

Circuit Court Split over the Constitutionality of SEC Administrative Law Judges Tees Up Issue for the Supreme Court

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The Tenth and D.C. Circuit Courts of Appeal have come to opposite conclusions in response to constitutional challenges to the Securities Exchange Commission's (the "SEC's") appointment of Administrative Law Judges ("ALJs"). As detailed in our prior [client alert](#), securities defendants across the country have contended that ALJs are inferior officers who were not appointed according to the Appointments Clause in Article II of the Constitution.

The issue initially appeared settled when the D.C. Circuit held in *Lucia v. SEC*, that ALJs were not officers subject to the requirements of the Appointments Clause. But, on December 27, 2016, the Tenth Circuit decided in *Bandimere v. SEC* that ALJs were indeed inferior officers and therefore were in violation of the Appointments Clause.

The Tenth Circuit's ruling, if ultimately upheld, has implications for pending and prior SEC actions, and may lead to similar questions about other agencies' administrative law judges. Given the circuit split, the constitutionality of the SEC's ALJ appointment process may be headed to the Supreme Court.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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