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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	Case No. CV 06-7878-GHK (CTx) **JOINT SUPPLEMENTAL BRIEF ON PLAINTIFF'S ADMINISTRATIVE PROCEDURE ACT CLAIM**

Pursuant to the Court's May 4, 2007 ("May 4 Order"), plaintiff Herbert Leslie Greenberg and the defendant Securities and Exchange Commission ("SEC") jointly submit this supplemental briefing responding to the six issues identified by the Court, as they relate to plaintiff's claim that the SEC has unreasonably delayed action on his petition for rulemaking.

I. In Which Courts Does Jurisdiction over Appeals of the SEC's Denial of Rulemaking Petitions Lie?

SEC Response:

If the SEC denies plaintiff's petition for rulemaking, the courts of appeals would have exclusive jurisdiction over any such denial. Plaintiff petitioned the SEC to modify the rules of self-regulatory organizations ("SROs") such as the National Association of Securities Dealers and New York Stock Exchange. Compl. ¶¶13-21. The SEC considers such proposals pursuant to its authority under Section 19(c) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(c), which provides that the SEC "by rule" "may abrogate, add to, and delete . . . the rules of a self-regulatory organization."

If the SEC denies plaintiff's petition, it will do so by order. Under the Administrative Procedure Act ("APA"), interested persons have "the right to petition for . . . amendment . . . of a rule," 5 U.S.C. 553(e), and agencies must explain in writing any decision to deny a petition asking the agency to engage in rulemaking. 5 U.S.C. 555(e). Under the APA, that decision would be an "order," a term that includes any "final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking." 5 U.S.C. 551(6). Thus, any decision by the SEC to deny plaintiff's petition, *i.e.*, any decision not to initiate or engage in rulemaking,[1] is an "order" under the APA.[2]

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[1] Even if a decision not to engage in rulemaking could itself be deemed rulemaking, as the Court noted and as is discussed by the SEC below, challenges to Section 19

Consistent with this definition, both the SEC and reviewing courts have treated an SEC denial of a petition for rulemaking as an "order." *See Timpinaro v. SEC*, 2 F.3d 453, 455 (D.C. Cir. 1993) (noting that SEC had issued an "order den[ying] a petition for rulemaking;" and accepting for direct review petition challenging that denial). Thus, were the SEC to deny plaintiff's petition, any challenge to that order would be covered by Section 25(a)(1) of Act, which provides that "[a] person aggrieved by a final order of the Commission entered pursuant to this title may obtain review" in the courts of appeals. 15 U.S.C. 78y(a)(1). This accords with Supreme Court and other precedent that recognizes agency denials of rulemaking petitions as orders to be directly reviewed (pursuant to the statutes governing that agency) in the courts of appeals. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 735-37 (1985) (court of appeals had jurisdiction over challenge to agency's denial of citizen petition for rulemaking, under statute providing for appellate court review of any "final agency order"); *FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468 (1984) (jurisdiction for review of final FCC order denying rulemaking petition lay in court of appeals).[3]

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rulemaking are within the exclusive jurisdiction of the courts of appeals under Section 25(b)(1).

[2] Indeed, the Ninth Circuit has noted how the term "order" broadly applies to any final agency action. *See Crist v. FAA*, 138 F.3d 801, 804 (9th Cir. 1998).

[3] *Cf. Massachusetts v. EPA*, 127 S.Ct. 1438, 1451 & n.16 (2007) (noting petitioner had challenged EPA "order" denying petition for rulemaking in court of appeals, pursuant to statute providing appellate court review of final agency actions); *Bullcreek v. NRC*, 359 F.3d 536, 537 (D.C. Cir. 2004) (noting that agency had issued an "order" denying petition for rulemaking); *Weight Watchers, Int'l v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995) (FTC denials of rulemaking petitions "appear to be final orders as a matter of law;" agency statute in that case placed review of orders in district court). While *Nader v. US EPA*, 859 F.2d 747, 754 (9th Cir. 1988) held the denial of a rulemaking petition was not an order for which direct appellate court review existed, it did so because – unlike here – the statute permitting appellate review only allowed such review of orders issued under subsections not implicated

