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PERSPECTIVE

Are fears about the SEC's discipline regime justified?

By Jasmine Singh

Lawyers fret. It's in their nature. Lawyers who practice before the Securities and Exchange Commission have at times fretted about the double gauntlet of disciplinary authority they face. The concern is not with the traditional disciplinary authority of their state's bar. It is with the second layer disciplinary authority of the SEC's Office of General Counsel (OGC). Anxiety spiked with the advent of Sarbanes-Oxley in 2002 and Dodd-Frank in 2010. Worries abounded: Why should SEC practitioners face such double oversight? Would the SEC apply new or different standards to lawyers? Would the SEC use its lawyer discipline authority to hold lawyers responsible for alleged misdeeds of their clients? Would an independent enforcement regime seek to conscript SEC practitioners into service for the SEC against their clients in the name of "gate-keeping"?

Evaluating the SEC's lawyer discipline regime is a bit difficult. We don't have a complete view into its workings, some of which may be private or informal or subtle. We have only the publicly available record of formal proceedings. Nonetheless, other observers have provided helpful insights into the SEC's lawyer discipline program, and we have reviewed all of the 16 orders arising from formal SEC lawyer discipline proceedings since July 2012.

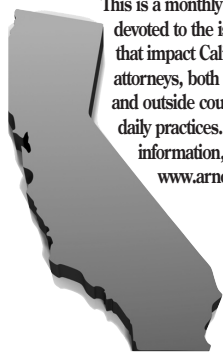
From our perch, we conclude that most of the worries have proven overwrought, but that the SEC's lawyer discipline program does indeed pose an additional layer of risk to SEC practitioners, which can lead to increased costs, publicity, cumulative discipline, and additional risks beyond the traditional system.

The SEC's lawyer discipline cases can be categorized generally as either follow-on or independent proceedings. By follow-on, we mean that the SEC acts after state bar prosecutors or another authority or tribunal has imposed sanctions. For example, if a lawyer is suspended from practice for a year by a state bar for client trust fund violations, the SEC may institute a follow-on proceeding to suspend the lawyer from practice before the SEC for one year, for the same reason. Independent proceedings are those pursued by the SEC alone, in the first instance, independent of any other lawyer disciplinary authority.

Follow-on proceedings

While there are legitimate concerns over the SEC's independent disciplinary action, the commission has not used its

CALIFORNIA PRACTICE:



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disciplinary authority to alter the lawyer's traditional relationship with her client. Some SEC observers have noted that the SEC has largely not acted independently to determine that there has been attorney misconduct, but has instead relied on previous findings of misconduct by state bars or district courts. Dixie Johnson and David Whipple, *Insights: The Corporation & Securities Law Advisor* — Goodman (2000-present), "Zealous Advocacy and Offending the SEC: The SEC's Lawyer Discipline Program" (Oct. 31, 2012). They found that from the period Jan. 1, 2007, through June 30, 2012, "the SEC issued 85 Rule 102(e) disciplinary orders against attorneys" and 81 of those were follow-on proceedings while only four were instances where the SEC acted first to discipline an attorney. They concluded that the SEC should "remain mindful" of "the perception risks of pursuing disciplinary action against advocates who appear before it," that such proceedings "merit the added process of an independent tribunal ruling on the underlying facts" and that the commission should be careful not to discourage "zealous advocacy."

Our review of the orders during the period July 2012 through January 2013 shows that the SEC has continued to proceed largely in this same manner pursuing follow-on proceedings. During this period, there were 16 orders instituting public administrative hearings. In four of those orders, attorneys were suspended from practicing before the commission after the attorneys were either suspended by a state bar or convicted of a felony. [fn1] In the other orders, attorneys were either convicted of something less than a felony or found by a court to be in violation of the securities laws and the commission also imposed a sanction. [fn2] In most of those proceedings, the commission imposed

the sanction agreed to in the responding lawyer's offer for settlement. Where the responding lawyers did not make an offer of settlement, the responding lawyer was suspended with an opportunity to petition the sanction.

