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SEC's Home "Court" Advantage Being Challenged



The U.S. Securities and Exchange Commission has made clear that it intends on filing more enforcement actions in administrative proceedings, which are heard by its own Administrative Law Judges (ALJs).

Perhaps not surprisingly, the SEC ALJs have found in favor of the SEC in *every* decision from September 2013 to September 2014. Now, however, at least two actions have been filed in the Southern District of New York challenging the constitutionality of the SEC administrative hearing process. The principle argument in both lawsuits is that the SEC's administrative proceedings violate Article II of the U.S. Constitution, in that Article II executive branch "officers," such as ALJs, may only be separated by one layer of tenure protection from presidential supervision and removal. SEC ALJs, however, have at least two levels of tenure protection, because ALJs can only be fired for good cause by the SEC, whose members themselves can only be terminated for cause. The plaintiffs appear to have support from at least one judge in New York. Judge Rakoff has also questioned the scope of the SEC's administrative powers, wondering in a footnote to his opinion ultimately approving of Citigroup's \$285 million settlement with the SEC: "From where does the constitutional warrant for such unchecked and unbalanced administrative power derive?" For now, we likely will have to wait until next year for an answer. On October 16, 2014, the SEC and the litigant in the first lawsuit agreed that the issues raised are purely legal issues that may be resolved solely on the submission of legal briefs. The Court set oral argument on the matter for March 6, 2015.

Authors

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