



SDNY Judge Berman Enjoins SEC Administrative Proceeding as "Likely Unconstitutional"

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The SEC favors administrative proceedings because of their increased speed and efficiency. However, such proceedings leave respondents at a disadvantage in a number of important respects:

- They take place on an expedited schedule (which tends to favor the SEC given its ability to conduct extensive investigations before initiating enforcement proceedings).
- They are subject to only limited judicial review, as described below.
- They involve only limited discovery (with no provision for either depositions or interrogatories).
- They permit the introduction of hearsay and other evidence that would not be admissible in federal court under the Federal Rules of Evidence.

Of particular importance is the fact that the SEC's administrative proceedings are subject to only limited judicial review. While they are ultimately appealable to federal courts of appeals, decisions in administrative proceedings are subject to deference, whereas federal district court decisions on matters of law are subject to de novo review. Thus, the SEC's administrative law judges, who are paid by the SEC and not subject to presidential appointment (or removal) or Senate confirmation, may interpret questions of law in a manner that is (or is perceived to be) favorable to the SEC and its Division of Enforcement. Indeed, Judge Jed Rakoff of the Southern District of New York has cautioned that the SEC's use of administrative proceedings could cause the SEC to "become, in effect, a law unto itself."¹

It remains unclear how Judge Berman's injunction against the SEC will affect SEC's use of administrative proceedings. Judge Berman suggested that the SEC could resolve the constitutional issue by altering its hiring practice for ALJs and having the SEC's commissioners directly appoint them. For now, the SEC has declined to adjust its hiring practice, and companies and individuals alike should be aware of this potentially significant defense to the SEC's exercise of its enforcement authority through administrative action. Akin Gump continues to follow litigation of this issue and encourages you to contact us should you have any questions about Judge Berman's Order or SEC enforcement more generally.

¹Jed S. Rakoff, *Is the S.E.C. Becoming a Law Unto Itself?*, Address Before the PLI Securities Regulation Institute (Nov. 5, 2014) (transcript available at [here](#)).

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