While the May 4 Order cited cases from the early 1970s holding that rules the SEC had promulgated were not "orders,"[4] those cases in no way impair the courts of appeals' exclusive jurisdiction over any denial of plaintiff's petition. Because any such denial would be by *order*, not *rule*, those cases are inapplicable. Moreover, their reasoning has since been rejected. For example, *Investment Co. Inst. v. Board of Governors of the Fed. Res. Sys.*, 551 F.2d 1270, 1276 (D.C. Cir. 1977), held that where rulemaking would be reviewed on the administrative record, statutes providing for appellate court review of "orders" encompassed review of rules.[5] But even if one applied those cases here, reasoning that a denial of plaintiff's petition for rulemaking would not be an "order" because it would really be a "rule," then Section 25(b)(1) would apply, and jurisdiction would still vest only in the courts of appeals.[6] Section 25(b)(1) states that "[a] person adversely affected by a rule of the Commission promulgated pursuant to Section . . . 19 of [the Act] may obtain review of this rule in the United States Court of Appeals[.]" 15 U.S.C. 78y(b)(1). As noted

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in that case. *See NRDC v. Johnson*, 461 F.3d 164, 172 (2d Cir. 2006) (analyzing *Nader*). To the extent *Nader* could be read to hold that denials of rulemaking petitions cannot be orders, it conflicts with Supreme Court precedent.

[4] *See id* at 7, *citing PBW Stock Exchange v. SEC*, 485 F.2d 718 (3rd Cir. 1973) (appellate jurisdiction for review of orders issued by the SEC, did not apply to review of rule promulgated by the SEC) and *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C. Cir. 1971) (holding that Section 25(a)(1) did not apply to review of SEC rule).

[5] Other cases have followed *ICI*'s reasoning. *See, e.g.*, *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981); *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 312-13 (7th Cir. 1980).

[6] The May 4 Order also cited *Levy v. SEC*, 462 F.Supp.2d 64 (D.D.C. 2006), for the proposition that Section 25(a)(1) does not apply to rulemaking. In that case, there was no provision expressly providing for appellate court jurisdiction over challenges to that rule, which was enacted under Section 16 of the Act. *Id.* at 65. Rulemaking under Section 16 (unlike under Section 19) is not expressly covered by Section 25(b)(1)'s appellate review provision. *See* 15 U.S.C. 78s(c).

above, any rule resulting from plaintiff's petition would be promulgated pursuant to Section 19(c), which authorizes the Commission "by rule" to "amend . . . the rules of a self-regulatory organization." 15 U.S.C. 78s(c). Stated more simply, on plaintiff's petition for rulemaking, the SEC will either

(1) issue an *order* denying it, in which case exclusive jurisdiction would vest in the courts of appeals under Section 25(a)(1); or

(2) accept the petition, and initiate *rulemaking* that in some manner would amend the SRO arbitration rules, in which case exclusive jurisdiction would vest in the courts of appeals under Section 25(b)(1).

Thus, regardless of how the SEC finally responds to plaintiff's petition, challenges to that final response lie exclusively in the courts of appeals.

Greenberg Response:

The Commission of defendant SEC ("Commission") is not restricted only to grant or deny rulemaking petitions. The Commission may take "such action as the Commission deems appropriate," which could include no action. 17 C.F.R. 201.192(a)("Rule 192").

It is not necessary to speculate as to what ultimate action, if any, the Commission might take in response to recommendations of defendant SEC's Staff ("Staff") to find lack of Section 25(a) original jurisdiction in the Court of Appeals. In Kixmiller v. SEC, 492 F.2d 641, 642, 643 and 645 fn. 24 (D.C. Circuit 1974), the Court of Appeals found it had no original jurisdiction to review lack of Commission action in response to a Staff recommendation by stating, in part:

> The Commission has refused either to examine the staff's view of the matter or to express a view of its own; it now asserts that we lack jurisdiction to consider the petition for review and urges dismissal. ... [W]hat petitioner seeks to have reviewed in this court is not an "order issued by the Commission."

...

