

Defendants Challenge SEC's Increased Use of Administrative Forum

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The Dodd-Frank Act expanded the SEC's jurisdiction to compel administrative hearings and to seek sanctions and remedies similar to those in federal court. The Commission's recent policy of commencing more enforcement proceedings before its own "home court"—rather than in federal courts—has provoked concern and criticism.

Defendants have alleged that proceedings in the SEC's administrative forum deprive them of their constitutional right to due process, e.g., that they are unable to adequately prepare and conduct their defense, because:

- hearing schedules typically are expedited;
- defendants generally cannot compel testimony at depositions or hearings;
- other discovery is more restricted; and
- the application of the federal rules of evidence and civil procedure is limited.

Other constitutional arguments include a violation of defendants' Seventh Amendment right to a jury trial or of Article II restrictions on executive power.

In recently denying the SEC's motion to dismiss a defendant's claim that the SEC's decision to sue him (but not multiple other defendants) in an administrative forum violated the equal protection clause, U.S. District Judge Jed Rakoff is among those who have expressed constitutional concerns.

While the SEC insists that it is motivated by the administrative forum's greater efficiency and streamlined process, the Commission's success rate before an administrative law judge (ALJ) is demonstrably greater than that before federal courts or juries. The SEC contends, however, that administrative proceedings—held before expert and experienced ALJs—are fair, constitutional, and subject to two levels of appeal.

The few federal courts addressing defendants' challenges have generally dismissed such suits for, among other reasons, lack of subject matter jurisdiction. Continued constitutional challenges can be expected and, at some point, a ruling by a federal appeals court.