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Questionable Proceedings

The constitutionality of adjudication by SEC administrative law judges faces judicial and legislative challenges

THE U.S. Securities and Exchange Commission's (SEC) practice of initiating administrative proceedings against defendants to be adjudicated by the SEC's in-house administrative law judges (ALJs) has taken place since the 1940s. Presently, five ALJs oversee the SEC's Administrative Law Court. All are appointed by the SEC's Office of Administrative Judges.

In the past few years, the SEC has dramatically increased the percentage of cases it has filed as administrative proceedings as opposed to actions in the federal courts. The SEC enjoys a much higher success rate in such proceedings compared with those overseen by an independent federal judiciary. A study by the *Wall Street Journal* demonstrated that the SEC's success rate in administrative proceedings from October 2010 through March 2015 was 90 percent compared with its 69 percent success rate in federal actions over the same period. The study also showed that when defendants who received an adverse ruling from an ALJ appealed directly to the SEC, 95 percent of such appeals were resolved in favor of the SEC.[1]

The SEC has acknowledged that it has filed more ALJ proceedings in the recent past than previously and has contended that such increases are due to changes under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) that permitted the SEC to seek certain penalties in ALJ proceedings that it previously could only seek in actions filed in federal court. [2]

Criticism against the SEC's paradigm shift has been levelled from many quarters, including from one federal judge.[3] Critics contend that the administrative arena lacks many of the due process protections of the federal courts, including an independently appointed judiciary, the opportunity for extensive discovery, and juries. Because the mere levying of claims by the SEC may result in devastating consequences for defendants and their families—e.g., the loss of jobs, careers, and income—critics argue that the process should be more fair and impartial. Indeed, the administrative process is held to be unfair to defendants who are judged first by an ALJ appointed by and beholden to the SEC and again on an appeal to the SEC's commissioners. Various commentators have said that a system in which the hand of the SEC is so heavy in administrative proceedings—from determining whether or not to institute proceedings to selecting the ALJ deciding the outcome to

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MICHAEL CALLAWAY


U.S. SECURITIES AND EXCHANGE COMMISSION
MCMXXXIV

determining on appeal whether or not an adverse judgment should be affirmed or reversed—is counter to the values of fairness and integrity inherent in the American judicial system.[4] They also have contended that the selection of ALJs by the SEC's Office of Administrative Law judges rather than by the president violates the Appointments Clause of the U.S. Constitution.[5]

Public Criticism

This public criticism and media attention has resulted in two rounds of judicial challenges to the SEC's administrative proceedings. Round one concerned the threshold issue of when such a challenge could be mounted—before the ALJ process had concluded or at the end of that process. This round largely appears to be over. All circuit courts of appeals that have considered the issue have found that these challenges must wait until the ALJ process has run its course. Round two addressing substantive arguments about the constitutionality of the SEC's ALJ process is just beginning. Already, a circuit split has developed on issues that could lead to review by the U.S. Supreme Court. If the Supreme Court ultimately decides that the SEC's ALJs presided over administrative proceedings in violation of the Appointments Clause of the U.S. Constitution, thousands of ALJ awards over many years in contested hearings potentially may be invalidated.

In response to criticism that its court system lacks due process, the SEC proactively changed and proposed changes to some of its administrative proceeding rules. However, these changes are not sufficient to rebut critics' concerns because they do not address the fundamental unfairness of proceedings prosecuted and adjudicated by individuals employed by the same agency.[6]

Finally, several legislative movements have been initiated by Republican members of the U.S. House of Representatives to address some of the concerns. It is unclear what impact a Republican in the White House will have on these efforts; however, President Donald Trump supports repeal of Dodd-Frank. If Dodd-Frank is repealed, the SEC may be forced to proceed in federal court if it wishes to pursue certain penalties that will no longer be available in administrative proceedings. Also, President Trump may support the legislative efforts of Republican Congressman Jeb Hensarling of Texas to repeal and replace certain portions of Dodd-Frank, including a specific proposal to permit all defendants in ALJ proceedings to remove such cases to the federal courts. If such legislation were passed, most defendants likely would choose removal to the federal courts resulting in a dramatic reduction of ALJ proceedings. Before round two in the courts has concluded, it is possible that legislative efforts may put an end to this issue and curtail or significantly reduce the SEC's ability to bring cases in an administrative forum.

