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Recent Enforcement Trends In The Commodity Markets (Part 1)

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Last fall, Aitan Goelman – the Director of Enforcement for the Commodity Futures Trading Commission (Commission) – made two interesting points that appear to be indicative of enforcement trends. Specifically, he stated that: (i) real deterrent of market manipulation requires putting people in jail and (ii) the CFTC is going to start trying cases before administrative law judges. Jean Eaglesham, " CFTC Turns Toward Administrative Judges," *The Wall Street Journal* (Nov. 9, 2014). At a minimum, these two points demonstrate the beat cop's resolve to triage all available resources in order to ensure the sanctity of the swaps and futures markets. At the outside, they define a troubling scenario in which administrative law judges with no trading experience will determine whether complex trading was or was not for legitimate purposes. And together they mean the agency will be aggressively enforcing the Commodities Exchange Act and its own rules. We will examine each of these subjects in a two-part blog series: **Administrative law judges, revisited** Mr. Goelman also made it abundantly clear to the *Wall Street Journal* that the Division of Enforcement will, in order to stretch each dollar and provide a credible trial threat, begin trying cases before administrative law judges. The CFTC eliminated its administrative law judges in 2013 for budgetary reasons. And, reportedly, the CFTC does not intend to hire new ALJs. Instead, it will "borrow" ALJs, as needed, from the pool of ALJs across all federal agencies, through the program administered by the Administrative Law Judge Program Office in the Office of Personnel Management. At a recent ABA Panel, Mr. Goelman was reported as saying that the ALJs would be borrowed from the Securities and Exchange Commission. What does this mean for Division of Enforcement cases brought administratively? First and foremost, the office of the administrative law judges is, as required by the Administrative Procedures Act, separate and independent from the Division of Enforcement. Accordingly, even if the CFTC were to retain its own ALJs again, such judges would be expected to be independent (historically, the CFTC's ALJs were even considered hostile to the Division of Enforcement). Of course, concerns about bias abound among practitioners before such courts. *See id.*; *see also* The GEE Blog, " Reader Responds To Recent [Administrative] Law Judge Blog Post." But those concerns – at least from a bias perspective – seem less pronounced when the CFTC is ***borrowing*** its judges from other agencies. Next, defendants can expect to have less access to discovery in administrative proceedings. Unlike the Securities and

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Exchange Commission, which has a requirement that an order be issued within 300 days of the Order Instituting Proceedings (17 C.F.R. § 201.360(2)), the CFTC has no such rocket-docket requirement. Yet, discovery is constrained compared to what is allowed in federal court. For instance, depositions are only allowed to preserve trial testimony from unavailable witnesses. 17 C.F.R. § 10.44(a). Discovery is generally limited to an exchange of expected trial exhibits – with limited ability to obtain discovery from third parties only by court consent. *Id.* at §§ 10.42 & 10.68. In addition, appellate review is effectively limited. To begin with, the first layer of appellate review is by the Commission itself. The Commission does ***not*** review *de novo* the ALJ's factual findings—instead determining only whether "substantial evidence" supports such conclusions. *Dohmen-Ramirez v. Comm. Fut. Tr. Comm'n,* 837 F.2d 847, 856 (9th Cir. 1987). Furthermore, an ALJ's credibility determinations are given "great deference" and are generally upheld unless "inherently incredible or patently unreasonable." *See id.* Then, an appellate court reviews the Commission's factual findings on a deferential basis, as well. *See id.* Furthermore, although an appellate court will "review *de novo* an ALJ's findings of law, [it will] afford deference to an agency's reasonable construction of statutes" and agency rules. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). Accordingly, the factual determinations by an ALJ and the legal determinations by the CFTC will often be the final word. One can question whether rulemaking by litigation is, ultimately, effective. *See* Stuart Shapiro, "Agency Oversight As 'Whac-A-Mole:' The Challenge of Restricting Agency Use Of Non-Legislative Rules," 37 Harvard J. of Law & Pol. No. 2, 523 & 528-530 ("case-by-case enforcement produces laws that are often vague and contradictory"). Certainly, the CFTC ran into difficulties with enforcement through administrative hearings in its previous go-round. *See* Return to Admin Court (quoting former Division of Enforcement Chief Trial Counsel Ken McCracken). Yet, now, resorting to administrative law judges certainly firmly establishes the agency's intent to aggressively enforce the Commodities Exchange Act and its own rules, despite its slim budget. Whether the CFTC will be more effective in its efforts this time remains to be seen. The author of this post, Trace Schmeltz, will present on this topic at FIA 37th Annual Law & Compliance Division Conference on the Regulation of Futures, Derivatives and OTC Products (L&C) (https://lc2015.fia.org/) to be held April 27-May 1, 2015, in Baltimore, Maryland. Visit the Barnes & Thornburg at Table 5 of the exhibition floor during the conference.