Clients&FriendsMemo

2016 YEAR IN REVIEW: SECURITIES LITIGATION AND REGULATION

2016 was an active year in securities litigation. In the first half of 2016 alone, plaintiffs filed 119 new federal class action securities cases.[1] It was also a busy year for SEC enforcement proceedings, with a record 868 cases filed, 548 of which were independent enforcement actions (as opposed to follow-up actions or cases based on delinquent regulatory filings).[2] This continued the trend of growth in SEC enforcement activity, as independent actions have increased by nearly 61% since 2013.[3] Amid this activity, there were a number of important legal and regulatory developments, including in the following areas:

- **Insider Trading:** In its first major insider trading case in 19 years, the Supreme Court clarified that a gift of confidential information to a tippee who is a trading relative or friend may be sufficient to support insider trading liability.
- **Securities Fraud and Class Actions:** The Second Circuit (and district courts in that Circuit) held that statements of opinion that allegedly failed to disclose facts potentially undermining the opinion did not necessarily constitute actionable misstatements; adopted the "ultimate authority" theory of liability for purposes of determining the "maker" of alleged misrepresentations; recognized an inflation-maintenance theory of loss causation in Section 10(b) actions; recognized that the fraud-on-the-market presumption applies in individual actions; and held there is not necessarily a duty to disclose developments in SEC investigations. The Eighth Circuit held that the fraud-on-the-market presumption may be rebutted during the class certification stage with evidence of no front-end price impact as a result of an alleged misstatement.
- **Jurisdiction:** The Supreme Court clarified when federal courts have jurisdiction over state law claims that raise questions involving the Securities Exchange Act of 1934 (the "Exchange Act").
- **SEC Enforcement and Regulation:** The Ninth Circuit held that the Securities and Exchange Commission ("SEC") may assert causes of action against CEOs and CFOs who provide false certifications under Rule 13a-14. The Eleventh Circuit clarified the statute of limitations for SEC "forward-looking" claims. A number of circuits disagreed with the Tenth Circuit as to whether the current method of appointing SEC Administrative Law Judges ("ALJs") is unconstitutional, setting up possible Supreme Court review. The SEC, meanwhile, amended the rules of procedure for administrative proceedings, brought enforcement actions aimed at protecting

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whistleblowers and scrutinizing the procedures followed by outside auditors, and issued Compliance & Disclosure Interpretations for the pay ratio disclosure rule under Regulation S-K.

- Consumer Financial Protection Bureau: The D.C. Circuit held that the Consumer Financial Protection Bureau's structure as an unchecked, single-director independent agency violates Article II of the Constitution.

I. Insider Trading

On December 6, 2016, the Supreme Court resolved what arguably was a circuit split and held that violations of the federal insider trading laws may occur when an insider gifts confidential information to a trading relative or friend, even if there is no exchange of something of pecuniary or similar value.[4] Under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, a corporate insider may not trade on material, non-public information or provide such information to others for the purpose of securities trading in exchange for a benefit to the insider.[5] In the 1983 decision *Dirks v. SEC*,[6] the Supreme Court explained that a tippee (the person who receives and trades on information from a corporate insider) assumes a fiduciary duty to shareholders not to trade on the information when the insider has breached his or her fiduciary duty to shareholders by disclosing information to the tippee and the tippee knows or should know that there has been a breach.[7] The tippee may be held liable when "the insider receives a direct or indirect *personal benefit* from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[8] Absent a personal benefit, the insider has not breached his or her duty to stockholders and, thus, the tippee cannot be liable for a derivative breach.[9]

In *Salman v. United States*,[10] Maher Kara, an investment banker at Citigroup, had access to confidential information regarding mergers and acquisitions involving Citigroup's clients, and shared information on certain planned mergers with his brother, Mounir. Mounir, in turn, traded on this information and shared it with Bassam Salman, Mounir's friend and Mahar's brother-in-law, who also traded on the information. After a jury in the Northern District of California found Salman guilty of insider trading, Salman appealed to the Ninth Circuit.

The Ninth Circuit affirmed Salman's conviction, holding that "[p]roof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading."[11] In so holding, the Ninth Circuit rejected the Second Circuit's 2014 decision *United States v. Newman*,[12] which overturned the conviction of two remote tippees, holding that the "personal benefit" requirement for insider trading may not be met "in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[13] To the extent *Newman* read *Dirks* to suggest "that evidence of a friendship or familiar relationship between tipper and tippee, standing alone, is insufficient to demonstrate that the tipper received a benefit," the Ninth Circuit declined to follow it.[14]

The Supreme Court agreed with the Ninth Circuit, finding the Second Circuit's requirement of a benefit of "pecuniary or similarly valuable nature" to be inconsistent with *Dirks*. "[B]y disclosing confidential information as a gift to his brother with the expectation that he would trade on it, Maher breached his duty of trust and confidence to Citigroup and its clients—a duty Salman acquired, and breached himself, by trading on the information with full knowledge that it had been improperly disclosed."[15] The Supreme Court, however, limited its holding to encompass gifts to a "trading relative or friend" and declined to adopt the government's more expansive view that a gift of inside information to *anyone* would qualify. How far *Salman* will extend beyond relatives and friends (if at all) will almost certainly be the subject of litigation in the years to come.

II. Securities Fraud and Class Actions

A. Failure to Disclose Facts Potentially Undermining Opinion

In *Tongue v. Sanofi*,[16] the Second Circuit held that sincerely held opinions set forth in corporate disclosures are not necessarily actionable under the federal securities laws even if facts potentially undermining the opinions are not disclosed. In *Sanofi*, Genzyme Corporation developed the drug Lemtrada to treat patients with MS. Genzyme used a single-blind study, instead of a double-blind study, during the drug's clinical trials. (In a single-blind study, either the researcher or the patient knows which drug was administered; in a double-blind study, neither the researcher nor the patient has that information.) The FDA expressed concerns about Genzyme's use of single blind studies but stated that such studies may be adequate "if the effect is large."[17] During the trial period, both Genzyme and Sanofi, which later acquired Genzyme, made optimistic statements about Lemtrada's effectiveness and its projected approval by the FDA. Citing the failure to use double-blind studies, however, the FDA ultimately rejected Sanofi's initial application for Lemtrada. The value of investors' contingent value rights, which was tied to the approval of Lemtrada, then plummeted.