In 2014, defendants in SEC administrative proceedings began filing suits in federal courts to enjoin ALJ proceedings before they had run their course. The defendants contended that such proceedings were unconstitutional because the ALJs were appointed in violation of the Appointments Clause. District courts initially reached different conclusions about whether or not they had jurisdiction to reach the merits of the constitutional challenges made to an administrative proceeding under the three-prong test outlined in *Thunder Basin Coal Company v. Reich*.[7] Some courts found that they had jurisdiction to consider the merits,[8] while others held that they did not.[9]

In the wake of these conflicting lower court rulings, appeals were taken. The Second, Fourth, Seventh, Eleventh and District of Columbia circuit courts of appeals have held they lack jurisdiction to entertain constitutional challenges to ALJ proceedings until such proceedings have run their course.[10] No circuit court of appeals has disagreed.

Accordingly, the first round of litigation challenges to the SEC's administrative proceedings is over. Five circuit courts of appeals concur that the lower courts have no jurisdiction to consider constitutional challenges to the ALJ process until after the exhaustion of all administrative remedies. As a result, the U.S. Supreme Court will not take an interest in this issue unless another circuit court of appeals takes a different tack and creates a circuit split.

Constitutional Challenges

Round one simply delayed the day of reckoning for courts to reach the merits. On August 9, 2016, the District of Columbia Circuit Court of Appeals became the first appellate court to do so.[11]

In *Lucia Companies, Inc. v. SEC*,[12] defendants received an adverse ruling in an administrative proceeding and exhausted all appeals to the SEC. On appeal, the commission found the defendants committed antifraud violations and imposed the same sanctions as the ALJ. The commission also rejected the defendants' argument that the administrative proceeding was unconstitutional because the ALJ was not appointed in conformity with the Appointments Clause. Although the parties conceded that the president does not appoint ALJs, the commission found that its ALJs are employees and not officers and, therefore, the Appointments Clause does not govern.

The *Lucia d*efendants filed a petition for review to the District of Columbia Circuit Court of Appeals and renewed the argument concerning the Appointments Clause. The *Lucia* court's analysis focused on whether or not ALJs were officers subject to the Appointments Clause or employees who are not subject to the Appointments Clause. The court's analysis "begins, and ends" with a consideration of whether or not ALJs issue "final decisions of the Commission."[13] If ALJs do not issue "final decisions of the Commission," they are employees who are not subject to the Appointments Clause.

In their briefs to the court, the defendant petitioners noted that an ALJ decision "becomes the final word of the agency unless further review is granted" and thus "[t]he ALJ's decision is not replaced by a final agency order; the ALJ decision itself 'become[s] final.'"[14] In other words, unappealed ALJ decisions automatically become the final action of the commission. Accordingly, the petitioners argued that ALJs do issue final decisions of the commission and therefore are officers subject to the Appointments Clause. They also noted that "ALJ's rulings are in fact rarely disturbed" and that the ALJ involved in the underlying matter "has apparently *never* been reversed by the SEC in more than 50 cases."[15]

The *Lucia* court, however, was not persuaded. It held that "[t]he Commission's final action is either in the form of a new decision after de novo review or, by declining to grant or order review, its embrace of the ALJ's initial decision as its own."[16] It further held that "the Commission's ALJs neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit."[17] Notwithstanding the evidence in the petitioners' brief that ALJ decisions are rarely disturbed by the commission, the court held that the "[p]etitioners offer neither reason to understand the finality order to be merely a rubber stamp, nor evidence that initial decisions of which the Commission does not order full review receive no substantive consideration as part of this process."[18]

On December 27, 2016, in *Bandimere v. SEC*,[19] the Tenth Circuit Court of Appeals issued a ruling directly contrary to *Lucia*. The court held that the SEC ALJ who presided over an administrative proceeding was an inferior officer who held his office in violation of the Appointments Clause.

