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Back To The Future: The Use of Administrative Proceedings for Enforcement at the CFTC and SEC

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Introduction

Recent months have seen renewed attention to the use of administrative adjudication in government enforcement cases. First, the Securities and Exchange Commission ("SEC") took several public steps to indicate and demonstrate that it intends to bring an increasing number of enforcement actions before administrative law judges rather than to federal court.[1] This, in turn, has triggered a flurry of criticism from a variety of sources, including a prominent federal court judge with a history of pointed interactions with the SEC.[2] While these events were unfolding, the Director of Enforcement at the Commodity Futures Trading Commission ("CFTC") announced that Commission intends to start using the administrative adjudicatory process for enforcement cases, after a number of years in which it never did so.[3]

This article will summarize the recent developments and put them in the context of the history of these agencies' use of administrative proceedings for enforcement, and the legal and policy issues surrounding that use.

The History of the Use of Administrative Enforcement Proceedings

While the use of administrative proceedings for enforcement has bubbled up at both agencies at the same time, the history of that use at the two agencies leading up to this point is much different.

For most of its existence, the SEC had been limited in its ability to use administrative proceedings for enforcement purposes. While some expansion of that authority had occurred over the years,[4] the major expansion came with the Dodd-Frank Act, in which Congress gave the SEC broad authority to bring cases administratively against non-registrants.[5]

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Given the history of limited authority to proceed via administrative procedure in enforcement actions, the SEC Enforcement Division bought most of its cases, and virtually all of its important cases, in federal court. As a result, even as the authority to use the alternative, administrative route expanded over the years, the Division appeared to continue to believe that important cases should have the imprimatur of federal court. Some of the more public frustrations that the Division has faced in recent years with what it likely perceived as straightforward matters, *e.g.*, the entry of settlements,[6] combined with the expansion of authority under Dodd-Frank, may have triggered a recognition that the administrative path might offer attractions that the Division had been overlooking.

The history at the CFTC is much different. There, from its initial days in the mid-1970s, the CFTC has always had authority to bring a full range of cases either administratively or to federal court.[7] Indeed, going back to the Commodity Exchange Administration in the Department of Agriculture, the administrative process produced important decisions.[8] Until the last decade, the CFTC's Enforcement Division was as likely, in fact more likely, to choose the administrative forum as to go to federal court, particularly for cases that were not "plain vanilla" fraud schemes. For example, during the 1990s, the CFTC filed more administrative actions than district court proceedings every year, with the percentage ranging between 55 and 80 percent of the filings for the year.[9]

During the later part of the tenure of Gregory Mocek as the Director of Enforcement at the CFTC, the Division ceased bringing cases through administrative proceedings. All matters were brought to federal court. Indeed, this use of the federal courts became so complete, the dockets of the CFTC's Administrative Law Judges ("ALJs") dwindled to almost nothing, and by 2012, the CFTC ceased employing any ALJs.[10] Although various explanations have been offered for the CFTC Enforcement Division's change in tactics, it is likely the case that mounting frustration with the duration of and results from the administrative process played major roles in the decision.

The reasons for turning now to the administrative processes also seem to vary somewhat between the two agencies. CFTC Enforcement Director Aitan Goelman has been quoted as saying that the "'overwhelming reason for this change is resources.'"[11] His view appears to be that administrative cases, with their more limited discovery, will not use up as much personnel time as federal court proceedings.[12]

Over at the SEC, the increased use of the administrative process first drew public attention in 2014 when Enforcement Director Andrew Ceresney said the agency would begin to use it more in insider-trading cases.[13] It quickly became apparent, however, that the increased use of administrative proceedings was likely to be across-the-board. As Kara Brockmeyer, the head of the SEC Enforcement Division Foreign Corrupt Practices Act unit, was recently quoted as saying, "'It's fair to say it's the new normal… . Just like the rest of the enforcement division, we're moving towards using administrative proceedings more frequently.'"[14] The reasons for doing so, moreover, have been ascribed not just to the need to conserve resources, but more broadly to various benefits flowing from use of the forum.[15]

