

SEC In-House Court Reforms Not Enough, Ex-Prosecutor Says

By **Ed Beeson**

Law360, New York (November 25, 2015, 9:23 PM ET) -- The U.S. Securities and Exchange Commission's plans for reforming its in-house court would still place defendants at a disadvantage, and the agency instead should look at ways to make the tribunal function more like the federal judiciary, a former federal prosecutor has told the agency.

In one of the first comment letters on the SEC's proposed amendments to the rules governing its administrative proceedings, Susan E. Brune, a former assistant U.S. attorney, on Tuesday said the agency is headed in the right direction with its plans but hasn't done enough to make the forum a more balanced place for litigating claims.

Furthermore, the proposals "do not address the real issue: that when the commission chooses to go administrative, it gets to play prosecutor, judge, jury and first-level appellate court," Brune wrote. "The proposed rules do not go far enough to protect the rights of respondents."

The SEC has faced extensive heat over its decision to litigate more complex cases within its administrative court, where it has been shown to have a better trial record than in federal district court. Among other things, defense attorneys have argued that the SEC's system is stacked against respondents because it forces them to quickly prepare for trial and have their cases decided by a judge who is on the SEC's payroll.

The SEC's proposed amendments appear to be intended to address some of these concerns. In a pair of proposals issued for public comment in September, the SEC said defendants in administrative proceedings should be allowed the right to a handful of depositions, which they don't currently have, and be given up to eight months to prepare for an administrative hearing, up from the current standard of roughly four months.

In her letter, Brune said these rigid limits don't really make sense and that the agency should instead allow in-house judges to make case-by-case determinations as to whether a matter needs more time to develop.

"Anything less than that is inconsistent with basic notions of due process," said Brune, who co-founded the boutique white collar firm Brune & Richard LLP. A former prosecutor in the U.S. Attorney's Office for the Southern District of New York, Brune's time in the office overlapped with the tenure of current SEC Chair Mary Jo White when she served as U.S. attorney.

“If the commission is presenting its ALJs as able to administer justice in a manner equivalent to that of federal judges, then surely the commission can trust its ALJs to manage the schedule of a case with the same flexibility that a federal judge has.”

Brune applauded the SEC for agreeing to give defendants the right to take depositions during discovery, but said the agency should allow for more than what it has proposed.

Under the SEC’s plans, both parties would be limited to three depositions each in cases involving a single defendant, and up to five on matters involving multiple defendants. The correct cap should be 10, Brune said, with right to seek leave for more if the case demands it.

She also said the enforcement division should be limited in the depositions it can take after it brings charges, because it has potentially several years in the run-up to an administrative case to depose witnesses on its own.

Another area where Brune said the SEC should modify its proposal is in the handling of hearsay.

Under the SEC’s plans, hearsay could be admitted so long as it is relevant, material and appears to be reliable. That is less strict than what the federal rules of evidence allow, yet there is no real reason why that should be, she said.

In the end, though, Brune said it would be most preferable if the SEC mostly abandoned any broader ambitions for its in-house court.

“The proper approach would be for the commission to bring all but its most routine cases in federal court, where there are appropriate due process protections,” she wrote.

--Editing by Philip Shea.