

[Securities Regulation Daily Wrap Up, ENFORCEMENT—S.D.N.Y.: Tilton explains new theory on unfairness of SEC in-house cases, \(Sept. 30, 2016\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Mark S. Nelson, J.D.](#)

Lawyers for Lynn Tilton told U.S. District Judge Ronnie Abrams that an appellate decision that ended her first law suit challenging the SEC's administrative law judges should not bar her new lawsuit taking on the SEC's in-house proceedings. After the Second Circuit rebuffed her Appointments Clause claims, Tilton pivoted her legal strategy to focus on the SEC's rules of practice, which she claims are facially unfair and unequally applied ([Tilton v. SEC](#), September 27, 2016).

Facial challenge distinct from Article II case. According to Tilton, her [renewed](#) effort to change how the SEC pursues in-house cases is different from the Second Circuit Article II Appointments Clause case she lost (although she still could ask the Supreme Court to hear that case) because she now asserts facial due process and equal protection claims. Tilton explained to Judge Abrams that her new legal theory would apply to multiple SEC respondents, and it involves facts that go beyond the factual records to be developed in those individual proceedings. In pressing these claims, Tilton cited the Supreme Court's *Thunder Basin* and *McNary* opinions, some of the authorities invoked by the Second Circuit majority to deny district court jurisdiction in Tilton's Article II case.

For one, Tilton claims the SEC's rules of practice in administrative enforcement cases violate the Due Process Clause because of the agency's pattern and practice of making it unfairly difficult for respondents to adequately defend themselves against complex charges. Specifically, Tilton cited the inability to fully develop the factual record, inadequate notice of the charges, and other procedural rules that are, in her view, either too loose (e.g., use of evidence typically excluded by federal courts) or too strict (e.g., compressed time frame for hearings and initial decisions).

Tilton also alleged equal protection violations based on the same pattern and practice. These claims rest on the inapplicability to her and three other SEC respondents of the Commission's newly revised rules of practice. Earlier this year, the Commission [adopted](#) somewhat more relaxed rules for in-house cases that recently became effective, but imposed special applicability dates for matters pending as of July 13, 2016.

Strike one at the Supreme Court. The Second Circuit [ruled](#) against Tilton in June (the decision drew a concurrence and a lengthy dissent), but she is still mulling whether to continue her Appointment Clause fight before the high court. Tilton recently [asked](#) Justice Ruth Bader Ginsburg to stay the administrative proceeding before the SEC while she decides if she will file a petition for certiorari.

Justice Ginsburg [denied](#) the stay on the same day Tilton offered an explanation of her new lawsuit to Judge Abrams. Tilton had argued in reply to the government's opposition brief that her jurisdictional claim was "nearly indistinguishable" from the facts in the Supreme Court's [Free Enterprise](#) opinion (accounting firm that was inspected and subject to formal investigation, but not yet charged, could challenge the PCAOB's existence on constitutional grounds). The dissenting judge in Tilton's Second Circuit case also had noted the similarities between Tilton's case and *Free Enterprise*.

By contrast, the government's [opposition](#) (see also, [Conkright](#)) to Tilton's stay request argued that the high court would likely never take her case because there was no relevant circuit split justifying a grant of certiorari to review the jurisdictional issue. Tilton had argued that a split of authority does exist between the SEC's view of its ALJs (see [Raymond J. Lucia Companies, Inc.](#)) and the Supreme Court's *Freytag* and *Buckley* decisions. Tilton would likely attempt to raise both the jurisdictional and Article II questions in a petition for certiorari.

The case is [No. 16-cv-07048](#).

Attorneys: Paul D. Clement (Bancroft PLLC) for Tilton, Lynn. Jacob H. Stillman for the SEC. Lawrence Jay Zweifach (Gibson Dunn & Crutcher LLP) for Lynn Tilton, Patriarch Partners, LLC and Patriarch Partners VIII, LLC. Jean Lin, U.S. Department of Justice, for the SEC.

Companies: Patriarch Partners, LLC

LitigationEnforcement: AccountingAuditing AlternativeInvestmentFunds DirectorsOfficers Enforcement HedgeFundsNews NewLawsuitsNews PrivateEquityNews NewYorkNews