

D.C. Circuit: SEC's In-House Court is Constitutional

October 13, 2016

Previously, we advised that the Securities and Exchange Commission's increased preference for bringing enforcement actions in its in-house court had triggered jurisdictional and constitutional challenges to SEC administrative proceedings (APs). See "Supreme Court Declines to Review Constitutionality of SEC In-House Court," *Expect Focus* Vol. II 2016. At that time, federal appellate courts had addressed only the pending jurisdictional issues, and declined to reach the merits of the constitutional challenges to the APs. In July 2016, the D.C. Circuit Court of Appeals became the first federal appellate court to affirmatively rule on such challenges, finding that the appointment of the SEC's administrative law judges (ALJs) is constitutional and upholding the constitutionality of the APs. In *Lucia v. SEC*, the court opined that the issue of whether ALJs are "inferior officers" depends on the officer's final decision-making authority. Relying on precedent, the court held that ALJs lack authority to issue final decisions because the Commission may conduct a review of an ALJ's initial decision, which becomes final only when the Commission issues a finality order. In sum, the D.C. Circuit held that ALJs are SEC employees, not "inferior officers," under Article II. Given the D.C. Circuit's expertise addressing administrative law issues, *Lucia* may buttress the SEC's use of APs; however, respondents are likely to continue to raise other constitutional challenges to them (e.g., defendants' Seventh Amendment right to a jury trial and deprivation of their constitutional right to due process).

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