” *Landgraf*, 511 U.S. at 275. Indeed, for rules that are “merely procedural in a strict sense (say, setting deadlines for filing and disposition) the natural expectation would be that [they] would apply to pending cases.” *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (internal citations omitted); *cf. Moore v. Agency for Int’l Development*, 994 F.2d 874, 879 (D.C. Cir. 1993) (“Where a statute deals only with procedure, prima facie it applies to all actions – to those which have accrued or are pending, and to future actions.”) (quoting Norman J. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41.04, at 349 (4th ed. 1986)). And because procedural rules regulate secondary, instead of primary, conduct, the considerations underlying the otherwise well-settled presumption against retroactivity (*e.g.*, fair notice, reasonable reliance, and the protection of settled expectations) are diminished. *See Landgraf*, 511 U.S. at 275 (noting “the diminished reliance interests in matters of procedure”).

The proposed rules do not level the playing field in administrative proceedings, but they do present more generous procedures than those offered by the existing slate. Given these circumstances, the proposed rules should apply retrospectively to pending cases. *See Landgraf*, 511 U.S. at 276 n. 30 (reciting “the principle . . . that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one”).

Application of the amended rules to cases which have yet to proceed to an evidentiary hearing would be both just and feasible. *See Landgraf*, 511 U.S. at 275, n.29 (stating that “[o]ur orders approving amendments to federal procedural rules reflect the commonsense notion that applicability of such provisions ordinarily depends on the posture of the particular case”). Indeed, this is in stark contrast to a situation where a litigant seeks to benefit from the retrospective application of new procedural protections after a trial has already been held. *See id.* (noting, for instance, that the “promulgation of a new rule of evidence would not require an appellate remand for a new trial”). In short, given their purely procedural nature, the amended Rules of Practice should be applied to pending cases which have yet to proceed to an evidentiary hearing.

2. Minimum Due Process Protections

In addition to applying the amended rules retroactively to respondents where just and practicable, the amended rules should afford respondents at least minimal due process.

Intentional or not, current procedures favor the Enforcement Division dramatically. To begin, the Enforcement Division has seemingly limitless time – often years – to investigate respondents. For example, the Enforcement Division investigated one respondent I represent for two years before obtaining an Order Instituting Proceedings against him. Such leeway gives the Enforcement Division ample opportunity to prepare a case against respondents. On the other hand, respondents receive up to four months to prepare a defense once the Order issues. That is an impossibly short amount of time in many cases, especially when the Enforcement Division's investigative file contains many thousands of documents to review.

In addition to time, the current procedures give the Enforcement Division limitless authority to depose witnesses nationwide during the investigation. Respondents ordinarily have no right to depose anyone at all. That is a significant handicap. It means that respondents have no opportunity to question in advance the witnesses the Enforcement Division calls at the final hearing. The prohibition on subpoenaing deponents also prevents respondents from questioning pre-hearing witnesses who might have helpful testimony but who refuse to speak with respondents without a subpoena. In my experience, that is a real possibility: Potential witnesses fear drawing the Enforcement Division's ire and thus avoid any contact with respondents that might lead to those witnesses being called opposite the Division at the final hearing.

To remedy these defects, the Commission should adjust the proposed amendments in at least two ways. First, the rules should guarantee that respondents' pre-hearing preparation time is at least 50% of the time the Enforcement Division took to investigate respondents – with a default cap at one year for respondents' preparation time. For example, if two years pass between issuance of the order initiating an investigation and the Order Instituting Proceedings, the respondent should have one year to prepare between the latter order and the final hearing. And if the Division investigated a respondent for three years, the respondent should get one year by default (leaving any further extension to the ALJ's discretion).

Second, because depositions are such a critical tool, especially in complex cases, the amended rules should at least give ALJs discretion to expand the number of depositions a respondent may take if doing so would not be unduly cumulative, the respondent can show that he has not had an adequate opportunity to obtain the information sought, and the burden of allowing the additional depositions would not exceed the benefit. *See* F.R.C.P. 26(b)(2)(A), (C). That will help ensure that respondents in complex cases have an adequate opportunity to prepare a defense without allowing unnecessary depositions in every case.

Finally, I join Ms. Brune in emphasizing that the changes to the Rules of Practice should not encourage the Commission to send cases to the administrative process liberally. The

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consequences of enforcement actions can be significant, sometimes life-changing. Those actions are also often complex. The default forum to handle such serious, complex matters should be the one with the greatest procedural protections and the most tools for sorting out complex matters: federal court.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "SE Hudson", is written in a cursive style.

Stephen E. Hudson