> Our authority to directly review Commission action springs solely from Section 25(a) of the Securities Exchange Act of 1934, which confines our jurisdiction to "[orders] issued by the Commission."
>
> ....
>
> "Agency action," as defined in the Administrative Procedure Act, "includes . . . failure to act," 5 U.S.C. § 551(13) (1970), and the Act commands the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1) (1970). But § 25(a) of the Securities Exchange Act of 1934, which sets our jurisdiction, "applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts. . . ." Independent Broker-Dealers' Trade Ass'n v. SEC, 142 U.S.App.D.C. 384, 395, 442 F.2d 132, 143 (1971).

A fortiori, here, where the Staff has not yet made any recommendation, jurisdiction should rest in the District Court.

Further, Sections 25(a) and (b) of the Act do not commit review to the Court of Appeals of a denial of a Section 19(c) rulemaking petition. The Act provides no expressed authority to deny a Section 19(c) rulemaking petition by either a "rule" or an "order." 15 U.S.C. 78s(c). Thus, jurisdiction is proper in District Courts pursuant to its general federal question jurisdiction statute, 28 U.S.C. § 1331 and Mandamus Act (28 U.S.C. § 1361) ["The district court shall have original jurisdiction...."].

Contrary to defendant SEC's incomplete analysis of the definition of "order," an "order" is not involved in the Section 19(c) rulemaking process. Unless otherwise specified by the statute, the APA governs a court's review of administrative agency actions and provides definitions, *e.g.*, "order," "rule," that the court should use when the agency has not provided a definition of a term. Levy at 67; Nat'l Wildlife Fed'n v. Babbitt, 835 F. Supp. 654, 661 (D.C. Cir. 1993). An

"order" is the "whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." (Emphasis added.) 5 U.S.C. 551(6). "[R]ule making" is "agency process for formulating, amending, or repealing a rule." (Emphasis added.) 5 U.S.C. 551(5). "Rule making" is not a single act, but a process. In 17 C.F.R. 201.192(a) ("Rule 192"), defendant SEC describes its rulemaking process as:

> Rule 192. Rulemaking: Issuance, Amendment and Repeal of Rules of General Application. (a) *By Petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition.... The Secretary shall ... refer (the petition) it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate.

The Commission is broadly authorized, as part of the rulemaking process, to take "such action as the Commission deems appropriate," *e.g.*, deny the rulemaking petition, do nothing. Thus, whatever action the Commission might take is not an "order" since it would be part of the rulemaking process.

"Section 25(a) applies in terms only to 'orders,' ... and is available only to persons who were 'parties' to actual agency 'proceedings.' Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132, 143 (1971). Thus, an "order" does not involve rulemaking petitions or denials thereof. 17 C.F.R. 201.101(a)(8) ["*(P)arty* means the interested division, any person named as a respondent ... or any person seeking Commission review of a decision"] and (9) ["*(P)roceeding* means any agency process initiated: (i) by an order instituting proceedings...."].(Emphasis in original.) The Commission may institute rulemaking proceedings only by "notice" not by "order." 17 C.F.R. 201.192(b).

The Court of Appeals has no original jurisdiction over denials of rulemaking petitions pursuant to Section 25(b). Section 25(b) provides that a "person adversely

affected by a rule of the Commission promulgated pursuant to" Section 19(c) of the Act may appeal to the Court of Appeals. 15 U.S.C. 78y(b)(1). Section 19(c) permits the "Commission, by rule, may abrogate, add to, and delete from ... the rules of a self-regulatory organization(.)" (Emphasis added.) However, the Act does not authorize defendant SEC to act by means of a "rule" to deny a rulemaking petition. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..." 5 U.S.C. 551(4). Denial of a rulemaking petition is not a "rule." Thus, Section 25(b) confers no original jurisdiction.

Cases cited by defendant SEC are not applicable. Timpinaro deals with a "petition for review of three orders ... pursuant to § 19(b)." (Emphasis added.) Timpinaro at 453. Section 19(b) explicitly grants defendant SEC authority to act by "order," but Section 19(c), applicable here, does not. 15 U.S.C. 78s(b).