The *Bandimere* court disagreed with the *Lucia* court's creation of a litmus test to determine whether or not the Appointments Clause had been violated, that is, whether the SEC ALJs' lack of final decision-making authority automatically means that the ALJs were not subject to the Appointments Clause. Instead, the Tenth Circuit held that such a conclusion should hinge on the ALJs' duties and not on final decision-making power.[20]

In so doing, the court held that "[w]hether SEC ALJs can enter final decisions is not dispositive to our holding" but "the SEC's argument that its ALJs can never enter final decisions is not airtight."[21] The court noted that the SEC may decline to review an ALJ decision or enter an order stating that the ALJ's initial decision is final without engaging in review and that in fact 90 percent of all initial SEC ALJ decisions follow such "a path for an initial decision to become final without plenary agency review."[22] The court recognized that SEC ALJ duties are more than ministerial tasks and that the ALJs carry out important functions pursuant to the laws of the United States. The SEC's power to review its ALJs does not transform them into lesser functionaries, the court said. Rather, it shows the AJLs are inferior officers subordinate to the SEC Commissioners.[23] Since the SEC ALJ held his office unconstitutionally when presiding over the underlying administrative proceeding, the Court granted the petition for review and set aside the SEC's opinion.[24]

In *Bandimere*, a vigorous dissent by Judge McKay relies on *Lucia* to contend that SEC ALJs are not inferior officers and thus not subject to the Appointments Clause because they cannot enter final decisions.[25] The dissenting opinion also contends that the majority's holding is "quite sweeping, and I worry that it has effectively rendered invalid thousands of administrative actions."[26] Judge Briscoe's separate concurring opinion refutes the contention that the ruling potentially invalidates all ALJs, and not simply SEC ALJs. [27] Judge Briscoe also criticizes the dissent's reliance on *Lucia*'s reasoning and repeats the conclusion of the majority that whether or not an ALJ possesses "final decision-making authority" is not the "*sine qua non* of inferior Officer status."[28]

In the immediate future, the SEC doubtless will seek a rehearing *en banc* in *Bandimere*. If that effort and the pending request for a rehearing *en banc* in *Lucia* are unsuccessful, then this issue is on track for review by the U.S. Supreme Court to resolve the split between the Tenth and District of Columbia circuit courts of appeals. Other circuit courts of appeals also will weigh in on this issue and choose to follow either *Lucia* or *Bandimere*. If the *Bandimere* decision holds through all appeals, the SEC potentially is facing the invalidation of thousands of SEC ALJ adjudications and many additional litigated issues concerning the scope and extent of such invalidations. It will be interesting to see what positions are taken on this issue by a new SEC chair and a new presidential administration.

On July 13, 2016, the SEC adopted amendments to its rules of practice governing administrative proceedings. The amendments address, among other issues, the timing of hearings in administrative proceedings, entitlement to depositions, the admissibility of evidence, and the contents of an answer. In a press release issued the same day, then SEC Chair Mary Jo White stated, "The amendments to the Commission's rules of practice provide parties with additional opportunities to conduct depositions and add flexibility to the timeliness of our administrative proceedings, while continuing to promote the fair and timely resolution of the proceedings."[29] The amendments became effective September 27, 2016, and apply to all proceedings initiated on or after that date. The amended rules also apply to pending cases in certain instances depending on their stage.[30]

Significant Changes

The most significant changes to the SEC rules of practice relate to the timing of hearings and entitlement to depositions. The SEC's rush to trial in administrative proceedings has been sharply criticized by defendants who contend that the accelerated timeline favors the SEC, which has several years to conduct its own investigation and build its case, and thus disadvantages defendants who have a limited amount of time to prepare their defenses.[31] The recent changes include an amendment to Rule 360, which governs the filing of an initial decision by the hearing officer and the timing of the initial stages of the administrative proceeding.

Under former Rule 360, the initial decision of the hearing officer had to be filed within 120, 210, or 300 days from the date of the service of the order instituting proceedings (OIP). Under the former rule, the more time the parties were afforded for pretrial preparation and motion practice, the less time the hearing officer had to prepare and file the initial decision, which incentivized compressing the pretrial schedule. By contrast, under amended Rule 360(a)(2)(i), the trigger date for the time to file the initial decision is either 30, 75, or 120 days from the date of the completion of post-hearing or dispositive motion briefing or a finding of a default.

Amended Rule 360(a)(2)(ii) also extends the length of the prehearing period from a maximum of four months to 10 months. Notably, the SEC rejected commenters' entreaties for an open-ended and flexible prehearing period to be determined by hearing officers and stated that the SEC "continue[s] to believe that timely completion of proceedings can be achieved more successfully with express deadlines for completion of the various steps in the administrative proceeding."[32] Although Amended Rule 360 affords defendants additional time to prepare their cases, even the maximum prehearing period of 10 months is a relatively short period of time to prepare for a complex trial.

