

Circuits Split Over Constitutionality of SEC's Administrative Law Judges

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The Tenth Circuit Court of Appeals, in *Bandimere v. SEC*, recently held that the SEC's administrative law judges (ALJs) are "inferior officers" whose appointments violate the Appointments Clause of the U.S. Constitution because they are not appointed by the President, the chairman of the SEC, or a court of law. This ruling squarely conflicts with that of the D.C. Circuit in *Lucia v. SEC*. See "D.C. Circuit: SEC's In-House Court is Constitutional," *Expect Focus*, Vol. III, 2016. In that case, the D.C. Circuit held that ALJs act as employees and not inferior officers because: (i) their decisions only become final after the SEC itself issues a final order; and (ii) the Commission retains discretion to review *de novo*. The Tenth Circuit opined that the D.C. Circuit improperly gave dispositive weight to the lack of finality of ALJs' decision-making power, which, the Tenth Circuit stated, was only one factor to be considered in deciding whether ALJs are inferior officers. The fact that ALJs "exercise significant discretion" led the Tenth Circuit to conclude that ALJs are inferior officers. The circuit split may make this issue ripe for future U.S. Supreme Court review. Or, this split may resolve itself: the D.C. Circuit has agreed to vacate its decision in *Lucia* to rehear argument en banc, and has set oral arguments for May 24, 2017, while the SEC has petitioned the Tenth Circuit for a rehearing. Whether the SEC may change its method of appointing ALJs, and how the Supreme Court will resolve this circuit split under the Trump administration are uncertain. For now, the Tenth Circuit's decision may lead to spates of litigation as petitioners who are subject to actions in the SEC's administrative forum will likely challenge that venue as unconstitutional.

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