Defendant SEC relies upon cases involving broad statutes, unlike the Act, *e.g.*, "47 U.S.C. § 402(a), in conjunction with 28 U.S.C. § 2342(1), expressly provides for judicial review of all final orders of the Federal Communications Commission that a party seeks to have enjoined, set aside, or suspended." WWHT, Inc. v. FCC, 656 F.2d 807, 814 n. 14 (D.C. 1981). The Court of Appeals has commented upon the "little utility" of trying to use such non-analogous statutes in claiming jurisdiction in the Court of Appeals.

> None of these cases, however, involved the FDCA. Nor did the statutes that were at issue employ analogous language in respect to their grants of jurisdiction to that contained in the FDCA. The provision at issue in *NRDC v. NRC*, for example, defines as reviewable any order in "*any* proceeding for the issuance *or modification* of rules and regulations dealing with the activities of [NRC] licensees." 42 U.S.C.

2239 (emphasis added). This broad language embraces a far more extensive range of reviewable actions....

...

[W]e find those cases of little utility.

...

[P]etitioners' reliance on *Florida Power* ... is misplaced. Petitioners read *Florida Power* as a general affirmation that any agency's denial of a petition is a reviewable order. Yet in that case the Court faced the question of whether the denial of a petition could be reviewed directly in the court of appeals ... --the same statutes that were at issue in *NRDC v. NRC*. Its holding depended on its lengthy exegesis of those specific statutes; nowhere did the Court intimate that it was ruling as a matter of general administrative procedure. Since jurisdiction in these cases is wholly a creature of statute, we are not at liberty simply to apply the Court's reading of one statute to a separate, dissimilar statute.

(Emphasis in original. Underline emphasis added.) Nader at 754.

Defendant SEC relies upon cases, involving statutes, which, unlike Section 25(b) of the Act, do not expressly provide for review of rules. While interpreting statutes other than the Act, Courts have expansively construed "order" "to permit direct review of regulations promulgated through informal notice-and-comment rulemaking...." Sima at 313. However, here, there is no need to expand the definition of "orders" as Section 25(b) specifically permits review of "rules" by the Court of Appeals. Lack of rule review authority was noted in ICI at 1278 ["(T)he legislative history of the 1970 amendments is completely silent with respect to the forum in which Board regulations would be reviewable."]. Additionally, the cited cases did not deal with denial of a rulemaking petition, but promulgated rules.

Thus, the Act does not confer original jurisdiction in the Court of Appeals to review denials of rulemaking petitions.

II. Does the Legislative History of the Act and Amendments Thereto, Including the 1975 Amendments to Section 25 of the Act, Address Whether (A) the Denial of a Rulemaking Petition is an "Order" under Section 25(a)(1), or (2) Jurisdiction to Review Denial of Rulemaking Petition is Vested with Any Court?

SEC Response:

The legislative history of the Act and its subsequent amendments give further proof that Section 25(a)(1) means simply to exclude appeals of actual rulemaking, and that appellate review is appropriate for appeals from any denial of a rulemaking petition. Before passage of what became Section 25(a), it was suggested that the Act's proposed judicial review provision be expanded to allow appellate review not just of orders but also of "rules or regulations of general application." The suggestion was not accepted. After emphasizing that a right of review was intended to be given only to persons aggrieved "[b]y an order, which is different from a rule or regulation," Ferdinand Pecora (counsel to the Senate Committee and a drafter of the bill) expressed the intent that there was a right to review a Commission order,[7] "but not the right to review the making of a rule or regulation." *See* Hearings Before Sen. Cmte. on Banking & Currency on S. Res. 84 (72d Cong.) and S. Res. 56-57 (73d Cong.), pt. 16 at 7569-70 (1934). Thus, the legislative history reveals that Congress only meant to exclude challenges to rules from the scope of Section 25(a)(1).[8]

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[7] This discussion in the legislative history refers to the FTC, which (before the SEC existed) administered the Securities Act of 1933.