Investors filed two class action suits alleging violations of federal securities laws. In their complaints, plaintiffs alleged that defendants' failure to disclose feedback from the FDA constituted a material misstatement. The District Court granted defendants' motion to dismiss on the grounds that (1) plaintiffs had failed to allege false or materially misleading statements; (2) plaintiffs failed to allege any facts suggesting that defendants did not genuinely believe their statements at the time they were made; and (3) there was no showing of objective falsity.[18]

Subsequently, the Supreme Court decided *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*,[19] in which it addressed (1) "when an opinion itself constitutes a factual misstatement" and (2) "when an opinion may be rendered misleading by the omission of discrete factual representations."[20] In *Omnicare*, respondent stock purchasers sued Omnicare alleging that the company's registration statement disclosing its views on compliance with state and federal law were "materially false." The Supreme Court disagreed, holding that the statements at issue "are pure statements of opinion" by Omnicare that they are obeying the law and "the Funds do not contest that Omnicare's opinion was honestly held."[21] In addition, the Court established that a plaintiff alleging that a statement of opinion is materially misleading must identify facts (1) that go to the basis of the issuer's opinion and (2) whose omission makes the statement misleading to a reasonable person.[22] Following the Supreme Court's decision in *Omnicare*, plaintiffs appealed to the Second Circuit.

The Second Circuit affirmed, clarifying that under *Omnicare*, a plaintiff must show either that "the speaker did not hold the belief she professed" or that "the supporting fact[s] she supplied were untrue."[23] Even if the opinion was sincerely held and otherwise true as a matter of fact, the defendant may nonetheless be liable if he or she "omits information whose omission makes the statement misleading to a reasonable investor."[24] Applying this standard, the Second Circuit concluded that plaintiff's allegations were insufficient because "the FDA had expressed concern about Defendants' testing methodology, [but] it had also stated that any deficiency could be overcome if the results showed an 'extremely large effect.'"[25] Here, "[t]here can be no conflict inferred from a statement of optimism consistent with the FDA's instructions as to the treatment results necessary for approval" since the record showed, and the parties did not dispute, that "Lemtrada's treatment effect was, in fact, large."[26] *Sanofi* should give some comfort to issuers that plaintiffs will not be able to successfully allege securities fraud simply because an optimistic opinion (though well founded at the time) turns out to be untrue and that *Omnicare* is retaining its vitality in the lower courts.

B. Ultimate Authority Theory of Liability

In *In re Pfizer Inc. Sec. Litig.*,[27] the Second Circuit held that evidence of Pfizer's final approval of allegedly misleading media responses created a genuine dispute of material fact as to whether Pfizer was the "maker" of the responses even though they were delivered by non-Pfizer employees. In *Pfizer*, plaintiffs brought a securities fraud class action against Pfizer and certain of its officers and directors for making allegedly fraudulent misrepresentations regarding the safety of two of its pharmaceutical products, Celebrex and Bextra. From 1998 to 2003, Pfizer was party to a co-promotion agreement with pharmaceutical manufacturer Searle, which was subsequently acquired by Pharmacia in 2000. In 2003, Pfizer purchased Pharmacia and obtained exclusive rights to Celebrex and Bextra. Pfizer's share price fell after an editorial in a medical journal questioned the safety of the two drugs and information about studies linking the drugs to cardiovascular risks became widely publicized.

Plaintiffs alleged that Pfizer was responsible for allegedly false statements issued by Searle and Pharmacia regarding alleged cardiovascular problems associated with Celebrex when Pfizer was a party to the co-promotion agreement, and also for Pfizer's own statements following Pfizer's acquisition of Pharmacia. The District Court granted defendants' motion for summary judgment because plaintiffs' expert "did not isolate the effects of Pfizer's alleged misrepresentations and omissions from the effects of certain of Searle's and Pharmacia's allegedly fraudulent statements" in calculating loss causation and damages.[28] Plaintiffs appealed, contending that the expert's "failure to disaggregate the impact of Pfizer's and other companies' misrepresentations is not a basis for excluding his testimony because . . . Pfizer had ultimate authority over those statements."[29]

The Second Circuit applied the Supreme Court's decision in *Janus Capital Grp. v. First Derivative Traders*,[30] which held that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[31] The Supreme Court in *Janus* cautioned that "make" should be read narrowly to encompass situations in which the statement came directly from the defendant or the defendant had the "statutory obligation" to make such statement.[32] According to the Second Circuit, plaintiffs did not present any evidence that Pfizer influenced or had authority over the Form 8-Ks that Pharmacia filed with the SEC containing certain allegedly misleading statements. In addition, the Court observed that the co-promotion agreement "stipulated that Searle (later Pharmacia) would have 'sole responsibility for communicating with . . . regulatory authorities' about Celebrex."[33]

However, the Court held that there was sufficient evidence to permit a reasonable jury to conclude that Pfizer had "ultimate authority" over certain other statements made by Searle and Pharmacia employees to the media because: (1) Pfizer and Searle jointly employed a public relations firm to address the press on questions about the potential cardiovascular risks associated with Celebrex; (2) both Pfizer and Searle reviewed and finalized statements to the press regarding Celebrex; and (3) a Pfizer senior management team member testified that senior management at Pfizer would need to approve media responses related to Celebrex before publication.[34]

C. Inflation-Maintenance Theory of Loss Causation

In *In re Vivendi, S.A. Sec. Litig.*,[35] the Second Circuit held that a plaintiff may plead and prove the loss causation element of a Section 10(b) claim by demonstrating that alleged misstatements maintained preexisting, artificial price inflation, even if they did not cause an artificial increase in the company's stock price and resulting losses upon corrective disclosure. From 2000 to 2002, Vivendi, a global media company, pursued mergers with a number of media and telecommunications companies. During this period, Vivendi repeatedly emphasized to the public its confidence in the company's cash income growth targets. Vivendi's public statements, however, allegedly did not reflect the true financial state of the company, which had liquidity and operational problems. As Vivendi's debt continued to grow, rating agencies downgraded its long-term senior debt, eventually to near-junk status. Shareholders of Vivendi filed a class action alleging violations of federal securities laws, eventually resulting in a jury finding Section 10(b) violations and awarding plaintiffs approximately $50 million in damages.