The Impact of the Use of Administrative Proceedings for Enforcement

The common wisdom is that administrative adjudications overwhelmingly favor the agency. And there are many aspects of the proceeding that strongly tilt the balance towards the prosecution. First and foremost, it would be hard to deny that, generally speaking, there is a significant "home-court advantage" to the administrative route. Indeed, as has been often cited in the recent furor over this issue, in the fiscal year ending September 30, 2014, the SEC won 100% of its internal administrative hearings, while winning only 61% of its trials in federal court.[16] Moreover, the Commission—SEC or CFTC—sits as judge on review of the ALJ's Initial Decision. Thus, even if the Administrative Law Judge ("ALJ") goes astray, each Commission is in a position to undo any departure from orthodoxy by an ALJ if it wishes to do so. Arguably, a recent example of this came in *In the Matter of Flannery and Hopkins*.[17] There, the SEC rejected the conclusion and reasoning of the ALJ's Initial Decision, and held that respondents could be held liable under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5(a) & (c) for their actions in connection with the making of a false or misleading statement even where they could not be liable under Rule 10b-5(b) in the wake of U.S. Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*.[18] And while a decision of either Commission is subject to appeal to the federal Courts of Appeal, the availability of that "independent" scrutiny is legally and practically more limited than the impact of hav-

ing the fact-finding and trial-level determinations occur in the court system.

Second, the opportunity for discovery is very much more limited in the administrative process. With few exceptions, there are no pre-hearing depositions, and third-party document discovery can be very much more difficult than in a federal court.[19] The agency staff, of course, has had all the opportunity it wants during the investigative phase to develop the record both through document production and testimony. To similar effect, the staff presumably takes as much time as it feels necessary to conduct the investigation and put its case together before filing. The defendants, in contrast, will be under the gun from the ALJ to prepare quickly for a hearing. While the staff has often taken years, the defendants seldom have more than months to prepare.[20]

Despite these significant disadvantages, an administrative proceeding is not always bad news for the defendant. Generally speaking, in proceedings at either Commission, the defendant can get quick and easy access to the non-privileged portions of the investigatory record.[21] Moreover, the enforcement divisions have affirmative obligations to disclose material, exculpatory information—not true in an enforcement case in federal court—and to turn over witness statements.[22] The less formal, less rule-bound procedures of the administrative hearing can often facilitate defendants' efforts to introduce into evidence potentially relevant information that might be more problematic under a strict application of the Federal Rules of Evidence. While, generally speaking, administrative proceedings do give the enforcement side a distinct home-field advantage, there is some history of ALJs being willing at times to rule against the staff, particularly at the CFTC. Indeed, at the CFTC, even the Commission has shown a willingness to rule for respondents in its adjudicatory capacity where it had previously authorized the action in its prosecutorial capacity.[23] Most importantly, particularly on issues involving market or industry-specific concepts or conduct, the patience and tolerance of federal judges facing crowded criminal dockets can wear thin, while ALJs (and Commissioners) who work regularly on the subject matter can bring an understanding of industry practice and non-intuitive realities to their examination of the facts and circumstances.

The use of administrative proceedings in enforcement proceedings has one clear impact on the development of the law, which is either a negative or a positive depending on your perspective. Because the Commission, be it SEC or CFTC, sits as adjudicator, the administrative process allows the Commission to develop the law through its decisions. The Commissions in effect already do that to some degree through their settlement orders, but as guidance on the meaning of the law, those orders are both somewhat problematic and controversial.[24] Fully adjudicated decisions that result from an adversarial process that provides for full briefing and often oral argument,[25] whatever its flaws, will produce decisions that will carry more weight, value and authority. The result—taking the interpretation and explication the law away from district court judges and putting it in the hands of the Commissions—is good, if you believe that there is value in the development of the law by the expert agency, or is bad, if you believe the law is better developed by Article III judges (a viewpoint discussed further below).