[8] It is of no moment that this legislative history focused on adjudicatory orders. Neither the SEC nor APA provisions for petitions for rulemaking existed at that

Moreover, in adding Section 25(b)(1) in 1975, Congress stressed that courts of appeals "provide the most appropriate forum for this review [of SEC rulemaking] in light of the fact that the District Court's fact finding function is rarely necessary and the questions subject to review are likely to end up in the higher court anyway." S. Rep. 94-75 at 36 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 179, 214. As any denial of a petition for rulemaking would, like the promulgation of a rule, take place on the administrative record, the 1975 amendments do reflect Congress's intent that on-the-record review of final agency actions regarding rulemaking belongs in the courts of appeals.

Greenberg Response:

Defendant SEC claims that: (1) prior to the 1975 amendment, while Congress refused to permit original jurisdiction in the Court of Appeals to "review the making of a rule or regulation," it intended, without expressly stating, that the denial of a rulemaking petition be an "order," thus authorizing original review jurisdiction review in the Court of Appeals; and, (2) the 1975 amendment did not change that alleged pre-1975 authorization. Logic, case law and the legislative history demonstrate otherwise.

It is logically inconsistent that Congress, while expressly intending to limit original jurisdiction in the Court of Appeals and mandating that certain acts be only by "order" or by "rule," would allow the Court of Appeals to be inundated with reviews of any action not specifically mentioned in the then legislative history. "Examination of the Congressional history reveals that the omission of rules or regulations from the terms of § 25(a) was no mere oversight on the part of Congress. ... [A]n examination of the legislative history reveals a clear and unequivocal

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time, and "'[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders.'" *Lorion*, 470 U.S. at 735 & n.9 (*quoting Foti v. INS*, 375 U.S. 217, 230 n.16 (1963)).

intention to insulate Commission rules or regulations from review under § 25(a)." PBW at 726. However, allowing review of denials of rulemaking petitions would remove the intended unequivocal insulation. Prior to 1975, defendant SEC's analysis would have indirectly permitted review of "rules" in the Court of Appeals. *See*, *e.g.*, Nader at 753 ["If parties were free simply to file petitions, await their denial, and then be assured of jurisdiction in the court of appeals, there would be little incentive to comply with the procedural provisions ... that require direct appeals from a regulation...."]. Congress intended to prevent such circumvention not permit it.

Congress did not intend to change then existing Section 25(a) or case law concerning reviewability of rulemaking petitions with the 1975 amendments. "Section 25(a), applicable to the reviewability of Commission orders, would be revised in form but remains basically unchanged as to substance." S. Rep. 94-75 ("Legislative History") at 137 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 179, 314. "The changes with respect to SEC orders are included in Section 25(a). These changes are intended to codify existing law and would not alter in any fundamental respect the availability of court review of orders...." Legislative History at 36. In 1975, Congress was aware of the then existing case law, which restricted jurisdiction in the Court of Appeals. Independent at 143 (1971) ["Section 25(a) applies in terms only to 'orders,' a narrower concept than that of "agency action" reviewable in district courts, and is available only to persons who were 'parties' to actual agency 'proceedings.']; PBW at 723 (1973) ["(§) 25(a) allows review here only when an order has been entered by the Commission. Neither any section of the Exchange Act nor of the APA vests jurisdiction in this court to review on direct appeal from the SEC rules or regulations which it has promulgated."]; Kixmiller 643 (1974) ["Our authority ... confines our jurisdiction to '(orders) issued by the Commission.'"].

Congress intended the 1975 amendment only to confer original jurisdiction

over pre-enforcement review of "rules," not denials of rulemaking petitions, upon the Court of Appeals. "[R]eview of rules, to the extent that it is available, is pursuant to the Administrative Procedure Act ... and is thus in the District Court. Section 25(b), as amended by the bill would give any person adversely affected a right to pre-enforcement review in the Court of Appeals of any rule promulgated under Sections ... or 19 of the Exchange Act...." Legislative History at 36.

It is incongruous to assume, as defendant SEC contends, that Congress, knowing of the then recent case law trend to restrict review jurisdiction of the Court of Appeals and enacting Section 25(b) to authorize pre-enforcement "rule" reviews only, would fail to mention any allegedly existing implied authority concerning denials of rulemaking petitions in the Legislative History.