On appeal, Vivendi argued that only statements that cause an increase in stock price are actionable under Section 10(b). The Second Circuit rejected the argument, observing that "[i]t is far more coherent to conclude that such a misstatement does not simply *maintain* the inflation, but indeed '*prevents* [the] preexisting inflation in a stock price from dissipating.'"[36] Additionally, the Court observed that "under Vivendi's approach, companies (like Vivendi) would have every incentive to maintain inflation that already exists in their stock price by making false or misleading statements."[37] In reaching its decision, the Second Circuit joined the Seventh and Eleventh Circuits in concluding that there is no difference between the "inflation maintenance" and "inflation introduction" theories under Section 10(b).

D. Fraud-on-the-Market Presumption on Class Certification

In *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*,[38] the Eighth Circuit applied the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*,[39] which held that defendants may rebut the fraud-on-the-market theory and presumption of reliance in the context of opposing class certification with evidence of *lack* of price impact.[40] The fraud-on-the-market presumption, articulated by the Supreme Court in *Basic Inc. v. Levinson*,[41] is based on the theory "that the market price of shares traded on well-developed markets reflects all publicly available information," and therefore "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price."[42] Under the presumption, "securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation."[43] In *Halliburton,* the Supreme Court expanded on *Basic* by holding that defendants may rebut the fraud-on-the-market presumption not only at trial or on summary judgment, but also "at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price."[44]

In *Best Buy*, the Eighth Circuit applied *Halliburton* and reversed the district court's decision certifying the class because, according to the Court, the defendants met their burden to defeat the presumption by presenting "strong evidence" of no price impact, including the opinion of plaintiffs' own expert, who testified that the economic impact of the "non-fraudulent press release statements and the alleged misrepresentations in the immediately following conference call was 'virtually the same,' and that the two 'would have been expected to be interpreted similarly by investors.'"[45]

Best Buy is significant because it establishes that a defendant may successfully rebut the fraud-on-the-market presumption by presenting evidence of no "front-end" price impact without making a "back-end" showing that the corrective disclosure did not cause the stock-price to decline.

E. Fraud-on-the-Market Presumption Rebutted by Evidence That Plaintiffs Would Have Invested with Knowledge of the Fraud

In *GAMCO Inv'rs, Inc. v. Vivendi Universal, S.A.*,[46] the Second Circuit recognized the applicability of the fraud-on-the-market presumption in individual actions. The plaintiff was GAMCO Investors, Inc., "value investors" that invested based on their own internal valuation of a company's stock.[47] GAMCO bought Vivendi stock from 2000 to 2002. After the disclosure of Vivendi's liquidity problems, the stock fell dramatically. Plaintiffs sued Vivendi in the Southern District of New York, alleging that Vivendi violated the federal securities laws through alleged material misrepresentations regarding its liquidity. Following a bench trial, the district court entered judgment in favor of Vivendi, holding that, as value investors, plaintiffs' purchasing decisions relied on an independent valuation of Vivendi securities, and not the integrity of the market. The District Court, however, limited its holding to the unusual facts of the case and explicitly advised that the case "should not be taken to suggest that sophisticated institutional investors or value-based investors are not entitled to the fraud on the market presumption in general."[48]

On appeal, the Second Circuit considered whether Vivendi had defeated the fraud-on-the-market presumption by demonstrating that "GAMCO would have purchased Vivendi securities *even had it known* of Vivendi's alleged fraud."[49] The Court held that, while the mere fact that plaintiffs were "value investors" did not alone suffice to rebut the fraud-on-the-market presumption, GAMCO's practice of making purchase decisions based on its independent valuation of a stock price rebutted the fraud-on-the-market presumption.[50] From the record established at trial, GAMCO continued to buy securities even after Vivendi's fraud came to light, and a GAMCO analyst testified that the liquidity problems had no impact on his calculation.[51] GAMCO policies also did not prohibit the purchase of stock "inflated by fraud, provided that other circumstances made the deal one worth pursuing."[52] Thus, the Court held that "it was [not] clearly erroneous for the district court to find that GAMCO, had it known of the liquidity problems at Vivendi, would have made the choice to buy the same securities it purchased."[53]

The *GAMCO* decision is narrow. Although finding the fraud-on-the-market presumption to be rebutted on the facts, *GAMCO* recognizes that the presumption may nonetheless apply to so-called value investors, and must be rebutted with specific evidence. The Second Circuit's decision is currently on appeal before the U.S. Supreme Court.[54]

F. No Affirmative Duty to Disclose SEC Investigation or Receipt of Wells Notices

In *In re Lions Gate Entm't Corp. Sec. Litig.*,[55] Judge John G. Koeltl of the Southern District of New York held that defendants do not have an affirmative duty to disclose developments in an SEC investigation, including the fact that an investigation had commenced and that the defendant was contemplating a possible settlement. Shareholders of Lions Gate Entertainment Corp. brought a

Section 10(b) class action, alleging that the company failed to disclose developments in an SEC investigation into the company's alleged defensive actions that it took in connection with a proxy contest and hostile takeover mounted by Carl Icahn, a minority shareholder. According to plaintiffs, the company misled investors by failing to contemporaneously disclose certain facts, including that the SEC commenced an investigation into possible securities violations, that the SEC provided Wells Notices indicating that the Enforcement staff was considering recommending an enforcement action to the Commission, and that the company determined that it would attempt to resolve the investigation and potential proceeding with a settlement. The Court disagreed, holding that the company's omission of these developments was not materially misleading.[56] According to the Court, there is no independent duty to disclose the commencement of an investigation by the SEC or the receipt of Wells Notices because "the securities laws do not impose an obligation on a company to predict the outcome of investigations."[57]

The Court also rejected plaintiffs' argument that the company's prior disclosures created a duty to disclose the investigation and receipt of the Wells Notices. The Court noted the well-established principle that "[a]lthough there is no independent duty to disclose a Wells Notice or an SEC investigation, if one chooses to speak on a subject, 'one must speak truthfully about material issues.'"[58] The Court reviewed the company's prior statements regarding pending claims and legal proceedings, and held that the omission of the developments in the SEC investigation did not render any of the statements materially misleading because the company had generally disclosed the existence of legal proceedings and stated the company's opinion that their outcome would not materially affect its stock price, a statement which ultimately proved to be correct.[59] The Court also rejected plaintiffs' argument that Regulation S-K required the disclosure of the investigation and Wells Notices, holding that a potential civil penalty—ultimately a $7.5 million penalty was assessed—was immaterial and did not "put Lions Gate's profits at risk or ma[k]e the stock 'risky.'"[60]

Companies evaluating their reporting obligations now have additional guidance from the Southern District of New York rejecting an affirmative duty, including under Regulation S-K, to disclose the commencement of an investigation by the SEC or the receipt of Wells Notices. However, companies should continue to make disclosure determinations on a case-by-case basis, particularly where the company already has spoken with respect to an investigation.