With respect to depositions, Amended Rule 233 now permits parties in 120-day proceedings the right to notice three depositions, of up to seven hours each, per side in a single-defendant case and five depositions per side in multidefendant cases. Under Amended Rule 233(a)(3)(ii), the parties are permitted to seek leave to notice up to two additional depositions based on a showing of a "compelling need." The depositions of witnesses unavailable to testify at the hearing do not count against each party's limit. Amended Rule 233 presents a marked shift from the former Rule 233 that only permitted parties to take the deposition of an unavailable witness and only with the permission of the ALJ. Defendants in 30-day or 75-day proceedings still have no right to take depositions. By contrast, under Federal Rule of Civil Procedure 30, a party may notice up to 10 depositions without leave of court. Commenters criticized the "'one-size fits all' approach" of providing a fixed number of depositions and argued that "hearing officer discretion in the matter of depositions is necessary because each case presents unique facts and circumstances."[33] The right afforded the parties by Amended Rule 233 to take a limited number of depositions in 120-day proceedings will not dampen criticism concerning the lack of due process in administrative proceedings.

The SEC's recent amendments also clarified the standards for admissibility of evidence. Under former Rule 320, all evidence was admissible in administrative proceedings unless it was "irrelevant, immaterial or unduly repetitious." Amended Rule 320(a) also excludes evidence that is unreliable. In addition, Amended Rule 320(b) clarifies that hearsay may be admitted if it "is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." The admission of hearsay evidence in administrative proceedings continues to be more permissive than under the Federal Rules of Evidence. Commenters warned that the proposed rule, which the SEC adopted, would "fail to offer any meaningful protection" and "provide[s] insufficient guidance and [is] prone to unfair application."[34]

While some of the SEC's amendments provide limited protections to defendants, at least one of the amendments imposes a burden on defendants. Amended Rule 220 requires a defendant to disclose in its answer to allegations in an OIP whether the defendant intends to assert a so-called reliance defense, such as reliance on advice of counsel. Failure to make this disclosure in an answer may be deemed to constitute a waiver of the defense. Asserting a reliance on advice of counsel defense requires careful consideration as it involves waiving the attorney-client privilege. Such decisions rarely can be made up front

in an administrative proceeding but require the benefit of discovery, including depositions and document production, before a defendant can thoughtfully consider if he or she wishes to make this defense. Requiring this defense to be asserted early in the process or risk waiver may be viewed as unfair and as an attempt by the SEC to gain insight into defendants' trial strategy very early in the matter. For these reasons, Amended Rule 220 is troubling to defendants and their counsel and seems to go backwards in terms of addressing due process concerns.

Legislative Efforts

Legislators have also joined the chorus of critics of the SEC's use of administrative proceedings. On October 22, 2015, Republican Congressman Scott Garrett of New Jersey introduced a bill titled the Due Process Restoration Act of 2015.[35] This proposed legislation would amend the Securities and Exchange Act of 1934 to permit a defendant within 20 days of notice of an administrative proceeding against him or her to terminate the administrative proceeding if the agency has brought charges seeking a cease-and-desist order and a civil penalty.[36] The agency would then be forced to file a complaint in federal district court in order to pursue its claims against the defendant.[37] The proposed legislation also raises the burden of proof on the agency requiring it to establish the defendant's alleged misconduct by "clear and convincing evidence" rather than the lower "preponderance of the evidence" standard.[38] On July 21, 2016, the Due Process Restoration Act was referred to the Committee of the Whole House on the State of the Union.[39]

In June 2016, Congressman Hensarling, chairman of the House Financial Services Committee, informally introduced the Financial Choice Act, which aims to repeal and replace portions of Dodd-Frank.[40] The bill was formally introduced in the House of Representatives on September 9, 2016.[41] A House committee approved the bill on September 12, 2016, and the bill was then referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law and the Subcommittee on Commodity Exchanges, Energy, and Credit.[42] The Financial Choice Act affords defendants in SEC administrative proceedings the right to remove the SEC's case against them to federal district court.[43] While these legislative efforts are proceeding at a relatively slow pace, it remains to be seen if President Trump will press for a repeal of Dodd-Frank, which could accelerate the legislative process.