Policy and Constitutional Issues Raised in Connection with the Use of Administrative Enforcement Proceedings

In any event, potential targets of administrative enforcement proceedings see the disadvantages as far outweighing the advantages, and a public hue and cry has arisen, particularly with regard to the SEC's announced plans to use the administrative process more regularly.[26] Many of those expressing concern focus on what they see as the misguided and even dangerous policy implications of the shift. Judge Jed Rakoff, who is well known for his willingness to critique the SEC handling of enforcement matters,[27] has discussed publicly what he has called "the dangers" that the SEC's shift towards administrative proceedings poses "to the development of the law." While noting that "the informality and arguable unfairness of S.E.C. administrative proceedings might present serious problems for those defending such actions," Judge Rakoff argues that the true danger that "the judiciary and the public" should fear from the shift is that "it hinders the balanced development of the securities laws." He reasons that,

> **while the decisions of federal district courts on matters of law are subject to de novo review by the appellate courts, the law as determined by an administrative law judge in a formal administrative decision must be given deference by federal courts unless the decision is not within the range of reasonable interpretations un-**

der the doctrine of established by the Supreme Court in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The result would be unlikely … to lead to as balanced, careful, and impartial interpretations as would result from having those cases brought in federal court.[28]

Others have focused more on the issue of the unfairness to defendants of the administrative process as compared to federal trials.[29] As one commentary put it, "the SEC will likely anticipate more wins or, at a minimum, the ability to grind down the respondent, who will have to wait years before seeing a neutral forum."[30] And some have called on Congress to act to prevent the use of administrative proceedings, at least for non-regulatory cases such as insider trading and fraud.[31]

Some defendants recently have also mounted constitutional challenges to the use of the administrative process in enforcement matters. These challenges raised primarily two constitutional arguments. One is an equal protection/due process argument. This argument starts with the claim that those subject to administrative proceedings where the facts and circumstances are similar or identical to others sued in federal court. It then asserts that those being brought to the administrative forum are being subjected to a kind of disparate treatment or adverse selective manner of prosecution motivated by a desire to limit the defendants' access to information or other procedural protections.[32] These claims have not gotten very far to date, although principally on the procedural ground that the courts have no jurisdiction over the ancillary attacks on the administrative processes, and that the arguments should be raised in the first instance instead in the pending administrative proceedings.[33]

The second constitutional argument arises from the vesting of executive power in the President of the United States under Article II—specifically, clause 2, the so-called "Appointments Clause."[34] In *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al.*,[35] the Supreme Court held that the Public Company Accounting Oversight Board was improperly constituted because the Board members, although acting with the powers of "executive officers," were insulated by statute from the President by two layers of limitations on removal. The improper insulation arose from the fact that the Board members could only be removed "for cause," and those who could remove the Board members could only be removed by the President, in turn, also "for cause." While the Court had previously upheld the constitutionality of imposing one level of protected tenure between those vested with executive power and the President, it held that two layers of protected tenure was a bridge too far.[36]

In the course of its opinion, the majority addressed the question of the impact of the decision on the use of ALJs at independent agencies such as the CFTC and SEC. Indeed, the dissenting opinion, authored by Justice Breyer and joined by three other Justices, recognized that ALJs are similarly insulated from removal by two levels of "for cause" requirements,[37] and asked the seemingly rhetorical question, "Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?"[38] The majority responded that its decision did not reach the question of the constitutionality of federal agency ALJs because: (1) it is not clear that they are "Officers of the United States," such as to trigger the Article II concern, and (2) "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, … or possess purely recommendatory powers."[39]

