

## **Division of Enforcement Approach to Forum Selection in Contested Actions**

The Commission generally is authorized to bring its enforcement actions in either of two forums – a civil action in federal district court or a Commission administrative proceeding (and/or cease-and-desist proceeding) before an Administrative Law Judge – though it has authority to proceed on certain charges or remedies in only one of those forums. The Division seeks to further the Commission’s mission to protect investors and the integrity of the markets through strong, effective, and fair enforcement of the federal securities laws. When recommending a contested enforcement action to the Commission, the Division recommends the forum that will best utilize the Commission’s limited resources to carry out its mission. The Division’s forum recommendations are in all cases subject to review and approval by the Commission.

There is no rigid formula dictating the choice of forum. The Division considers a number of factors when evaluating the choice of forum and its recommendation depends on the specific facts and circumstances of the case. Not all factors will apply in every case and, in any particular case, some factors may deserve more weight than others, or more weight than they might in another case. Indeed, in some circumstances, a single factor may be sufficiently important to lead to a decision to recommend a particular forum.

While the list of potentially relevant considerations set out below is not (and could not be) exhaustive, the Division may in its discretion consider any or all of the factors in assessing whether to recommend that a contested case be brought in the administrative forum or in federal district court.

- **The availability of the desired claims, legal theories, and forms of relief in each forum:** Certain claims, theories, and relief are only available in one forum.
  - For example, charges of failure to supervise or causing another person’s violation can only be pursued in the administrative forum; liability as a controlling person or as a relief defendant can only be pursued in district court actions.
  - In situations where there is a need for emergency proceedings or relief – where the alleged violative conduct is ongoing and/or there is a risk that proceeds of the alleged wrongdoing will be dissipated or moved offshore or evidence will be destroyed – only a federal district court can issue the necessary emergency relief to protect investors, such as a temporary restraining order, asset freeze, and/or a document preservation order.

- Whether any charged party is a registered entity or an individual associated with a registered entity: Registered entities and associated persons have long been subject to the Commission’s regulatory oversight, which has long included Commission administrative proceedings. Although the Commission also may bring actions against them in district court, certain charges and forms of relief applicable to registered entities and associated individuals are available only in the administrative forum. For example, associational bars and suspensions can only be imposed in an administrative proceeding. When seeking such remedies, it is often a more efficient and effective use of limited agency resources to seek those remedies directly in an administrative proceeding rather than first commencing a district court action, seeking and obtaining a district court injunction, and then instituting a separate administrative proceeding seeking the remedies based on the injunction. In addition, as described below, Administrative Law Judges and the Commission develop extensive knowledge and experience concerning issues that frequently arise in matters involving registered entities or associated persons.
- The cost-, resource-, and time-effectiveness of litigation in each forum: This factor incorporates consideration of the efficient and effective use of the Commission’s limited resources.
  - In general, hearings are held more quickly in contested administrative actions than in contested federal court actions. This may allow the Division to use the Commission’s limited resources more effectively.
    - When a matter involves older conduct, this may allow for the presentation of testimony from witnesses who have a fresher recollection of relevant events.
    - This also may permit a more timely public airing, based on evidence offered by all parties to the proceeding, of the facts and circumstances of the conduct and practices at issue in a matter.
  - The ability to seek and obtain relief in a single proceeding may enable the Commission to use its limited resources more efficiently. This may be possible in district court, for example, when the Division is recommending charges against multiple parties, including relief defendants – claims against relief defendants can only be pursued in district court. This also may be possible in the administrative forum, for example, in the regulated entity/associated person context described above or in situations where we are recommending charges against multiple parties and there may be no

single district court that is a permissible venue for an action against each of the parties.

- There may be potential efficiencies if the case can be decided on, or the disputed issues narrowed by, a motion for summary judgment in federal court (which generally addresses a broad range of claims and issues) or a motion for summary disposition in the administrative forum (which generally requires leave from the Administrative Law Judge to file and typically addresses a narrower range of claims and issues). For example, district courts more frequently address and resolve elements of claims (such as whether a statement is false or whether an instrument is a “security”) on summary judgment.
- The additional time and types of pre-trial discovery available in federal court may entail both costs and benefits, which should be weighed under the facts and circumstances of a case. Although pre-trial discovery procedures exist in both administrative proceedings and district court actions, the mechanisms of discovery are different. For example, in administrative proceedings, the Division must produce to respondents all non-privileged documents from its case file and the Division has *Brady* and *Jencks* obligations, requirements that do not exist in civil district court litigation. On the other hand, depositions are available in district court but generally not in administrative proceedings. It also is appropriate to consider whether witness testimony that is critical to fair resolution of the matter may be compelled in one forum but not another.
- Fair, consistent, and effective resolution of securities law issues and matters.
  - Administrative Law Judges, who adjudicate securities law cases, and the Commission develop extensive knowledge and experience concerning the federal securities laws and complex or technical securities industry practices or products.
  - If a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission’s rules, consideration should be given to whether, in light of the Commission’s expertise concerning those matters, obtaining a Commission decision on such issues, subject to appellate review in the federal courts, may facilitate development of the law.

- Conversely, where application of state law or other specialized areas of federal law is integral to the matter, district court may be appropriate.
- If similar charges are being or have been brought against similarly situated parties (*e.g.*, registered entities or associated persons) in the same or closely-related contested matters, it may be preferable to recommend charges against similarly situated parties in the same forum.

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