Round two's circuit split may deepen as other circuit courts of appeals consider whether to side with *Lucia* or *Bandimere*. While those cases are underway and the process of seeking review of this issue by the U.S. Supreme Court proceeds, it is clear that the SEC appears to be losing on the ALJ issue in the court of public opinion. Critics wonder why when the consequences of an administrative proceeding are so dire does the SEC not elect to have such matters heard on a level playing field by the independent federal judiciary and juries.[44] Critics also wonder if the SEC has chosen to proceed more frequently in the administrative arena rather than in the courts because it is easier for it to prevail there and to control the development of the securities laws.[45] At least one federal judge has made the point that using administrative proceedings more frequently than the federal courts impedes the growth and development of the securities laws in the federal courts, which is to the detriment of the public.[46]

In the face of these questions, adverse publicity for the SEC, and a new president along with anticipated leadership changes at the highest levels of the SEC, it is unclear whether judicial resolution of these issues or legislative developments will come first. Judicial resolution will decide whether SEC ALJ adjudications performed in the past were done contrary to the U.S. Constitution

and if so, what will happen to the thousands of past SEC ALJ adjudications. Legislative efforts may permit a defendant in the future to select whether to proceed in an administrative proceeding or in federal court. When faced with such a choice, defendants are bound to choose the federal courts every time. ■

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[1] *See* Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015) [hereinafter Eaglesham]. *See also* C. Mixter, *The SEC's Administrative Law Enforcement Record*, 49 REV. SEC. & COMMODITIES REG. 6 (Mar. 23, 2016) (from 2006-2015, observing the SEC's increasing election of an administrative proceeding rather than a federal court action; over 87% success rate for SEC in administrative proceedings that rises to 91% when the SEC's own review process is taken into account). One professor, however, has contended that the high success rate for the SEC in ALJ proceedings from 2010-2015 "can be attributed to the routine nature of most of the cases filed administratively." David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1183 (2016).

[2] *See* Andrew Ceresney, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), *available at* https://www.sec.gov. A recent article analyzing the SEC's contested ALJ proceedings in 2015-16 suggests that the SEC recently has limited its use of its authority under Dodd-Frank to bring actions to an ALJ as opposed to federal court. If this is true, the SEC has pulled back on ALJ proceedings silently. The analysis states "[i]t is unclear whether the agency has restrained its use of its Dodd-Frank [administrative proceeding] authority based on a litigation strategy, as it waits for appellate courts to resolve the pending legal challenges, or a broader reluctance to transfer a large portfolio of its litigation docket to the administrative forum." However, the data outlined in the article is very small and insufficient to draw any definitive conclusions at this time. *See* David Kornblau and Sarah MacDougall, *SEC In-House Practice Going Back To 'Old Normal'*, Law360 (Nov. 18, 2016), *available at* https://www.law360.com.

[3] Hon. Jed. S. Rakoff, Is the S.E.C. Becoming A Law Unto Itself?, Keynote Address at PLI Securities Regulation Institute (Nov. 5, 2014) *available at* https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf [hereinafter Rakoff].

[4] *See* Kent Barnett, Op-ed, *Due Process vs. Administrative Law*, WALL ST. J. (Nov. 15, 2015); Gretchen Morgenson, *Crying Foul on Plans to Expand the S.E.C.'s In-House Court System*, N.Y. TIMES (June 26, 2015); David Bario, *As the SEC Brings More Administrative Proceedings, Criticism Grows*, THE AMERICAN LAWYER, (Feb. 26, 2015); Russell G. Ryan, Op-ed, *The SEC as Prosecutor and Judge*, N.Y. TIMES (Aug. 4, 2014); Gretchen Morgenson, *At the S.E.C. a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013) [hereinafter Morgenson—SEC].

[5] U.S. CONST. art. II, §2. For a discussion of the cases raising the Appointments Clause issue *see infra* at 4-6.

[6] *See* all sources listed, *Supra* note 4.

[7] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212-3 (1994).

[8] *See, e.g.*, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015); Duka v. SEC, 103 F. Supp. 3d 382 (S.D. N.Y. 2015).

[9] *See, e.g.*, Spring Hill Capital Partners, LLC v. SEC, No. 15-CV-04542 (ER) (S.D. N.Y. June 26, 2015); Bebo v. SEC, No. 15-C-3, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015).

