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SEC's Use of ALJs: Possible U-Turn Ahead



Oh, what a year makes. Back in October 2014, all the chatter was about the SEC's increased use of its home-grown Administrative Law Judges to move its enforcement actions to their conclusion versus tangling with defendants in federal court.

The WSJ (like every other media outlet) [reported](#) on this turn in the SEC's strategy, with the head of the SEC's anti-foreign-corruption enforcement unit suggesting it was "the new normal." But if you wait long enough, what goes around.... This week, the [WSJ reported](#) that the SEC has actually been scaling back on using its ALJs (in the last 3 months, the WSJ determined that only 11% of the SEC's contested cases took the ALJ route versus 40% in the same period last year, and for FY 2015, SEC ALJ's were used 28% of the time versus 40% in FY 2014). The WSJ also reports that SEC Enforcement leadership this Spring started pushing their staff to file more in federal court versus before ALJs. So the hue and outcry over the unfairness of the SEC using its home-court advantage may have had its desired result, as it's hard to believe the SEC has shifted to federal court just to even the playing field (the WSJ did a multi-year study of the SEC's track record and found a 90% success rate before its ALJs versus 69% when it took cases to court). And there may be even more change in the wind as the [SEC reconsiders rules](#) governing how cases are litigated before its ALJs, including "modernizing" administrative proceedings so they are more in line with federal court procedures. So for SEC matters heading toward the charging phase, it's worth looking closely into which venue the SEC intends to bring its enforcement act and why, especially given these shifting sands.

Authors

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