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New Administrative Law Judges At The SEC

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On June 30, 2014, Reuters reported that the SEC will be adding 2 new administrative law judges and three new lawyers to the administrative law staff -- bringing the total number of judges to 5 and doubling the size of the clerk pool serving those judges. According to the Reuters article, the new judges were needed to "meet growing demand since the 2010 Dodd-Frank Wall Street reform law," which gave the SEC new authority to impose civil penalties in traditional cease-and-desist administrative proceedings. As far as that analysis goes, it makes sense -- but is that really what is going on? There are at least two alternative motives: (i) the SEC is seeking a friendlier forum for certain insider-trading cases, as its record has not been great of late; and (ii) it is preparing for a new era on the administrative court, as one or more members may retire soon. First, what is the upside to the SEC suing defendants in its own court? There are several advantages for the SEC. First, administrative actions are on a "rocket docket," going to hearing on an accelerated schedule in which a hearing must be completed and an initial decision rendered by an administrative law judge within 270 days of the filing of the Commission's complaint. Second, there is no discovery in administrative proceedings. Third, there is no right of trial by jury. Finally, factual findings by the SEC in an administrative proceeding can only be reversed on appeal if the defendant shows that the findings failed to meet the "substantial evidence" test. In an administrative proceeding, the rules of evidence do not apply and an administrative judge may be more willing to admit evidence that no district court judge would ever admit, or allow trial procedures that would not be permitted in federal court. Moreover, the SEC hires its own judges (from a panel of candidates approved by the Office of Personnel Management) and decides whether to retain them. The real reason for these new hires is not simply the SEC's ability to seek monetary sanctions in adminstrative proceedings, given that the SEC has had that authority for nearly four years and has always had the ability to seek monetary penalties in a separate case filed in the United States District Court (often bifurcating proceedings in order to do so). Furthermore, this past year, Congress shorted the SEC by over $500,000,000 in its budget request, so it would seem the SEC, in spending money to beef up its administrative law department, has made the determination that spending such funds will materially advance its enforcement mission. As Jeanine Kerridge wrote on this blog on June 19, at least one answer as to why the SEC would be spending these funds likely lies in Andrew Ceresney's recent statements about trying more insider trading cases in-house. And, although Ceresney denies that the decision to try more

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insider trading cases in-house has anything to do with the SEC's win-loss ratio, his protestations seem hollow. The SEC is tasked with regulating the financial industry. In doing so, the SEC's Enforcement Division often views its job as deciding who "doesn't belong" in the financial industry, and their pursuit of those individuals or entities is often relentless. By giving the Commission staff a speedier trial before a "hometown" judge, in which the Commission could obtain a bar from the financial industry against the individual or entity, is simply more efficient than trial in federal court (with a higher likelihood of success) and, consequently, more likely to further the Commission's mission. The SEC may also be looking to the future. According to the SEC's release, newly-appointed Judge James Grimes previously spent 13 years at the U.S. Department of Justice where he was a senior litigation counsel in its civil division and a member of the faculty at the Department of Justice National Advocacy Center. He began his career in the U.S. Navy's Judge Advocate General's Corps, where he first served as a trial defense counsel defending service members in courts-martial and later served as an appellate counsel representing the government before military appellate courts. Judge Grimes received his B.A. degree, cum laude, in 1992 from Miami University in Oxford, Ohio, and graduated with honors from The Ohio State University College of Law in 1995. It seems almost certain that the SEC will bring more insider trading cases against financial professionals in administrative law proceedings. The process is cheaper, moves more quickly, and is more likely to lead to good results for the SEC. In addition, it may simply be time for the Commission to refresh its bench. One way or the other, the next year or two will provide an interesting learning curve for those who practice before the SEC.