III. Jurisdiction

In *Merrill Lynch v. Manning*,[61] the Supreme Court held that Section 27 of the Exchange Act does not confer federal jurisdiction over state securities claims if the claims do not raise a disputed and substantial federal issue. Between 2006 and 2007, Merrill Lynch and several other financial institutions engaged in naked short sales[62] of Escala Group stock, allegedly causing Escala's share price to plummet and the plaintiff, Greg Manning, to lose most of his investment. Manning filed suit in New Jersey state court asserting causes of action under state law. Although Manning did not bring any claims under federal law, his complaint characterized Merrill Lynch's actions as violating SEC Regulation SHO, which the SEC adopted in 2005 to address concerns regarding potentially abusive naked short selling.

Merrill Lynch removed the case to federal district court, invoking federal question jurisdiction under 28 U.S.C. § 1331 and Section 27 of the Exchange Act. Section 27 provides that federal courts "shall have exclusive jurisdiction" over "violations of [the Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder."[63] The District Court denied Manning's motion to remand. On appeal, the Third Circuit reversed, concluding that federal courts did not have jurisdiction because all of Manning's claims were brought under state law and none necessarily raised a federal issue.

The Supreme Court affirmed, determining that Section 27 of the Exchange Act confers "exclusive federal jurisdiction of the same suits as 'aris[e] under' the Exchange Act pursuant to the general federal question statute."[64] The Supreme Court specified that federal jurisdiction exists only under two circumstances: (1) when federal law creates the cause of action asserted; and (2) if a claim "necessarily raises" a substantial and disputed federal issue which a federal court may adjudicate without disturbing the balance of state and federal power.[65] According to the Court, the fact that Manning *referred* to Regulation SHO in his complaint did not confer federal jurisdiction because "all his claims sought relief under state law and none necessarily raised a federal issue."[66]

IV. SEC Enforcement and Regulation

A. SEC Cause of Action Under Rule 13a-14

In *SEC v. Jensen*,[67] the Ninth Circuit held that the SEC may assert a cause of action against CEOs and CFOs for falsely certifying the accuracy of a company's financial reports under Rule 13a-14 of the Exchange Act. Under Rule 13a-14, every report filed under Section 13(a) of the Exchange Act, including reports on Forms 10-Q and 10-K, must include a signed certification by each principal executive and principal financial officer of the issuer as to the accuracy of the financial statements therein.[68] In *Jensen*, the SEC brought a civil enforcement action under Rule 13a-14 alleging that corporate officers of Basin Water, Inc. participated in a scheme to defraud investors by improperly recognizing millions of dollars in revenue.[69] When Basin released corrected financial restatements in 2008, the stock price dropped substantially. The District Court held that, although Rule 13a-14 requires corporate leadership to certify financial statements, it does not provide the government a cause of action against officers who certified false statements. The SEC appealed.

The Ninth Circuit reversed, holding that Rule 13a-14 provides the SEC with a cause of action, not only against corporate officers who failed to file the required certifications, but also against officers who certified false or misleading statements.[70] "[T]he affixing of a signature is not a mere formality, but rather signifies that the signer has read the document and attests to its accuracy."[71] The Court noted that it had previously concluded that other, similar rules (including Rule 13a-13, which requires the filing of quarterly reports, and Rule 13a-1, which requires issuers to file annual reports), "include an implicit truthfulness requirement."[72] The Court also explained that its decision aligned with the Second Circuit, which has held that, even though SEC regulations do not require a Schedule 13D to be accurate, "the obligation to file *truthful* statements is implicit in the obligation to file"[73]; the D.C. Circuit, which has held that "Sections 13(d)(1) and 13(d)(3) and the rules promulgated thereunder undoubtedly create the duty to file truthfully and completely"[74]; and the Fourth Circuit, which has held that the "truthfulness and completeness" of a Schedule 13D is a justiciable issue.[75] If any more incentive were required, after *Jensen*, officers and directors should take significant care to ensure that the statements they certify under SEC rules are accurate. This requires CEOs and CFOs to have a "sufficient basis" to believe that the certification is accurate when they "sign their names to a document certifying that SEC filings include no material misstatements or omissions."[76]

B. Statute of Limitations

In *SEC v. Graham*,[77] the Eleventh Circuit clarified that the five-year statute of limitations set forth in 28 U.S.C. § 2462 bars the SEC from bringing later-filed claims seeking enforcement of penalties, but does not apply to SEC claims seeking to enjoin "future" violations of the law. In *Graham*, the SEC brought a civil enforcement action alleging that defendants violated the federal securities laws by selling condominiums that functioned as unregistered securities. The SEC sought injunctive relief, declaratory relief and disgorgement. Defendants moved for summary judgment, arguing that the SEC's claims were barred under 28 U.S.C. § 2462. Without reaching the merits, the district court dismissed the SEC's complaint as time-barred.

The Eleventh Circuit reversed in part, concluding that Section 2462 applied to the SEC's request for declaratory relief and disgorgement but not to the request for injunctive relief. The Court reasoned that "penalties" look "backward in time," addressing wrongs done in the past, but injunctions look "forward in time," seeking to prevent *future* violations of law.[78] Thus, in contrast to declaratory relief and disgorgement (which seek to address past wrongs), injunctive relief is not a "civil fine, penalty, or forfeiture" covered by § 2462 and the SEC was not time-barred from seeking such relief.[79]

C. Amendments to Rules of Practice for SEC Administrative Proceedings

In recent years, the SEC has increasingly opted to bring enforcement proceedings in an administrative forum instead of filing suit in federal district court. Administrative proceedings have a number of built-in advantages for the SEC, including that they are tried before an ALJ employed by the SEC, a respondent's right to discovery is limited, the federal rules of evidence do not apply, they move quickly, and they offer a respondent no opportunity to move to dismiss at the outset of a case. In response to these criticisms, the SEC adopted amendments to its rules of practice for administrative proceedings on July 13, 2016. Among others, the new rules "[e]xtend the potential length of the prehearing period" from four months to a maximum of 10 months, and allow parties "in cases designed for the longest timelines the right to notice three depositions per side in single-respondent cases and five depositions per side in multi-respondent cases, and to request an additional two depositions."[80] The new rules also clarified (1) "the types of dispositive motions that may be filed at various stages of proceedings; (2) "the applicable procedures and legal standards for the motions"; and (3) rules regarding the admissibility of certain types of evidence.[81]

