



Since the financial crisis, the Securities and Exchange Commission's enforcement activity has been the subject of much attention and debate.

But depending on the results of pending litigation and agency proposals, the SEC's enforcement activities could change significantly. Three key areas of potential change include insider trading, the SEC's use of in-house tribunals, and enforcement resources. **1. Insider Trading Prosecutions.** As discussed in a prior [post](#), in [United States v. Salman](#), the Ninth Circuit affirmed that the requisite "personal benefit" for insider trader liability is established where an "insider makes a gift of confidential information to a trading relative or friend." In so holding, the Ninth Circuit rejected the Second Circuit's [narrower holding](#) in *United States v. Newman* that a "personal benefit" may only be inferred from a personal relationship where the exchange of information "represents at least a potential gain of a pecuniary or similarly valuable nature." The Supreme Court has granted certiorari in *Salman* to potentially resolve the circuit split regarding the "personal benefit" element of insider trading liability. (Notably, while the government filed a petition for certiorari in *Newman*, the Supreme Court denied it prior to granting *Salman*'s petition.) Earlier this month, *Salman* filed his brief in the Supreme Court, and the case is scheduled to be addressed during the Supreme Court term starting October 2016. The Supreme Court's decision in *United States v. Salman* will undoubtedly affect the number and type of insider trading cases the SEC pursues, and will provide crucial guidance about the contours of insider trading liability. **2. Continued Challenges to the Use of In-House Tribunals.** Over the last year, the SEC has also faced an increasing number of lawsuits challenging the constitutionality of the SEC's in-house administrative tribunals. The results of a number of pending cases raising such challenges could fundamentally impact the SEC's ability to use such tribunals. Specifically, multiple pending lawsuits have alleged that Section 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act—which authorizes the SEC to seek civil monetary penalties from "any person" in an administrative hearing—violates the Appointments Clause in Article II of the Constitution because SEC administrative law judges are not appointed by the President, a court of law, or a department head. A number of these challenges have been dismissed on jurisdictional grounds. *See, e.g., Bebo v. S.E.C.*, 799 F.3d 765 (7th Cir. 2015), *cert denied*, 136 S. Ct. 1500 (2016); *Jarkesy v. S.E.C.*, 803 F.3d 9, 12 (D.C. Cir. 2015).

Some district courts, however, have preliminarily enjoined SEC administrative proceedings on the ground that they may be unconstitutional. *See, e.g., Hill v. S.E.C.*, 114 F. Supp. 3d 1297, 1319 (N.D. Ga. 2015) (holding that an investor proved substantial likelihood of success that the ALJ in his administrative proceeding was appointed in violation of the Appointments clause and granting a preliminary injunction); *Duka v. S.E.C.*, 124 F. Supp. 3d 287, 288 (S.D.N.Y. 2015) (same). These decisions continue to work their way through the appellate system. In parallel to these legal challenges, there is some evidence that the SEC has begun shying away from the tribunals, choosing instead to bring cases before federal courts. As one Wall Street Journal [report](#) found, for the fiscal year ending September 30, 2015, the SEC used its tribunal for just 28% of its contested cases, compared with 43% for the previous 12 months. This is a notable shift given that the SEC has a [higher success rate](#) before the tribunals than in federal court. Although other factors may well be in play, it is reasonable to infer that the legal challenges to the tribunals (while still pending) have already influenced the SEC's decision making in this area. **3.**

Increased Enforcement Activity. Finally, the number of enforcement actions could increase, or falter, depending on the SEC's effort to lobby Congress for additional funding to support its enforcement efforts. For Fiscal Year ("FY") 2017, the SEC is seeking an enforcement budget of approximately \$543 million. This number is up approximately 6% from FY 2016 and roughly 12% from FY 2015. According to SEC Chairwoman Mary Joe White's [testimony](#) on the budget, this increase is requested in order to expand the SEC's "enforcement program's investigative capabilities and strengthen [its] ability to litigate against wrongdoers." Each year since 2013, the number of SEC enforcement actions have increased, and there is ample reason to believe that the SEC expects that trend to continue. But depending on how the results in the three challenge areas above shake out, the contours of the SEC's enforcement activity could be altered significantly.

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