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December 4, 2015

Mr. Brent Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. S7-18-15

Dear Mr. Fields:

This letter is a response to the Securities and Exchange Commission's request for comments on its proposed amendments to the Commission's Rules of Practice and the application of those amendments to pending cases. We are members of the Government Enforcement and White Collar Crime group at Skadden, Arps, Slate, Meagher & Flom LLP, and are writing to express our personal views. We regularly represent individuals and companies before the Commission in enforcement matters and appreciate the importance of the agency's mission in protecting investors through enforcement actions.

As vital as that mission is, protecting investors is not the agency's only mandate. As a government agency with the power to destroy livelihoods and reputations, in addition to levying substantial monetary penalties, the Commission also has a responsibility to uphold the principles of fairness and due process on which the validity of the American justice system depends. The Commission's own legitimacy depends just as much on its fidelity to those principles, as it does on its win-loss percentage in enforcement actions.

As a result of its increased use of administrative proceedings to try complex cases, the Commission may have improved its chances of winning any particular case, but it has undermined the public's confidence in the institution itself. This lack of confidence stems from the fact that the administrative process suffers from conflicts-of-interest that preclude it from being perceived as fair. The most offensive characteristic of the system is that the Commission decides to authorize the filing of an enforcement action against certain respondents, and then later sits in judgment of those same respondents. The Commission cannot be a neutral arbiter in such matters because it has already prejudged the merits of the case. Indeed, if it has ever occurred, it is extremely rare for a Commissioner to dismiss a case after having already been persuaded to approve the very institution of those proceedings. Nor can the Commission be neutral in deciding issues of law when it also serves as the prosecutor that stands to benefit from favorable legal rulings.

As the Commission is well aware, our federal judicial system is viewed as legitimate in large part because it affords defendants in complex cases the opportunity to have such cases decided by a jury of their peers. As adjudicative bodies that operate outside the government's influence, juries stand as one of the citizenry's most deep-seated safeguards against abuses of government power. Such protections are especially important in SEC enforcement actions where the government seeks to penalize and condemn those accused of wrongdoing. Rather than embrace the jury trial and the legitimacy it bestows by continuing its practice of bringing complex cases in federal court, the SEC has instead increasingly chosen to subject respondents in such cases to a system without juries, ostensibly, to increase its own chances of winning the litigation. Indeed, the Division of Enforcement of the SEC has admitted that in deciding whether to bring a case administratively or in federal court, the agency would consider "whether the case would play well before a jury." *See Yin Wilczek, Bloomberg BNA Corporate Law and Accountability Report, "SEC to Pursue More Insider Trading Cases In Administrative Forum, Director Says" (June 13, 2014).*

Without an independent adjudicator, no number of proposed changes to the SEC's Rules of Practice will be sufficient to correct the impression that the SEC's administrative system is conflicted and prejudiced. Accordingly, the Commission's proposed rules' greatest flaw is that they do nothing to correct this underlying problem. To remedy this, the Commission should reform its rules to allow respondents in certain cases, such as those brought under the SEC's anti-fraud provisions, to remove a suit filed administratively to federal court, as was recently suggested by former SEC Commissioner Joseph Grundfest before Congress. *See Legislative Proposals to Improve the U.S. Capital Markets: Hearing on H.R. 3798, et al., Before the House Subcommittee on Capital Markets and Government Sponsored Enterprises, 114th Cong. 7 (Dec. 2, 2015) (statement of Hon. Joseph*

Grundfest), available at: <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba16-wstate-jgrundfest-20151202.pdf>.

Rather than address the most conspicuous problem with the administrative system, the Commission's proposals focus on making incremental procedural changes. While insufficient on its own to ensure the due process rights of respondents, we agree that, at a minimum, a procedural overhaul of the system is needed, especially with regard to factually complex cases.