D. Constitutionality of SEC Administrative Proceedings

In 2016, the Second Circuit, D.C. Circuit, and Tenth Circuit considered challenges to the constitutionality of SEC administrative proceedings. In each case, the issue was whether the ALJs hold their positions unconstitutionally in violation of the Appointments Clause of the U.S. Constitution. The Appointments Clause vests the President with the power to appoint ambassadors, public ministers and consuls, Supreme Court justices, and "all other officers of the United States" (subject to the advice and consent of the Senate), but provides that Congress may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[82] If the SEC ALJs are considered "inferior officers," then the current method by which they are appointed—*i.e.*, by the Office of Personnel Management, and not the President, a court of law, or the head of a department—would be unconstitutional. The courts reached different conclusions in response to these challenges, creating a circuit split as to whether the appointment process for the SEC ALJs is constitutional.

In *Tilton v. SEC*,[83] the SEC brought an enforcement action against Lynn Tilton and her investment firms for allegedly making material misstatements regarding the financial status of her investment funds in public filings in violation of the Investment Advisers Act. Two days after the commencement of the proceeding, Tilton filed a separate lawsuit in federal district court, challenging the constitutionality of adjudication by the ALJ under the Appointments Clause. Without addressing the constitutional question, the district court dismissed the suit for lack of subject matter jurisdiction, concluding that the "Appointments Clause challenge fell within the exclusive scope of the SEC's administrative review scheme and could reach a federal court only on petition for review of a final decision by the Commission."[84] The Second Circuit affirmed on two grounds: (1) "the text, structure, and purpose of the securities laws make clear that Congress intended the SEC's scheme of administrative review to permit the Commission to bring its expertise to bear in enforcing securities laws";[85] and (2) the SEC's administrative review scheme encompasses Tilton's challenge to the presiding ALJ because there is an opportunity for meaningful judicial review of the claim, the claim is "substantively intertwined" with the merits dispute in the proceeding, and the constitutional challenge falls within the SEC's expertise.[86] In *Bennett v. SEC*,[87] the Fourth Circuit reached the same conclusion on largely similar reasoning.

In *Raymond J. Lucia Cos. v. SEC*,[88] the D.C. Circuit reached the constitutional question and held that SEC ALJs are not unconstitutionally appointed because they do not issue final agency decisions. In *Lucia*, the SEC commenced an administrative proceeding against petitioners for allegedly misleading advertising under the Investment Advisers Act. The ALJ found the petitioners liable and imposed sanctions. The petitioners appealed the ALJ's decision to the Commission, and also argued that the ALJ presiding over the enforcement action was unconstitutionally appointed. After the Commission rejected petitioners' challenges, they sought review of the SEC's final decision in the D.C. Circuit.

The D.C. Circuit disagreed with the petitioners. Under the Securities and Exchange Commission Authorization Act of 1987, the SEC has the authority to delegate any of its functions, including "hearing, determining, ordering, certifying, reporting," to any division or individual within the SEC.[89] The statute also provides that the "Commission shall retain a discretionary right to review the [delegated] action . . . upon its own initiative or upon petition of a party to or intervenor in such action."[90] Under the Appointments Clause, an appointee is an "officer" if he exercises "significant authority pursuant to the laws of the United States."[91] Significant authority includes consideration of factors such as "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions."[92] The Court held that the ALJs were not "officers" under the Appointments Clause because they do not issue final decisions of the Commission.[93] Under the Commission's adjudicatory scheme, the Commission can review a challenge to the ALJ's decision, decline to review, or exercise discretionary right to review the decision of any ALJ. In each instance, the Court reasoned that "the Commission must affirmatively act—by issuing the order—in every case."[94] Thus, "the Commission's ALJs neither have been delegated sovereign authority to act independently of the Commission nor . . . do they have the power to bind third parties, or the government itself, for the public benefit."[95]

The Tenth Circuit reached the opposite conclusion in *Bandimere v. SEC*,[96] holding that SEC ALJs hold office in violation of the Appointments Clause because they are "inferior officers" who are not appointed by the President, courts, or department heads. In *Bandimere*, the SEC brought an administrative action against David Bandimere for violations of the federal securities laws. The ALJ found Bandimere liable for securities fraud, "barred him from the securities industry, ordered him to cease and desist from violating securities laws, imposed civil penalties, and ordered disgorgement."[97] The SEC affirmed the ALJ's decision and also rejected Bandimere's constitutional challenge to the ALJ on the basis that the ALJ was an employee and not an "inferior officer."

On appeal, the Tenth Circuit interpreted "inferior officers" broadly and rejected the D.C. Circuit's conclusion in *Lucia*.[98] The Tenth Circuit identified three factors under a Supreme Court decision, *Freytag v. Comm'rs of Internal Revenue*,[99] relevant to determining inferior officer status: (1) whether the position was established by law; (2) whether the duties, salary, and means of appointment are specified by statute; and (3) the amount of discretion exercised in carrying out important functions.[100] In *Freytag*, the Supreme Court held that special trial judges appointed by the Tax Court were inferior officers because the position was established by law, "the duties, salary, and means of appointment for that office are specified by statute," and the special trial judges "take testimony, conduct trials, rule on the admissibility of evidence," which are more than ministerial tasks.[101]

The Tenth Circuit concluded that, for similar reasons, SEC ALJs are inferior officers. First, "the office of the SEC ALJ was established by law" because the Administrative Procedure Act created the ALJ position and the Exchange Act "authorizes the SEC to delegate 'any of its functions' with the exception of rulemaking to ALJs."[102] Second, the Administrative Procedure Act, the Exchange Act, and SEC regulations specify the SEC ALJs' duties, salary, and means of appointment, which provide that the ALJs "receive career appointments and can be removed only for good cause."[103] Third, SEC ALJs "exercise significant discretion in performing 'important functions'," including ruling on the admissibility of evidence, issuing subpoenas, and presiding over trial-like hearings, which the SEC affords "considerable weight" during agency review.[104] Thus, according to the Court, the SEC ALJs "are inferior officers who must be appointed as the Constitution commands"—not by the Office of the Personnel Management.[105]

In a dissenting opinion, Judge Monroe McKay warned that the majority's interpretation of *Freytag* would have "repercussions that will throw out of balance the teeter-totter approach to determining which of all the federal officials are subject to the Appointments Clause."[106] Judge McKay was concerned that the majority's interpretation and application of *Freytag* have "effectively rendered invalid thousands of administrative actions" that leave more questions than answers: "it does not tell us how much authority is too much" and "[i]t lists the duties of SEC ALJs, without telling us which, if any, were more important to its decision than others and why."[107] In light of the circuit split created by the D.C. Circuit's decision in *Lucia* and the Tenth Circuit's decision in *Bandimere*, it is certainly possible that the Supreme Court will address the issue in the near future.