As the dissent in *Free Enterprise Fund* suggested, however, it is not clear how powerful those distinctions really are. In *Freytag v. Commissioner of Internal Revenue*,[40] the Supreme Court discussed when personnel serving an adjudicatory function—in that case, special trial judges appointed by the Tax Court—were "inferior officers" subject to the constrains of the Appointments Clause. There, the Court noted that the special trial judges could be assigned to render decisions in certain types of cases—which the parties apparently conceded would make them subject to the Appointments Clause.[41] The Court also reasoned that, even if the employees "lack authority to enter a final decision," their "duties, salary and means of appointment … are specified by statute," and they "perform more than ministerial tasks." In that regard, the majority opinion noted in particular that the special trial judges "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." Moreover, the decision noted, "In the course of carrying out these important functions, the special trial judges exercise significant discretion."[42]

These duties, of course, sound a great deal like those that SEC and CFTC ALJs perform.[43] And the Commissions' ALJs certainly exercise significant discretion in discharging those duties.[44] Indeed, importantly, Justice Scalia, in the course of his concurring opinion in *Freytag* on behalf of four Justices,

expressly stated that the federal "corps of administrative law judges … are all executive officers."[45]

On the other hand, in applying *Freytag*, the United States Court of Appeals for the District of Columbia has suggested that, in deciding if agency ALJs trigger an Appointments Clause analysis as 'inferior officers" rather than merely employees, the crux of the issue is whether their decisions are only "recommended" or can be final. In *Landry v. Federal Deposit Insurance Corp*,[46] the court noted the Supreme Court's discussion in *Freytag* of the various duties of the special judges in question and the reference to their exercise of discretion, but concluded that the judges' "power of final decision in certain classes of cases was critical to the Court's decision."[47] Because the ALJs in question in the case before it "have not such powers," but only could make recommended decisions, proposed findings of fact and conclusions of law and proposed orders, the court concluded that they were not inferior officers triggering concerns under the Appointments Clause.[48] Moreover, it rejected the argument in the case before it that the FDIC had not engaged, in fact, in *de novo* review, characterizing that, even if true, as "go[ing] only to [the FDIC's] carefulness, not its authority."[49]

Thus, the precise stature of the ALJs' decisions at the agency and the nature of the agency review authorized under its rules could be critical to the consideration of the constitutional issue. In that regard, while the rules at the SEC and CFTC are generally similar with regard to the nature and handling of an ALJ's Initial Decision, they differ in small ways that could nonetheless be critical to the constitutional analysis.

At the SEC, on the one hand, the rules state that, on appeal of an ALJ Initial Decision, "The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record."[50] They also provide that the Commission, on its own initiative and without limitation, can decide to review an Initial Decision of an ALJ.[51] On the other hand, the Initial Decision is not called a recommendation, and the rules state that, in deciding whether to grant a petition for review,

> **the Commission shall consider whether the petition for review makes a reasonable showing that: (i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.[52]**

Moreover, the Commission rules require a Commission order to be issued in order for the Initial Decision to become a final decision, but they leave no discretion as to the issuance of such an order in the absence of petition for review or a decision by the Commission to review the Initial Decision on its own initiative.[53]

The CFTC rules similarly state that, on appeal of an Initial Decision, "[T]he Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the Administrative Law Judge and make any findings or conclusions which in its judgment are proper based on the record in the proceeding."[54] While the Initial Decision, again, is not characterized as a recommendation, in contrast to the SEC rules, the CFTC does not appear to grant itself any discretion under its rules whether to hear an appeal if one is sought by a party.[55]

On the other hand, and also in contrast to the SEC procedure, no Commission order is necessary for an ALJ's Initial Decision to become a final decision of the CFTC. Rather, the rules state that, if no appeal is taken and the Commission does not take a case for review on its own initiative, "The initial decision shall become the decision of the Commission 30 days after service thereof."[56] If that happens, the rules provide that any affected party "shall be duly notified thereof by the Proceedings Clerk. The notice shall state that the time for filing a notice of appeal by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party."[57]