By 1975, Congress was aware of APA definitions and procedures. "Section 19(c) would provide that the Commission's action shall be by 'rule'. Accordingly, the basic procedures the Commission would be required to follow are specified in the Administrative Procedure Act (5 U.S.C. § 553) for rulemaking...." Legislative History at 31. Congress knew that action pursuant to the rulemaking process was not an "order." 5 U.S.C. 551(5)-(6). Had Congress intended that a denial of Section 19(c) rulemaking petitions be by "order," it would have deemed it so.

The Commission may disapprove of Section 19(b) proposed rule changes only by "order." 15 U.S.C. 78s(b)(2)(B)["At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change."]. Had Congress intended that denial of Section 19(c) rulemaking petitions be by "order," it would have so stated in Section 19(c).

Section 25(d)(2) was added in 1975. This addition dealt with the denial of a proposed Section 19(b) rule changes, but deemed it an "order" for Section 25 and APA purposes. 15 U.S.C 78y(d)(2) ["For purposes of a(4) of this section and section 706 of title 5, United States Code, an order of the Commission ... pursuant to section 19(b) of this title disapproving a proposed rule change by such a clearing

agency shall be deemed to be an order of the appropriate regulatory agency...." (Emphasis added.)]. Had Congress deemed denials of other proposed rule changes to be "orders," it would have so stated.

III. If Jurisdiction Over Appeals of the SEC's Denial of Rulemaking Petitions Does Not Lie Exclusively in the Courts of Appeals, Is the Jurisdiction of the Courts of Appeals Sufficiently "Exclusive" to Warrant Their Sole Jurisdiction Under *TRAC* and its Progeny?

SEC Response:

Even if the courts of appeals' jurisdiction over SEC denials of rulemaking petitions is not described as "exclusive" in the Act, their jurisdiction is sufficiently exclusive to warrant their sole jurisdiction over petitions for interlocutory relief under the reasoning of *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").[9] *TRAC* noted that there were "compelling policy reasons" for holding that the jurisdiction of the courts of appeals is exclusive over claims that an agency has unreasonably delayed in taking final agency action with regard to a rulemaking. First, that "[a]ppellate courts develop an expertise concerning the agencies assigned them for review[;] [e]xclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise[;]" second, that "exclusive jurisdiction eliminates duplicative and potentially conflicting review." *Id.* at 78.

Both reasons counsel in favor of finding that the courts of appeals' jurisdiction is sufficiently exclusive here. Agency decisions on rulemaking proposals like plaintiff's (which does not seek relief for himself, but seeks to modify SRO rules that affect all investors) are more likely to raise major legal and policy issues than requests for individual relief. *See* Richard J. Pierce, Jr., *Admin. Law*

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[9] *See also Public Utility Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (following *TRAC*).

Treatise, § 18.2, at 1328 (4th ed. 2002). As such, "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *NRDC v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982). Moreover, consistent with Congress's 1975 enactment of Section 25(b)(1), the courts of appeals have over 30 years of developed expertise in rulemaking undertaken pursuant to the Act.

In addition, any review here would be undertaken on the administrative record. *See* 5 U.S.C. 706, 706(1) (in determining whether agency "unreasonably delayed" agency action, "the court shall review the whole record or those parts of it cited by a party").[10] Exclusive appellate jurisdiction over the SEC's ultimate action on plaintiff's petition also avoids having two levels of identical review of the administrative record. *See Lorion,* 470 U.S. at 744-45 (stressing that "jurisdictional provisions that place initial review in the courts of appeals" "avoid the waste attendant upon this duplication of effort. . . Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeal").[11]

Greenberg Response:

There is no policy or factual basis to expand the concept of exclusivity. Jurisdiction within the District Court would not interfere with the ultimate power of review of the Court of Appeals. TRAC dealt with unreasonable delay in taking "final agency action" with regard to rulemaking, but, here, the issue is unreasonable

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[10] *See also EDF v. Reilly*, 909 F.2d 1497, 1506 (D.C. Cir. 1990) ("APA review, save in rare instances, must be conducted on the administrative record"); Section 25(a)(2) of the Act, 15 U.S.C. 78y(a)(2) (for petitions for review, the SEC "shall file in the court the record on which the order complained of is entered").