E. Protections for Whistleblowers

The SEC brought two whistleblower protection cases in 2016 relating to restrictive provisions in employee severance agreements: *In the Matter of BlueLinx Holdings, Inc.*[108] and *In the Matter of Health Net, Inc.*[109] The *BlueLinx* severance agreement prohibited employees from disclosing confidential information to outsiders without permission from the company unless required to do so under applicable law, and barred employees from receiving pecuniary gains stemming from their communication with government agencies. The Health Net severance agreement required employees to waive their right to any monetary recovery related to his or her participation in any investigation before a federal agency. The SEC brought administrative proceedings against both companies, arguing that the severance agreements violated Rule 21F-17, which provides: "No person may take any action to impede an individual from communicating directly with the

Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."[110]

In both cases, the companies settled with the SEC, admitting to no fault against the charges, but agreeing to pay monetary penalties—$256,000 for BlueLinx and $340,000 for Health Net. In addition, both companies agreed to make a reasonable effort to contact all former employees who signed the restrictive severance agreements, to undertake efforts to comply with Rule 21F-7, and to provide written narrative of compliance to the SEC.

F. Scrutiny of Procedures Followed by Outside Auditors

The SEC also brought enforcement proceedings against a number of outside auditing firms. For example, in *In the matter of EFP Rotenberg LLP and Nicholas Bottini CPA*,[111] the SEC brought an enforcement proceeding against accounting firm EFP Rotenberg and one of its partners, Bottini, in connection with their audit of ContinuityX Solutions under Section 10A(a) of the Exchange Act. Section 10A(a) requires that the audit of "the financial statements of an issuer by a registered public accounting firm" include "procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statements."[112] The SEC alleged that the accounting firm failed to detect illegal acts while reviewing ContinuityX's financial statements. ContinuityX's Form 10-K contained several misstatements and omissions including: "(1) grossly overstating revenue by improperly recognizing commissions from fraudulent transactions; (2) failing to disclose related party transactions; (3) overstating assets by recognizing third party assets as its own; (3) falsely stating that [a vendor] was not able to charge back previously paid commissions; and (4) failing to recognize revenue from [vendors] in accordance with their contractual agreements."[113] The SEC found that EFP Rotenberg engaged in improper professional conduct and willfully aided and abetted ContinuityX's violation of securities laws. Specifically, EFP Rotenberg did not plan or perform procedures designed to detect illegal acts including fraud, failed to perform procedures to identify related party transactions, failed to obtain sufficient audit evidence to support its audit opinion, failed to perform procedures to resolve inconsistences, failed to document findings that contradicted its conclusions, improperly relied on management's representations, and had deficient policies and procedures.[114] EFP Rotenberg entered into a settlement agreement with the SEC, which required EFP to: (1) refrain from accepting an audit engagement from any new client for 12 months; (2) retain an independent consultant to review and evaluate EFP Rotenberg's audit review policies and procedures; and (3) pay a civil penalty of $100,000 (and $25,000 for Bottini).

G. New Compliance and Disclosure Interpretations for Regulation S-K

On April 13, 2016, the SEC published a concept release "to seek public comment on modernizing certain business and financial disclosure requirements in Regulation S-K."[115] Regulation S-K provides for uniform reporting requirements in reports on Forms S-1, 10-K, and 8-K. This concept release was part of "a comprehensive evaluation of the Commission's disclosure requirements" under the "Disclosure Effectiveness Initiative" to improve disclosure requirements for both investors and registrants.[116] The release specifically sought comments on seven key issues: (1) importance of specific disclosures in making investment and voting decisions; (2) enhancing information provided to investors while promoting efficiency, competition, and capital formation; (3) increasing investor protection; (4) balancing costs of disclosure with the benefits; (5) lowering cost to registrants of providing information through advancements in technology and communications; (6) increasing benefits to investors and facilitating investor access to disclosure; and (7) addressing any challenges to current disclosure requirements.[117] The comment period ended on October 31, 2016, and the SEC received over 300 comments from individuals, state and federal government personnel, as well as from law and accounting firms, among others.[118] Generally, larger institutions urged the SEC to loosen the disclosure requirements, citing cost of compliance as the biggest obstacle. In contrast, individuals expressed the need to increase corporate accountability by establishing more stringent reporting requirements for public companies.

In response to the comments, on October 18, 2016, the SEC updated its Compliance & Disclosure Interpretations ("C&DIs") for Regulation S-K, adding five new questions and answers regarding the pay ratio disclosure rule.[119] The pay ratio disclosure rule, mandated by the Dodd-Frank Act and adopted in 2015, "requires a public company to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees . . . in registration statements, proxy and information statements, and annual reports that call for executive compensation disclosure."[120] The new rule, which went into effect on January 1, 2017, provides flexibility in meeting the rule's requirements, including permitting a company "to select its methodology for identifying its median employee and that employee's compensation."[121] The C&DIs provide clarification for the pay ratio disclosure requirements, including how to select a consistently applied compensation measure ("CACM") to identify the median employee. Most notably, the C&DIs provide that a registrant *may not* "exclusively use hourly or annual *rates* of pay as its CACM" because "[u]sing an hourly rate without taking into account the number of hours actually worked would be similar to making a full-time equivalent adjustment for part-time employees, which is not permitted."[122] Along the same lines, "using an annual *rate* only, without regard to whether the employees worked the entire year and were actually paid that amount during the year, would be similar to annualizing pay, which the rule only permits in limited circumstances."[123]