Of course, as the *Freytag* decision suggests, it may be sufficiently problematic under the constitutional analysis if ALJs exercise significant procedural authority and discretion over the conduct of the hearing, the admissibility of evidence and the taking of discovery. At both the SEC and the CFTC, the ALJs are given the types of responsibilities to which the *Freytag* opinion appeared to be referring in that regard.[58]

In any event, whether because of the exchange between the majority and dissenting opinions in the Supreme Court's *Free Enterprise Fund* decision or the recent new attention given the administrative

process by the agencies' enforcement divisions, various litigants are teeing up the Appointments Clause issue in the courts. While, as noted above, several such attempts have been turned aside for the moment for being procedurally flawed, attempts at collateral attacks on the use of administrative proceedings for enforcement continue to be filed.[59] There seems little doubt that the courts eventually will need to grapple with this issues, with potentially profound effects on the use of administrative proceedings for enforcement, including by the CFTC and SEC.

Conclusion

The increased use of administrative enforcement proceedings at both the CFTC and SEC promises to have an impact on outcomes, procedural rights of defendants—both perceived and real—and on the development of the substantive law. How significant an impact there will be will depend on how the administrative proceedings actually are conducted, how the agencies handle their increased role in developing the law as adjudicators, and policy decisions regarding the types and volume of cases brought administratively. But it also could be a relatively short-lived impact, depending on how the courts ultimately handled the constitutional issues that will eventually be before them.

ENDNOTES

1. *See, e.g.,* Joyce, "SEC to Use Administrative Cases More, Despite Defense Bar Complaints, Officials Say," Corporate Law & Accountability Report, Nov. 7, 2014, *found at* http://www.bna.com/sec-administrative-cases-n17179911882/.
2. *See Id*.
3. Eaglesham, "CFTC Turns Toward Administrative Judges," Wall St. J., Nov. 9, 2014, found at http://www.wsj.com/articles/cftc-turns-toward-administrative-judges-1415573398.
4. *See, e.g.*, Sec. 202, Securities Enforcement Remedies and Penny Stock Reform Act of 1990, P.L.101-429 (Oct. 15, 1990) (expanding administrative remedies under the Securities Exchange Act of 1934).
5. Sec. 929P, Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (Jul. 21, 2010).
6. For a brief history of the SEC's infamous tussle with Judge Jed Rakoff over its efforts to settle a case with Citigroup, see Portess & Goldstein, "Overruled, Judge Still Left a Mark on S.E.C. Agenda," N.Y. Times, Jun. 4, 2014, found at http://dealbook.nytimes.com/2014/06/04/appeals-court-overturns-decision-to-reject-s-e-c-citigroup-settlement/?_r=0.
7. *Compare* Commodity Exchange Act ("CEA") Sec. 6(c)(4), 7 U.S.C. §9(4) (authority to bring administrative enforcement proceedings) *with* CEA Sec. 6c, 7 U.S.C. §13a-1 (authority to bring enforcement proceedings in federal court).
8. *See, e.g.*, *David G. Henner*, 30 Agric. Dec. 1151 (1971).
9. Chart, Division of Enforcement section, *1999 CFTC Annual Report*, found at http://www.cftc.gov/anr /anrenf99.htm.
10. CFTC ALJs also heard reparation cases brought by private parties under the Commodity Exchange Act. *See* CEA Sec. 14, 7 U.S.C. §18 (authorizing private parties to "apply" to the CFTC for damages against registered entities). That function has been entirely taken over by hearing officers employed by the agency. *See* H.Rep. 113-116, Committee on Appropriations, U.S. House of Representatives, "Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation" (Jun. 18, 2013) at 59 (expressing concern about the CFTC's elimination of ALJs and intended use of hearing officials instead, noting that "questions have been raised by the Federal ALJ Conference regarding authority under the Administrative Procedures Act and best practices," that "[m]inimum requirements for such hearing officers do not include a law degree," and that "CFTC has sole authority to hire and fire these non-ALJ hearing officers.")
11. Eaglesham, "CFTC Turns Toward Administrative Judges," *supra*.
12. *Id.*
13. Lynch, "U.S. SEC to File Some Insider-Trading Cases in its In-House Court," Reuters, Jun. 11, 2014, found at http://www.reuters.com/article/2014/06/11/sec-insidertrading-idUSL2N0O-S1AT20140611.
14. Eaglesham, "SEC is Steering More Trials to Judges it Appoints," Wall. St. J., Oct. 21, 2014, found at http://www.wsj.com/ articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590.
15. See Ceresney, "Remarks to the American Bar Association's Business Law Section Fall Meeting," Nov. 21, 2014, found at http://www.sec.gov/News/Speech/Detail/Speech/1370543515297#.VKGJOl4Ao (detailing the "number of benefits to using the administrative forum that can lead us to file cases there").
16. Eaglesham, "SEC is Steering More Trials to Judges it Appoints," *supra*.
17. Release No. 33-9689 (SEC Dec. 15, 2014).
18. ___ U.S. ___, 131 S.Ct. 2296 (2011). In *Janus*, the Court held that the "maker" of a materially false statement liable under Section 10(b) of the Exchange Act and Rule 10b-5(b) is only "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302.

