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# GENERAL COUNSEL



# SEC's New, Powerful Enforcement Options

By Daniel Patrick Wendt

**A**

change is underway in the SEC enforcement climate. It has several causes, but the key is a lesser-known provision of the 2010 Dodd-Frank legislation that allows the Securities and Exchange Commission to pursue civil penalties for a broad range of actions through administrative actions. As a result, companies and executives challenging enforcement actions or negotiating settlements involving the Foreign Corrupt Practices Act are in new terrain, with advantages in some circumstances and disadvantages in others.

Historically, Congress has allowed the SEC to choose between pursuing enforcement actions either in federal court or administratively before administrative law judges (ALJs) employed by the SEC.

Until recently, the two options were easily distinguished: If the SEC wanted to impose civil penalties, then it was required to go to federal court, except for a small subset of cases typically unrelated to FCPA enforcement.

In Dodd-Frank, however, Congress authorized the SEC to impose civil penalties in its own administrative actions as well as in federal court. In short, the SEC can now do its enforcement work in FCPA cases without ever having to leave home.

It has now been several years since this rule changed, and relevant precedent is developing. The SEC has pursued civil penalties against

individuals and related entities in administrative proceedings, albeit not for FCPA violations. Many of the defendants have argued that these administrative enforcement actions violate their constitutional rights. Specifically, defendants

In Dodd-Frank, Congress authorized the SEC to impose civil penalties by way of its own administrative actions.

have argued that they lose the right to a jury trial, the ability to seek discovery as allowed in federal courts, and the right to challenge the SEC's theories before trial.

## CHALLENGES

One of the earliest and most well-known defendants, Rajat Gupta of Goldman Sachs, was able to secure the withdrawal of an administrative action, although the SEC ultimately initiated a successful federal action against Mr. Gupta.

Two recent defendants, however, have lost preliminary motions on these issues, when federal judges in the Southern District of New York and the DC District were unwilling to suspend ongoing administrative actions, given the clear intent of Congress. The underlying lawsuits remain active, so it is possible that the federal ju-

diciary may take a different tack, but currently it appears that the Dodd-Frank amendments are established.

Recently, in the FCPA context, the SEC resolved an enforcement action with Alcoa, Inc. through its administrative process rather than through federal court. As a result of the settlement, Alcoa agreed to pay \$175 million as disgorgement of ill-gotten gains, in addition to other

neither admit nor deny the allegations.

Similarly, in FCPA matters, some federal judges have substantially delayed the confirmation of settlement agreements, as the court collected and reviewed evidence, essentially to test the appropriateness of the SEC's settlement terms. By pursuing administrative actions, the SEC will be able to exclude the federal judiciary from settlement agreements.

## One result: The SEC and general counsel may have more flexibility in negotiating the terms of FCPA-related settlements.

amounts owed to the Department of Justice.

Technically, because the resolution did not include a civil penalty, the SEC could have brought the action as an administrative proceeding either before or after Dodd-Frank. Nonetheless, agency officials have cited the action as a harbinger of its rising preference for administrative actions rather than civil suits in federal court.

While individual defendants may lament the loss of rights with a move from federal court to administrative actions, corporate defendants may welcome the option, especially in FCPA matters. In short, federal judges have been delaying or potentially undoing settlements negotiated between the SEC and corporate defendants in recent years.

For example, there has been much debate inside and outside federal courtrooms about whether the SEC should continue its general policy of allowing corporate defendants to “neither admit nor deny” any wrongdoing in civil settlements. Generally, corporate defendants prefer to include this clause in a settlement, to protect themselves from collateral consequences, including shareholder suits. However, Judge Rakoff of New York threatened to undo a non-FCPA settlement over the issue of whether the SEC should have allowed the defendant to

Corporate defendants therefore may welcome the additional certainty that the SEC can now provide, both as to the scope and timing of any agreement.

### MIXED RESULTS

This change could mean several things for corporate counsel. First, Congress has removed speed bumps for the SEC, allowing the SEC to pursue more enforcement actions with the same resources.

Second, and similarly, corporate defendants may be able to avail themselves of shorter timelines for resolving issues that are voluntarily disclosed, as is often the case in FCPA investigations.

Third, the SEC and general counsel may together have more flexibility in negotiating the terms of FCPA-related settlements for corporate defendants, given that the federal judiciary does not need to play a prominent role.

Fourth, general counsel should note that when the SEC does pursue contested enforcement actions against individuals or corporate defendants, the SEC may opt for administrative proceedings before its own administrative law judges, which may create certain disadvantages for the defendants. ■



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