V. Consumer Financial Protection Bureau

In *PHH Corp. v. Consumer Fin. Prot. Bureau*,[124] the D.C. Circuit held that the Consumer Financial Protection Bureau's ("CFPB") single-director structure violates Article II of the Constitution, which confers on the President "authority to supervise, direct, and remove at will subordinate officers in the Executive Branch."[125] In response to the financial crisis in 2008, Congress established the CFPB as an independent agency under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") "to implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services, and that markets for consumer financial products and services are fair, transparent, and competitive."[126] The CFPB consolidates the consumer financial protection responsibilities, including with respect to rulemaking, supervision and enforcement, that previously had been the province of seven federal agencies.[127] In exercising its enforcement powers, the CFPB has the discretion to create any appropriate legal or equitable remedy to address violations of the consumer financial protection laws, including temporary and permanent cease-and-desist orders, rescission, reformation of contracts, refunds, disgorgements, damages and civil money penalties.[128] In addition, the CFPB has wide and exclusive authority—except where it shares rulemaking power with the FTC—to promulgate rules "as may be necessary or appropriate to enable the Bureau to administer . . . enforce and otherwise implement the provisions of Federal consumer financial law."[129] As the head of the CFPB, the director serves a five-year term and may be removed only for cause: "for inefficiency, neglect of duty, or malfeasance in office."[130] The CFPB's structure is unique in that it is headed by a single director, unlike other independent agencies that "have historically been headed by *multiple* commissioners, directors, or board members who act as checks on one another."[131] It is also different from a traditional executive agency, whose directors may be removed by the President without cause.

The CFPB brought an enforcement action against PHH, a home mortgage lender, for alleged violations of the anti-kickback provision of the Real Estate Settlement Procedures Act ("RESPA"). The CFPB ALJ issued a recommended decision, finding PHH liable, and ordered disgorgement in the amount of $6,442,399. On appeal, the CFPB Director Richard Cordray affirmed the ALJ's recommended decision but increased the disgorgement amount to $109,188,618. PHH appealed the Bureau's final order to the D.C. Circuit, arguing that "the CFPB's status as an independent agency headed by a single Director violates Article II of the Constitution."[132]

The D.C. Circuit agreed. According to the Court, proponents of the CFPB envisioned the Bureau "to be another traditional, multi-member independent agency," but Congress ultimately "established the CFPB as an independent agency headed not by a multi-member commission but rather by a single Director."[133] This departure from the traditional model had the effect of vesting in the CFPB director "more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President."[134] The D.C. Circuit held that the "CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency."[135] Accordingly, the Court concluded that the CFPB's structure violated Article II because it lacked critical constitutional protections and far exceeded the traditional bounds on independent agencies.

Although the Court held that the CFPB's structure is unconstitutional, it rejected PHH's proposal to invalidate the CFPB in its entirety. Instead, the Court "simply sever[ed] the statute's unconstitutional for-cause provision from the remainder of the statute,"[136] thus, providing the President with "the power to remove the Director at will, and to supervise and direct the Director."[137] According to the Court, this reform satisfies Articles II's requirements by bringing the CFPB within the Executive Branch and subject to the President as a "check" on its actions. The Court's decision, however, calls into question the constitutionality of the CFPB's prior decisions and rulemaking under the unchecked single-director structure and likely will invite further litigation.

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[1] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2016 MIDYEAR ASSESSMENT 1 (2016), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-Midyear-Assessment. Of the 119 new cases, 24 involved mergers and acquisitions; 17 cases were filed against companies in the financial sector; and 32 cases were filed against biotechnology, pharmaceuticals, and healthcare companies. *Id.* at 2.

[2] CORNERSTONE RESEARCH, SEC ENFORCEMENT ACTIVITY AGAINST PUBLIC COMPANIES AND THEIR SUBSIDIARIES: FISCAL YEAR 2016 UPDATE 3 (2016), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants-2016.pdf.

[3] *Id.*

[4] *Salman v. United States*, 137 S. Ct. 420 (2016).

[5] 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2016).

[6] 463 U.S. 646 (1983).

[7] *Id.* at 654-55.

[8] *Id.* at 663 (emphasis added).

[9] *Id.* at 660-64.

[10] 137 S. Ct. at 429.

[11] *United States v. Salman*, 792 F.3d 1087, 1094 (9th Cir. 2015), *aff'd*, 137 S. Ct. 420 (2016).

[12] 773 F.3d 438 (2d Cir. 2014), *abrogated by Salman v. United States*, 137 S. Ct. 420 (2016).

[13] *Id.* at 452.

[14] *Salman*, 792 F.3d at 1093.

[15] *Salman*, 137 S. Ct. at 428.

[16] 816 F.3d 199 (2d Cir. 2016).

[17] *Id.* at 203.

[18] *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 531-47 (S.D.N.Y. 2015).

[19] 135 S. Ct. 1318, 1325 (2015).

[20] *Id.* at 1325.

[21] *Id.* at 1327.

[22] *Id.* at 1332-33.

[23] *Sanofi*, 816 F.3d at 210 (quoting *Omnicare*, 135 S. Ct. at 1327).

[24] *Id.* (citing *Omnicare*, 135 S. Ct. at 1332).

[25] *Id.* at 211.

[26] *Id.*

[27] 819 F.3d 642, 657 (2d Cir. 2016).

[28] *Id.* at 645.

[29] *Id.* at 654.

[30] 564 U.S. 13 (2011).

[31] *Id.* at 142.

[32] *Id.* at 145-47.

[33] *In re Pfizer*, 819 F.3d at 656.

[34] *Id.* at 657.

[35] 838 F.3d 223 (2d Cir. 2016).

[36] *Id.* at 258.

[37] *Id.*

[38] 818 F.3d 775 (8th Cir. 2016).

[39] 134 S. Ct. 2398 (2014).

[40] *Id.* at 2417.

[41] 485 U.S. 224 (1988).

[42] *Id.* at 247.

[43] *Halliburton*, 134 S. Ct. at 2408.

[44] *Best Buy*, 818 F.3d at 782.

[45] *Id.*

[46] 838 F.3d 214 (2d Cir. 2016), *petition for cert. filed*, No. 16-818 (Dec. 27, 2016).

[47] *Id*. at 216.

