

## Securities Regulation Daily Wrap Up, ENFORCEMENT—Ceresney testimony on Enforcement’s activities tackles administrative proceeding controversy, (Mar. 19, 2015)

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This morning, the House Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing on the oversight of the SEC’s Division of Enforcement. As the sole witness at the hearing, Enforcement Director Andrew Ceresney discussed the Division’s recent efforts and successes and fielded a number of questions regarding the Commission’s use of administrative proceedings versus court action, an issue that has recently come under enhanced scrutiny.

**Ceresney statement.** In his prepared statement, Ceresney noted that, in 2014, the Division brought the largest number of enforcement actions to date (755) and obtained monetary remedies exceeding \$4.16 billion. With these activities, the director explained, the Division punished wrongdoers, returned funds to injured parties, and sent messages of deterrence to would-be violators. Issues directly affecting investors—including the conduct of investment advisers and their funds, the ever-evolving nature of trading technologies, developments in municipal securities and public pensions, and losses connected with insider trading—remain priorities for the Division, the director stated.

“A strong enforcement program is at the heart of the Commission’s efforts to ensure investor trust and confidence in the nation’s securities markets, and the Division is committed to the swift and vigorous pursuit of those who have broken the securities laws,” Ceresney said.

**Administrative proceedings.** While acknowledging that administrative proceedings lower costs and improve efficiency, several committee members noted the due process concerns that may arise without judicial intervention. Without the availability of jury trials and discovery and evidentiary limitations, they stated, fair processes may not be available.

As the committee questioned whether the Division has a “home court advantage,” Rep. Bruce Polquin (R-Me) cited the Division’s near-perfect success rate in administrative proceedings and its less-stellar rate of success in court actions. The Division seems to be relying more often on the SEC’s in-house process, he said, asking how it determines whether to commence an administrative proceeding as opposed to a court action. Ceresney explained that no definitive written set of procedures exists to govern the decision but stated that guidelines and factors provide a means by which to weigh the alternatives. The Division uses the appropriate forum for investor protection, Ceresney noted, and, while there has been an uptick in in-house proceedings, most are settled. He also noted that, just yesterday, an administrative law judge ruled against the Division.

While agreeing that the enforcement of the federal securities laws should be fair to all concerned parties, Ceresney highlighted the fact that administrative proceedings provide numerous due process protections. Respondents are provided with investigative case files and details of charges, as well as with witness statements and all exculpatory evidence, he explained. Moreover, district court actions may take years to complete, and juries may have difficulty understanding related complex financial issues. With administrative proceedings, respondents get the SEC’s industry expertise in the first instance while retaining access to full Commission review, and later judicial appellate review, if appropriate. Every penalty recommendation by the staff is approved by the Commission, the director stated.

Echoing Rep. Polquin’s comments on fairness, Rep. Luke Messer (R-Ind) expressed concern that, when companies have to pay out, whether in a civil court action or an administrative proceeding, the burden ultimately falls on shareholders. Ceresney assured the committee member that the Division considers shareholder impact, as well as the conduct itself and efforts to mitigate, when determining penalties.

Finally, Rep. Brad Sherman (D-Cal) asked the director whether the Division actively “trolls” for schemes and related misconduct. The Division does engage in proactive surveillance, Ceresney stated, but this is only one source of information. Referrals by self-regulatory organizations and blue sheet data provide information, and the Division continues to evaluate issues through an ongoing dialogue with the SEC’s policy divisions. In part, this is why the SEC’s 2016 budget requests 93 additional Enforcement positions, the director explained. These additional resources will provide support for the Division’s three core activities—intelligence and data analysis, evaluation and investigation, and litigation activities.

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