

Circuit Court Decisions Addressing Constitutional Challenges to SEC Administrative Enforcement Proceedings

12.19.16



(Article from *Securities Law Alert*, December 2016)

For more information, please visit the [Securities Law Alert Resource Center](#)

D.C. Circuit: Rejects a Constitutional Challenge to the SEC's In-House Courts, and Holds SEC Administrative Law Judges Are Not "Officers of the United States" Subject to the Appointments Clause

On August 9, 2016, in the first circuit court opinion to consider a constitutional challenge to the SEC's in-house courts, the D.C. Circuit affirmed the constitutionality of the SEC's appointment of administrative law judges ("ALJs"). *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (Rogers, J.). The D.C. Circuit held the SEC's ALJs are not "Officers of the United States" subject to the Appointments Clause of the United States Constitution^[1] because "no initial decision of [the SEC's] ALJs is independently final" under the SEC's regulatory framework.

The D.C. Circuit noted that in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), it held that ALJs of the Federal Deposit Insurance Corporation ("FDIC") were not Officers for purposes of the Appointments Clause "because their authority was limited by FDIC regulations to recommending decisions that the FDIC Board of Directors might issue." *Raymond Lucia*, 832 F.3d 277. The D.C. Circuit found the SEC ALJ's decisions to be "no more final than the recommended decisions issued by the FDIC ALJs" in *Landry* because the SEC has a discretionary right to review the action of any ALJ as it sees fit, either on its own initiative or upon a petition for review filed by a party or aggrieved person. *Id.* (citing 15 U.S.C. § 78d-1(a)-(b)). The court emphasized that the SEC "retain[s] full decision-making powers" over cases heard by the ALJs.

Second and Eleventh Circuits: Constitutional Challenges to Pending SEC Administrative Enforcement Proceedings are Premature

On June 1, 2016, the Second Circuit rejected as premature claims brought by respondents in a pending SEC enforcement proceeding alleging that the SEC's appointment of the ALJ in the matter violated the Appointments Clause. *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (Sack, J.). Consistent with the provisions of the SEC's administrative review scheme, the Second Circuit determined "the appellants must await a final [SEC] order before raising their Appointments Clause claim in federal court." In so holding, the Second Circuit agreed with similar decisions issued last year by the D.C. Circuit and the Seventh Circuit. *See Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).

On June 17, 2016, the Eleventh Circuit relied in part on the Second Circuit’s decision in *Tilton* to reverse a district court ruling exercising jurisdiction over constitutional challenges to pending SEC administrative enforcement proceedings. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016) (Pryor, J.).

[1] The Appointments Clause states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States.” U.S. Const. art. II, § 2, cl. 2. The D.C. Circuit explained that “[o]nly those deemed to be employees or other ‘lesser functionaries’ need not be selected in compliance with the strict requirements of Article II.” *Raymond Lucia*, 832 F.3d 277.

Authors and
Contacts

Paul Gluckow
Partner and General Counsel
pgluckow@stblaw.com
+1-212-455-2653

Jonathan Youngwood
Partner
jyoungwood@stblaw.com
1-212-455-3539

Peter Kazanoff
Partner
pkazanoff@stblaw.com
+1-212-455-3525