[10] *See* Bennett v. SEC, No.15-2584, 2016 WL 7321231 (4th Cir. Dec. 16, 2016); Hill v. SEC, Nos. 15-12831 and 15-13738, 2016 WL 3361478 (11th Cir. June 17, 2016), *reh'g denied*, (11th Cir. Sept. 6, 2016); Tilton v. SEC, No. 15-2103, 2016 WL 3084795 (2nd Cir. June 1, 2016) (Judge Droney wrote a lengthy dissent finding that the lower court had jurisdiction to consider the constitutional argument under *Thunder Basin*, *Id.* at *12-18 (2nd Cir. Aug. 23, 2016)); Jarkesy v. SEC, 803 F. 3d 93 (D.C. Cir. 2015); Bebo v. SEC, 799 F. 3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (Mar. 28, 2016); *see also* Duka v. SEC, 124 F. Supp. 3d 287 (S.D. N.Y. 2015), *vacated and remanded*, (2nd Cir. June 13, 2016) (in light of Tilton), *reh'g denied*, (2nd Cir. Aug. 23, 2016).

[11] *See* Raymond J. Lucia Cos., Inc. v. SEC, No. 15-1345, 2016 WL 1460234 (D.C. Cir. Aug. 9, 2016), *reh'g en banc petition pending* (D.C. Cir. Sept. 23, 2016).

[12] *Id.*

[13] *Id.*, slip op. at 11(D.C. Cir. Aug. 9, 2016).

[14] *Id.*, Petitioners' Opening Brief at *35-36 (D.C. Cir. Apr. 13, 2016) (citation omitted).

[15] *Id.* at 40 (emphasis in original) (citing Sarah N. Lynch, *SEC Judge Who Took On 'Big Four' Known for Bold Moves*, REUTERS (Feb. 2, 2014), *available at* http://reuters); Eaglesham, *supra* note 1.

[16] Lucia, No. 15-1345, slip op. at 13 (D.C. Cir. Aug. 9, 2016).

[17] *Id.* (citation omitted).

[18] *Id.* at 15.

[19] Bandimere v. SEC, No. 15-9586 (10th Cir. Dec. 27, 2016).

[20] *Id.*, slip op. at 28.

[21] *Id.* at n.36; *see also id.*, concurring op. at 11 (referring to the Commission's review of ALJ adjudications as "faux 'de novo' review").

[22] *Id.*, slip op. at n.36.

[23] *Id.* at 37.

[24] *Id.*

[25] *Id.*, dissenting op. at 1-16.

[26] *Id.* at 11.

[27] *Id.*, concurring op. at 1-11.

[28] *Id.* at 2.

[29] SEC Press Release, SEC Adopts Amendments to Rules of Practice for Administrative Proceedings (July 13, 2016), *available at* https://www.sec.gov.

[30] 81 Fed. Reg. 50,228-30.

[31] Margaret A. Dale and Mark D. Harris, *SEC Adopts Amendments to Rules for Administrative Proceedings*, N.Y. L.J., Aug. 10, 2016.

[32] 81 Fed. Reg. 50,214.

[33] 81 Fed. Reg. 50,215.

[34] 81 Fed. Reg. 50,226.

[35] Due Process Restoration Act of 2015, H.R. 3798, 114th Cong. §§1, 2, 40 (2015).

[36] *Id.* §§2, 40(a).

[37] *Id.* §§2, 40(b).

[38] *Id.* §§2, 40(c).

[39] H.R. Rep. No. 114-697 (2016).

[40] Victoria Finkle, *Republicans Unveil Plan to Revamp Dodd-Frank*, N.Y. TIMES (June 7, 2016).

[41] Financial Choice Act of 2016, H.R. 5983, 114th Cong. (2016).

[42] H.R. 5983, 114th Cong., 162 Cong. Rec. D913-01, at D915, All Action (2016), *available at* https: //www.congress.gov/bill/114th-congress/house-bill/5983/all-actions?overview=closed#tabs.

[43] H.R. 5983 §418.

[44] *See* Letter from certain partners at Skadden, Arps, Slate, Meagher & Flom LLP to SEC providing comment on proposed amendments to the SEC's Rules of Practice (Dec. 4, 2015), *available at* https://www.sec.gov; *see also* Morgenson—SEC, *supra* note 4.

[45] Eaglesham, *supra* note 1.

[46] *See* Rakoff, *supra* note 3.