As they currently stand, the rules of procedure that govern SEC administrative proceedings greatly favor the SEC over respondents in such cases. There is a stark asymmetry between the time and tools that the SEC has to prepare its case, and that which is afforded respondents. The SEC often spends years investigating cases and has an almost unlimited ability to subpoena documents and testimony from witnesses. It never has to file a case before it is fully ready to litigate it. In contrast, respondents often do not know the specific nature of what they will be charged with until the SEC files its order instituting proceedings, at which point they have only a matter of months to review what may constitute millions of electronic documents and/or audio files before a factual hearing is held. Respondents must prepare for that hearing without the benefit of even the most basic discovery mechanisms, such as depositions or interrogatories. It is in part due to these disparities that the SEC's increased use of administrative proceedings has been accompanied by an upsurge of respondents seeking to extricate themselves from such proceedings by challenging their constitutionality on various grounds. If respondents viewed the SEC's procedures in these cases as fair, such a trend would not have occurred.

The point is illustrated by the case against our clients Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC, Patriarch Partners XIV, LLC, and Patriarch Partners XV, LLC ("Patriarch") in an SEC administrative proceeding relating to alleged conduct over a ten-year time frame involving multiple structured finance vehicles. Although the SEC took over five years to investigate and prepare its case, we were forced to digest the SEC's entire investigative file, including approximately 2.4 million pages of documents and transcripts of witness testimony, respond to the SEC's multiple expert reports, and prepare our own witnesses and experts, all within a six-month time frame. Patriarch, in turn, challenged the constitutionality of the administrative proceeding, a matter which is currently pending before the United States Court of Appeals for the Second Circuit while the administrative proceeding is stayed.

The SEC's proposed rule changes do little to correct the imbalance. In proposing that the number of depositions afforded to respondents in multi-

respondent cases be capped at five and that a hearing must occur within eight months of the filing of an order instituting proceedings, the Commission has proposed a "one-size-fits-all" approach to adjudication that is fundamentally at odds with the way that the federal judiciary operates and which will be insufficient in most complicated cases. *See* Amendments to the Commission's Rules of Practice ("Proposed Rules") at 5, 7-9, Release No. 34-75976 (Sept. 24, 2015). While some depositions are certainly better than no depositions, and an eight-month schedule is better than a four-month one, we submit that decisions as to the appropriate number of depositions and timing for the hearing should be left to the discretion of the adjudicators who are presumably most familiar with the issues and needs of any particular case. There should be no predetermined limit on the number of depositions or on the timing of the hearing.

With regard to the minimal procedural changes that it offers, the Commission has requested comment on "the effective date and whether and how any amended rules should apply to proceedings pending on the effective date." Proposed Rules at 25. We submit that any changes that enhance the rights of respondents, no matter how small, should apply to proceedings pending on their effective date.

The Commission has stated that it has proposed these amended rules to "modernize" the Rules of Practice and "to provide parties in administrative proceedings with the ability to use depositions and other discovery tools." *See* Press Release 2015-209, Securities and Exchange Commission, SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015); Proposed Rules at 3. The Commission has recognized that allowing respondents the ability to take depositions will provide them with "an opportunity to develop arguments and defenses . . . which may narrow the facts and issues to be explored during the hearing." *See* Proposed Rules at 7. The Commission has also proposed extending the schedule for when a hearing must occur. *Id.* at 5.

The rationale for updating the rules, affording additional time to prepare for a hearing and allowing additional discovery applies with equal force to respondents in pending SEC administrative proceedings as it does to respondents in prospective proceedings. The former are in just as much need of the time and opportunity to develop arguments and defenses as the latter. There is no reason to deny a respondent this benefit simply because the SEC chose to institute a proceeding against that respondent prior to the effective date of the amendments.

When the Federal Rules of Civil Procedure are amended, those amendments generally apply to pending cases, unless such an application would "work injustice." *See Paluch v. Secretary Pennsylvania Dep't of Corrections*, 442 Fed. App'x 690, 2011 WL 3652418, at *2 (3d Cir. 2011) ("Generally, when amended procedural rules

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take effect during the pendency of a case, the amended rules will be given retroactive application to the maximum extent possible, unless doing so would work injustice."); *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 335 n.2 (5th Cir. 2004) ("Our jurisprudence requires that the amended Rules . . . be given retroactive application to the maximum extent possible . . . unless their application . . . would work injustice.").

No injustice would result from providing respondents in pending SEC administrative proceedings with greater discovery rights. To the contrary, extending such additional rights to respondents would help correct an injustice by allowing them a greater opportunity to develop arguments and defenses in the face of a system that is already heavily tilted towards the SEC.

Very truly yours,

/s/ David Zornow

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