

[Securities Regulation Daily Wrap Up, ENFORCEMENT—In light of Bandimere, SEC stays proceedings subject to Tenth Circuit review, \(May 23, 2017\)](#)

Securities Regulation Daily Wrap Up

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In light of the Tenth Circuit's decision to deny the SEC's petition for rehearing en banc of *Bandimere v. SEC*, the SEC has stayed certain administrative proceedings assigned to an administrative law judge in which respondents may seek review in the Tenth Circuit of a final Commission order. The stay takes effect immediately and will remain in effect until the time has expired for the government to file a petition for writ of certiorari in *Bandimere*, the resolution of any cert petition and any decision issued by the Supreme Court in that case, or further order of the Commission.

The [order](#) implementing the stay affects final orders of the Commission that are subject to Tenth Circuit review under Securities Act Section 9(a), Exchange Act Section 25(a), Investment Company Act Section 43(a), and Advisers Act Section 213(a).

On May 4, the Tenth Circuit [denied](#) the SEC's petition for a rehearing en banc of the divided panel decision in *Bandimere*, which held that the Commission's administrative law judges (ALJs) are unconstitutionally appointed inferior officers. The panel had [decided on a 2-1 vote](#) that the SEC's appointment of its ALJs violated the Appointments Clause of the Constitution, thus setting aside an ALJ's ruling that David F. Bandimere was liable for violations of the federal securities laws. The panel reasoned that since ALJs exercise significant discretion in carrying out important functions, including the power to find respondents liable, to impose sanctions, and to enter default judgments, they meet the criteria established under the Supreme Court's *Freytag* decision to be considered "inferior officers."

The SEC's order directs ALJs in applicable cases to issue a notice indicating that the proceeding has been stayed. The order does not prohibit the Commission, however, from assigning any proceeding pending before an ALJ to itself or to any member of the Commission. The order also stays all administrative proceedings pending before the Commission on review from an initial decision by an ALJ in which a respondent has the option to seek review in the Tenth Circuit of a final Commission order.

On May 24, the D.C. Circuit will hear oral argument in *Raymond J. Lucia Companies, Inc. v. SEC*, another case in which the respondents have challenged the constitutionality of the SEC's administrative enforcement regime. The D.C. Circuit [previously held for the SEC](#), finding that the SEC's ALJs more closely resembled those of the FDIC, which the court held in its 2000 *Landry* decision are not inferior officers, than the special trial judges in *Freytag*. That decision has been [vacated](#), however, pending the rehearing en banc.

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