[48] *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 102 (S.D.N.Y. 2013), *aff'd*, 838 F.3d 214 (2d Cir. 2016).

[49] *GAMCO*, 838 F.3d at 218 (emphasis added).

[50] *Id.*

[51] *Id.* at 220.

[52] *Id.*

[53] *Id.* at 223.

[54] *GAMCO Investors, Inc. v. Vivendi Universal, S.A.*, No. 16-818 (U.S. 2016).

[55] 165 F. Supp. 3d 1 (S.D.N.Y. 2016).

[56] *Id.* at 16.

[57] *Id.* at 12.

[58] *Id.* at 15 (quoting *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2002)).

[59] *Id.* at 16.

[60] *Id.* at 21.

[61] 136 S. Ct. 1562 (2016).

[62] "Unlike a typical short sale, where a person borrows stock from a broker, sells it to a buyer on the open market, and later purchases the same number of shares to return to the broker, the seller in a 'naked' short sale does not borrow the stock he puts on the market, and so never delivers the promised shares to the buyer." *Id*. at 1563-64.

[63] 15 U.S.C. § 78aa(a) (2010).

[64] *Manning*, 136 S. Ct. at 1567.

[65] *Id.* at 1569-70.

[66] *Id.* at 1575.

[67] 835 F.3d 1100 (9th Cir. 2016).

[68] 17 C.F.R. 240.13a-14 (2009).

[69] *Jensen*, 835 F.3d at 1105.

[70] *Id.* at 1104.

[71] *Id.* at 1112 (quoting *United States v. Gomez-Gutierrez*, 140 F.3d 1287, 1289 (9th Cir. 1998)).

[72] *Id.* at 1113.

[73] *GAF Corp. v. Milstein*, 453 F.2d 709, 720 (2d Cir. 1971).

[74] *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978).

[75] *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1227 (4th Cir. 1980).

[76] *Jensen*, 835 F.3d at 1113.

[77] 823 F.3d 1357 (11th Cir. 2016).

[78] *Id.* at 1361.

[79] *Id.*

[80] *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings*, SEC. EXCH. COMM'N, https://www.sec.gov/news/pressrelease/2016-142.html. (last visited Jan. 8. 2017).

[81] *Id.*

[82] U.S. Const. art. 2, § 2, cl. 2.

[83] 824 F.3d 276 (2d Cir. 2016).

[84] *Id.* at 279.

[85] *Id.* at 281.

[86] *Id.* at 282-90.

[87] No. 15-2584, 2016 WL 7321231 (4th Cir. Dec. 16, 2016).

[88] 832 F.3d 277 (D.C. Cir. 2016).

[89] 15 U.S.C. § 78d-1(a) (1987).

[90] 15 U.S.C. § 78d-1(b) (1987).

[91] *Lucia*, 832 F.3d at 284 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

[92] *Id.* (quoting *Tucker v. Comm'r Internal Revenue*, 676 F.3d 1129, 1133 (D.C. Cir. 2012)).

[93] *Id.* at 285-86.

[94] *Id.* at 286.

[95] *Id.*

[96] No. 15-9586, 2016 WL 7439007 (10th Cir. Dec. 27, 2016).

[97] *Id.* at *1.

[98] *Id.* at *4 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 539 (Breyer, J., dissenting)).

[99] 501 U.S. 868 (1991).

[100] *Bandimere*, No. 15-9586, 2016 WL 7439007, at *8.

[101] *Freytag*, 501 U.S. at 881.

[102] *Bandimere*, No. 15-9586, 2016 WL 7439007, at *8.

[103] *Id.*

[104] *Id.* at *8-9.

[105] *Id.* at *9-10.

[106] *Id.* at *21.

[107] *Id.* at *25.

[108] Exchange Act Release No. 78528, 2016 WL 4363864 (Aug. 10, 2016).

[109] Exchange Act Release No. 78590, 2016 WL 4474755 (Aug. 16, 2016).

[110] 17 C.F.R. § 240.21F-17(a) (2011).

[111] Exchange Act Release No. 78393, 2016 WL 4363837 (July 22, 2016).

[112] 15 U.S.C. § 78j-1(a)(1) (2010).

[113] Exchange Act Release No. 78393, 2016 WL 4363837, at *3.

[114] *Id.* at *3-11.

[115] SEC. EXCH. COMM'N, *Business and Financial Disclosure Required by Regulation S-K* 1 (2016), https://www.sec.gov/rules/concept/2016/33-10064.pdf.

[116] *Id.* at 9.

[117] *Id.* at 7-8.

[118] *Comments on Concept Release: Business and Financial Disclosure Required by Regulation S-K*, SEC. EXCH. COMM'N, https://www.sec.gov/comments/s7-06-16/s70616.htm. (last visited Jan. 8, 2017).

[119] *Regulation S-K*, SEC. EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

[120] *SEC Adopts Rule for Pay Ratio Disclosure: Rule Implements Dodd-Frank Mandate While Providing Companies with Flexibility to Calculate Pay Ratio*, SEC. EXCH. COMM'N (Aug. 5, 2016), https://www.sec.gov/news/pressrelease/2015-160.html.

[121] *Id.*

[122] *Regulation S-K*, SEC. EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm. (last visited Jan. 8, 2017).

[123] *Id.*

[124] 839 F.3d 1 (2016).

[125] *Id.* at 5 (citing *Myers v. United States*, 272 U.S. 52 (1926)).

[126] 12 U.S.C. § 5511(a) (2010).

[127] The seven agencies are the Board of Governors of the Federal Reserve, Department of Housing and Urban Development ("HUD"), Federal Deposit Insurance Corporation ("FDIC"), Federal Trade Commission ("FTC"), National Credit Union Administration, Office of the Comptroller of the Currency, and Office of Thrift Supervision. Dodd-Frank § 1061(b)(1)-(7).

[128] Dodd-Frank § 1055(a)(2). Until the timely filing of an appeal, the CFPB may, at any time, modify, terminate, or set aside any order that it has issued.

[129] Dodd-Frank §§ 1022(a)-(b), 1061(b)(5)(B).

[130] 12 U.S.C. § 5491(b)(2), (c)(1)-(3) (2010).

[131] *PPH Corp.*, 839 F.3d at 6.

[132] *Id.* at 7.

[133] *Id.* at 6.

[134] *Id.* at 7.

[135] *Id.* at 8.

[136] *Id.*

[137] *Id.*