[11] *See also ICI,* 551 F.2d at 1276 (for judicial review based on administrative record, requiring petitioners to go first to district court results in unnecessary delay and expense and undesirable bifurcation of the reviewing function).

delay in making recommendations pursuant to Rule 192, which is not "final agency action." Plaintiff simply seeks to enforce his Rule 192 rights, not interim relief regarding some other mandatory act of defendant SEC. Complaint, page 20 ["(O)rder(ing) defendant SEC to act upon Petition No. 4-502 pursuant to the requirements of defendant SEC's General Rule 192(.)"]. A Staff recommendation, if made, "is not a final order within the meaning of section 25(a)(1) of the Act and ... Court (of Appeals) therefore lacks jurisdiction to review it." Amalgamated v. SEC, 15 F.3d 254, 257 (2nd Cir. 1994).

Unlike the Act, the statutes supporting exclusivity contain broad statutory authority. TRAC at 75 ["The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission.... "]; Public Utility Commissioner of Oregon v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir. 1985) ["(All) Suits to challenge ... final actions and decisions ... shall be filed in the United States court of appeals(.)"]; Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1991) ["[A]ny order, affirmative or negative, issued by the [Administrator] . . . shall be subject to review by the courts of appeals."].

The policy considerations requiring that one seek interlocutory relief in the Court of Appeals do not warrant further expansion here. The "basic rationale is to prevent the courts ... from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." Air Line Pilots Association, International v. Civil Aeronautics Board, 750 F.2d 81, 85 (D.C. Cir. 1984). "[T]here are compelling policy reasons for holding that the jurisdiction of the Court of Appeals is exclusive. Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the

litigants by taking advantage of that expertise. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, Investment Co. Institute, 551 F.2d at 1279, and the delay and expense incidental thereto." TRAC at 78.

Extending Court of Appeals jurisdiction would not serve the public interest. "Where an agency's refusal to institute a rulemaking is held to be final agency action subject to judicial review, it is reviewed under the arbitrary and capricious standard of U.S.C. § 706(2)(A)." Weight Watchers at 992. Facts related to undue delay by Staff in issuing recommendations would not enter into an analysis of the merits of how the Commission eventually acts. Staff, after seeking public comment, sought non-public advice from SICA (an advisory committee known to Staff to espouse views contrary to those in the rulemaking petition); however, without reasonable expectation of a response, Staff waited more than one year for that advice without taking further action. (Complaint ¶¶5-21, 27-28.) Analysis of the undue delay issue would not require judicial development of special expertise in esoteric administrative policies as plaintiff does not seek any specific recommendations, but only a judicial determination that the Staff make recommendations pursuant to Rule 192. The issues are separate and distinct. Thus, no judicial economy or conflicting review could result.

There is no basis to extend Section 25(a) exclusive jurisdiction to enforcement of Rule 192 recommendation requirements. District Court review of undue delay in making recommendations would not cause entanglement in "abstract disagreements over agency policies" or interfere with any eventual reviews.

IV. If *TRAC* Does Not Apply, What is the Statutory Basis of the District Court's Jurisdiction.

SEC Response:

Even if *TRAC* did not apply, the SEC is unaware of any statutory basis for this court's jurisdiction over plaintiff's claim to compel SEC action on a petition for

rulemaking. The APA permits review of "[a]gency action made reviewable bystatute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Here, the Act places judicial review of any SEC order (or rule enacted under Section 19(c)) in the courts of appeals, and no statute expressly permits challenges in district court to the SEC's ongoing handling of a petition. Nor has there been "final agency action" here. *See* Compl. ¶¶ 20-21. Plaintiff also has adequate alternative remedial avenues. For this reason, too, 28 U.S.C. 1361 does not provide district court jurisdiction. *See Busey*, 959 F.2d at 812 (no jurisdiction under Section 1361, as review was available in court of appeals).