19. See, e.g., SEC Rules of Practice 230-234, 17 CFR §§201.230-.234; CFTC Rules of Practice 42-44, 17 CFR §§10.42-.44.
20. Indeed, the SEC has formal rules, reflected in its orders commencing proceedings, that put the ALJs under time limits to complete the hearing process. Even the longest of the periods allowed for under the SEC rules is less than one year. See SEC Rule of Practice 360(a)(2), 17 CFR §201.360(a)(2). The CFTC has no equivalent formal time deadlines, although one would expect that, under any revived administrative processes, the ALJs will be under similar pressure to complete proceedings swiftly.
21. SEC Rule of Practice 230(a)(1), 17 CFR §201.230(a)(1); CFTC Rule of Practice 42(b), 17 CFR §10.42(b).
22. SEC Rules of Practice 230(b)(2), 231, 17 CFR §§201.230(b)(2), .231; *In re First Guar. Metals, Co.*, Nos. 79-55 to -57, 1980 WL 15696, at *9 (CFTC July 2, 1980) (requiring disclosure of exculpatory evidence by the enforcement division in administrative proceedings as "a rule of fairness and minimum prosecutorial obligation"); CFTC Rule of Practice 42(c), 17 CFR §10.42(c) (requiring disclosure of witness statements); *see also* Note, "Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure," 95 Minn. L. Rev. 1424, 1436-37 (2011) (discussing disclosure of exculpatory evidence in SEC and CFTC administrative proceedings).
23. *See, e.g.*, *In the Matter of Grain Land Cooperative*, CFTC Dckt. No. 97-01 (CFTC Nov. 25, 2003) (reversing the ALJ's Initial Decision and dismissing the administrative complaint).
24. *See* Mills & Nathan, "CFTC Speaking Orders: Are They Lawful," 15 Securities Litigation Journal 26 (Securities Litigation Comm., Sec. of Litigation, ABA, Win./Spr. 2005).
25. *See* SEC Rules of Practice 540, 17 CFR §201.540; CFTC Rules of Practice 102-103, 17 CFR §§10.102-.103.
26. Interestingly, the General Counsel of the SEC has suggested publicly that the Commission might be willing to take a renewed look at some of the asserted procedural unfairness. *See* Kraft, "Attys Ready To Pounce On SEC's Outdated Admin Rules," Law360, Jun. 18, 2014 (paraphrasing SEC General Counsel as having said at a public forum, "it was fair for attorneys to question whether the SEC's rules for administrative proceedings were still appropriate, given the fact that the rules were last revised 'quite some time ago,' before the Dodd-Frank Act gave the SEC permission to try any type of case in its in-house forum"), found at http://www.law360.com/articles/ 549549/attys-ready-to-pounce-on-sec-s-outdated-admin-rules.
27. *See supra*. n.6.
28. Jed S. Rakoff, Judge, U.S. District Court for the SDNY, "Is the SEC Becoming a Law Unto Itself?," Address, PLI Securities Regulation Institute, Nov. 5, 2014.