In only four matters from Jan. 1, 2007,

Independent proceedings

to present, did the SEC act independently to discipline attorneys. We don't know why the commission did so in these particular cases. It could be that in these cases the commission pursued issues of unique importance to the SEC that did not attract the interest of the traditional attorney disciplinary authority. In the case of Charles E. Hall, Jr., for example, Hall was alleged to have failed "to disclose conflicts of interest, misused client assets, and engaged in improper self-dealing." *In re American Pegassu LDG, LLC, et al.*, Admin. Proc. File No. 3-14169, Rel. No. 9167 (Dec. 21, 2010). The SEC found that Hall committed fraud and barred him from practice. There is no explanation of why another tribunal did not act first and this does not appear to be a fact pattern so innocuous that a state bar prosecutor would forego prosecution.

In another independent determina-

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tion, *In re Steven Altman, Esq.*, Admin. Proc. File No. 3-12944, Initial Decision Rel. No. 367 (Jan. 14, 2009), an Administrative Law Judge found that Altman breached the state ethics code and he was suspended from appearing before the SEC for nine months. The commission's OGC appealed and the commission found that Altman violated rules contained in New York's Code of Professional Conduct and permanently suspended him from practicing before the commission. Altman appealed on the grounds that he had not been charged with violating federal securities law and so this suspension was improper. The D.C. Circuit Court of Appeals heard the appeal and found that Altman's conduct was egregious and, where egregious conduct is at issue, independent action is proper. Whipple and Johnson note that "it seems likely that the D.C. Circuit would not approve disciplinary action against an attorney based on an SEC interpretation of

state ethical rules where the proven conduct does not obviously and egregiously depart from a state authority's requirements." That begs the question: If the conduct so departed from state authority requirements, why did the state bar refuse or fail to act to discipline Altman first? Especially where the case does not appear to be the kind a state bar prosecutor would forego.

To date, the SEC lawyer discipline regime has mostly acted consistently with, not independently of, the traditional lawyer disciplinary authorities. To many SEC practitioners, that should spell some relief for now, though it's likely there will be more reason to fret down the road.

[fn1] *In re Gary R. Wolf*, EAR No. 67749, 2012 WL3716806 (Aug. 29, 2012), File Nos. 3-15000, *In re Roger L. Shoss*, EAR No. 67914, 2012 WL 4338859 (Sept. 24, 2012) 3-15041, *In re James W. Marguileis*, EAR No. 68446, 2012 WL 6561119 (Dec. 14, 2012), 3-15136, *In re David C. Lin*, EAR No. 68509, 2012 WL 6642668 (Dec. 21, 2012), 3-15152.

[fn2] *In re Jacques Nichols*, EAR No. 68087, 2012 WL 5210800 (Oct. 23, 2012) File Nos. 3-15075, *In re Stephen J. Czarnik*, EAR No. 67465, 2012 WL 2952091 (July 19, 2012) 3-14957, *In re Cameron H. Linton*, EAR No. 67912, 2012 WL 4320219, (Sept. 21, 2012) 3-15040, *In re Robert T. McAllister*, EAR No. 67586, 2012 WL 3144939 (Aug. 2, 2012) 3-14970, *In re James S. Quay*, EAR No. 68234, 2012 WL 5511036 (Nov. 14, 2012) 3-15091, *In re Martin M. Werner*, EAR No. 68364, 2012 WL 6042819 (Dec. 5, 2012) 3-15118, *In re Carl N. Duncan*, EAR No. 68501, 2012 WL 6642665, (Dec. 20, 2012) 3-15149, *In re Stephen G. Bennett*, EAR No. 68592, 2013 WL 53843 (Jan. 4, 2013) 3-15163; *In re Stewart A. Merkin, Esq.*, EAR No. 68543, 2012 WL 6707203, (Dec. 27, 2012) File Nos. 3-15158, *In re Larry L. Adair*, EAR No. 68673, 2013 WL 16982 (Jan. 16, 2013) 3-15178, *In re Mitchell Segal*, EAR No. 67930, 2012 WL 44582 (Sept. 28, 2012) 3-14945, *In re Jilaine H. Bauer*, EAR No. 67845, 2012 WL 39902034 (Sept. 12, 2012) 3-15020.

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