

Reader Responds To Recent Law Judge Blog Post

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Recently, we posted [an article about New Administrative Law Judges at the Securities and Exchange Commission](#). The article, if you have not read it, included our thoughts as to why the SEC is bulking up its administrative law bench. We posited a number of reasons the SEC might be trying to bring more cases in its administrative courts, including cases that it has historically filed in the United States District Courts. In response to that article, we heard from an administrative law judge, from another agency, who saw our article in the National Law Review. The Judge wrote us because “a few issues [we] raise[d] are worthy of clarification.” We have included some of the Judge’s comments here and provided our responses. Before addressing any of the Judge’s substantive points, we first want to note that we appreciate the feedback. Our blog is intended to spark dialogue, raise issues, and express (and test) opinions. So, we welcome the commentary and invite more. One more point before getting to the substance: we apologize for inadvertently referring to the newest administrative law judge at the SEC, Judge Grimes, as “Mr. Grimes.” Upon realizing it, we immediately corrected our mistake and meant no slight by it. With respect to the substance, the Judge’s comments largely focused on questions of bias and independence. According to the Judge, we seemed “to imply that the SEC is more likely to find a favorable forum before their Administrative Law Judges because it’s their ‘hometown judge.’” The Judge went on to note that our “statements imply that SEC ALJs are biased in favor of the agency.” The Judge also noted that we have left our readers “with the impression that ALJs are simply federal employees under the direction and control of the agency,” even though the ALJs are appointed after “extensive testing and interviewing” and may only be removed for “good cause.” Finally, the Judge asked what “facts [we] draw to support” our conclusions. To begin with, we did not mean or intend to attack the character or integrity of any ALJ, at the SEC or otherwise. We know, from our experience, that the Administrative Law Judges are hard-working, conscientious, and thorough. They are intelligent and diligent. We do not believe them to be “controlled,” in any way, by the Commission itself. Our point was intended to be more nuanced. In our experience, put simply, many ALJs seem often inclined to give the benefit of the doubt to the SEC’s Division of Enforcement lawyers who appear before them, as well as to the Division’s experts, witnesses, and its view and interpretations of the law. This may very well be because the ALJs share the same office space, cafeterias, and gyms as—and see the same lawyers from—the Division of Enforcement. In other words, based on our experience, our concern is that some ALJs

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Administrative Law Judge (ALJ)

come to see themselves as part of an enforcement mission, albeit in a market in which enforcement is needed. Administrative Law Judges with such a view are more likely to perceive or even presume that defendants brought before them, by the same agency that selected the ALJ, are there for good reason. Certainly, this is not an “ALJ specific” issue; there are Article III judges who appear to share this same predilection. Many former government attorneys understandably respect and even identify with the mission of the offices from which they came. As a result, some judges may—and sometimes, in the opinion of many private attorneys who appear in such forums, perceptibly do—give the benefit of the doubt to the government attorneys who appear before them. As we indicated in our prior article, it has been the observation of many private defense lawyers that such phenomena are not unheard of in SEC Administrative proceedings. In turn, lawyers from the Division of Enforcement may also have this perception—which may explain why they want to bring more cases before ALJs. Of course, we are not alone in positing that the SEC Enforcement Staff may feel more comfortable before SEC ALJs. Gretchen Morgenson, famed reporter for the New York Times, wrote [an article entitled, “At the S.E.C., a Question of Home-Court Edge.”](#) In her article, she quotes noted securities expert Lewis D. Lowenfels (a forty-year securities lawyer whom Forbes touts as “one of the best securities lawyers in the business”), who stated, “As a securities lawyer, I’ve been involved in these administrative proceedings for many years and have been struck by the unfairness and lack of neutrality in the system.” Lowenfels went on to note that, “The judges’ mind-set reflects the agenda of the agency, which in this arena is enforcement.” Let us make one final point in response to the Judge. With respect to the facts on which we base our opinion, the statistics appear to speak for themselves. Ms. Morgenson, for example, notes that “[t]he S.E.C.’s track record in these [administrative] proceedings is certainly impressive. Among cases filed in fiscal 2011, the most recent period for which all the matters have been decided, the agency won seven of the eight matters that went before an administrative law judge. That’s an 88 percent success rate.” Given the SEC’s recent spotty and well-publicized record in insider trading cases brought in United States District Courts, it’s not hard to see why we may have concluded that the SEC’s win-rate may be one reason it has decided to bring more cases administratively and, accordingly, is adding more administrative law judges.