29. *See, e.g.*, Cuban & Melsheimer, "It is Time to Rein in the SEC," Wash. Post, Dec. 19, 2014, found at http://www.washingtonpost.com/opinions/it-is-time-to-rein-in-the-sec/2014/12/19/bb7b988c-86cd-11e4-b9b7-b8632ae73d25_story.html.
30. "There's No Place Like Home: SEC Increasingly Uses Administrative Proceedings," Nat'l Law Review, posted Dec. 22, 2014, found at http://www.natlawreview.com/article/there-s-no-place-home-sec-increasingly-uses-administrative-proceedings.
31. *See, e.g.*, Cuban & Melsheimer, *supra*.
32. *See, e.g.*, *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011) (rejecting SEC motion to dismiss complaint); *Jarkesy and Patriot28 LLC v. SEC*, Fed. Sec. L. Rep. ¶ 97,990 (D.D.C. Jun. 10, 2014) (dismissing action), appeal pending, No. 14-5196 (D.C. Cir. filed Aug. 12, 2014); *Chau v. SEC*, No 14-cv-1903 (S.D.N.Y. Dec. 11, 2014) (dismissing action).
33. *See, e.g.*, *Chau v. SEC*, *supra*.
34. "[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."
35. 561 U. S. 477 (2010).
36. *Id.* at 495-98.
37. As Justice Breyer noted, federal agency ALJs are removable only "for good cause established and determined by the Merit Systems Protection Board," the members of which in turn can be removed by the President only for good cause. *Id.* at 542.
38. *Id.* at 543.
39. *Id.* at 507 n.10.
40. 501 U.S. 868 (1991).
41. *Id.* at 882.
42. *Id.* at 881-82.
43. *See, e.g.*, CFTC Rules of Practice 41-44, 66-68, 17 CFR §§10.41-.44, .66-.68; SEC Rules of Practice 232-235, 320, 323, 17 CFR §§201.232-.235,. 320,.323.
44. *Id.*
45. *Id.* at 910 (emphasis omitted).
46. 204 F.3d 1125, 1133-34 (2000).
47. *Id.* at 1134.
48. *Id.*
49. *Id.* at 1133.
50. SEC Rule of Practice 411(a) , 17 CFR §201.411(a).
51. SEC Rule of Practice 411(c), 17 CFR §201.411(c)..
52. SEC Rule of Practice 411(b)(2), 17 CFR §201.411(b)(2).

53. "If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error of fact in the initial decision, and if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final as to that party. The decision becomes final upon issuance of the order." SEC Rule of Practice 360(d)(2), 17 CFR §201.360(d)(2).
54. CFTC Rule of Practice 104(b), 17 CFR §10.104(b).
55. CFTC Rule of Practice 102(a), 17 CFR §10.102(a). Like the SEC, the CFTC may also decide to review an Initial Decision on its own initiative. CFTC Rule of Practice 105, 17 CFR §10.105.
56. CFTC Rule of Practice 84(c), 17 CFR §10.84(c).
57. CFTC Rule of Practice 84, 17 CFR §10.84.
58. *See supra* n.43.
59. *See, e.g.*, *Duka v. SEC*, 15-cv-00357, (S.D.N.Y. Filed Jan. 16, 2015) (Complaint for Declaratory and Injunctive Relief); *Stilwell et al. v. SEC*, 14-cv-7931 (S.D.N.Y. filed Oct. 1, 2014) (Complaint for Declaratory and Injunctive Relief).