Greenberg Response:

"The district courts shall have original jurisdiction of any action ... to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The duty arises under Rule 192. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review thereof." 5 U.S.C. 702. "[A]gency action" includes the whole or a part of an agency rule, order ... relief, or the equivalent or denial thereof, or failure to act(.)" 5 U.S.C. 551(13). District Courts have authority to remedy "unreasonable delay" of agency action where such action is required by an agency rule. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62, 124 S. Ct. 2373, 159 L.Ed. 2d 137 (2004); Center For Biological Diversity v. Veneman, 394 F.3d 1108, 1109-1114 (9th Cir. 2005). Memorandum In Opposition To Motion To Dismiss at pages 19-22.

Courts have found jurisdiction in the District Courts over denials of rulemaking petitions. "Because the denials of rulemaking petitions are not governed by special statutory review under the Exchange Act, judicial review must be found elsewhere. ... Int'l Bhd. of Teamsters v. Pena, 305 U.S. App. D.C. 125, 17 F.3d 1478, 1481 (D.C. Cir. 1994) (stating that '[u]nless a statute provides otherwise, persons seeking review of agency action go first to district court [under APA section

703] rather than to a court of appeals'). If there is no special statutory review procedure specified by a statute, the APA provides that jurisdiction lies in a court of 'competent jurisdiction.' 5 U.S.C. § 703; see also In re Spaulding Broadcasting, L.P., 1996 U.S. App. LEXIS 20330, 1996 WL 453637 at *1 (D.C. Cir. July 25, 1996) (holding that absent a statute vesting jurisdiction in the court of appeals, jurisdiction generally lies in the district court); Pena, 17 F.3d at 1481." Levy at 68. "(T)he district court has jurisdiction to review the FTC's denial of the rulemaking petition under the APA and 28 U.S.C. § 1331." Weight Watchers at 992.

"[W]here a denial of review in the District Court will truly foreclose all judicial review, district court review might be predicated on the general federal question jurisdiction statute, 28 U.S.C. § 1331." TRAC at 78. If Staff makes no recommendation or the Commission takes no action upon a recommendation, plaintiff has no remedy in the Court of Appeals. Kixmiller at 641-645.

V. If it Has Jurisdiction, Can the District Court Effect Any Remedy Without Interfering With the Court of Appeals' Prospective Jurisdiction Over Final Enacted Rules?

SEC Response:

In any case where the SEC has received a rulemaking petition, it is possible that the SEC will issue a rule, which can only be reviewed by a court of appeals. A district court hearing a suit to compel agency action on a pending rulemaking petition cannot know with any certainty whether the SEC will amend its (or, here, the SROs') rules in response to that petition. Thus, any decision by the district court in that situation risks interfering with the courts of appeals' ultimate jurisdiction should the SEC enact a rule. To avoid such interference, as *TRAC* counseled, any interlocutory challenge to an agency's consideration of a rulemaking petition should be made to a court of appeals.

Greenberg Response:

The Complaint seeks declaratory and injunctive relief pursuant to APA 706(1) ["The reviewing court shall - (1) compel agency action ... unreasonably delayed(.)"]. The requested relief would not micromanage the nature of the Staff's recommendations, but would cause compliance with Rule 192 --- Staff timely make recommendations and transmit them, with the rulemaking petition, to the Commission.

A holding by the District Court that Staff unreasonably delayed making recommendations to the Commission would have no impact upon a pre-enforcement "rule" review in the Court of Appeals. (Plaintiff, not being a self-regulatory agency to which the proposals in the rulemaking petition are directed, would not be a party to any such review, not being "adversely affected" by the "rule.") A finding of undue delay by the Staff would not reflect upon the nature or merits of the recommendations or the "rule" or the Commission's actions.

Accordingly, enforcing the requirements of Rule 192 through APA § 706(1) would not interfere with the ultimate power of review of the Court of Appeals.

VI. Additional Issues Which Might Help Resolve the Question of Whether District Court has Jurisdiction Over Plaintiff's APA Claims.

SEC Response:

The SEC has identified no additional issues.

Greenberg Response:

Plaintiff has identified no additional issues.

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