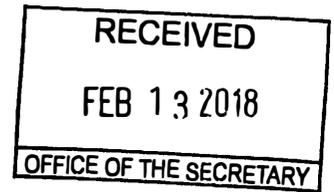




UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
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February 12, 2018

Via Email and UPS Overnight Delivery

Hon. Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090
Washington, DC 20549

Re: Matter of RD Legal Capital, LLC, et al. File No. 3-17342

Dear Judge Patil:

The Division notes at the outset that Respondents have not identified any constitutional argument that is not foreclosed by binding Commission precedent. *See* Division's Sept. 8, 2017 Letter addressing Respondents' "constitutional objections." There is, consequently, no reason to find in favor of Respondents on their constitutional challenges.

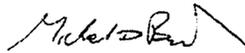
Although we are not aware of any authority that supports the notion that an ALJ may dismiss an agency proceeding on constitutional grounds, the Division does not contest that such an argument may be raised as a defense to a proceeding and can conceivably form a basis for finding against the Division in an initial decision. Indeed, in the OIP, the Commission instituted "public administrative and cease-and-desist proceedings" to determine whether "the allegations set forth" by the Division are true and, if so, whether "remedial action is appropriate in the public interest," OIP, at 15 (July 14, 2016, and specifically "afford[ed] Respondents an opportunity to establish any defenses to such allegations." *Id.* The Commission also "ORDERED that a public hearing for the purpose of taking evidence on th[ose] questions . . . be convened . . . at a time and place to be fixed, and before an Administrative Law Judge," and "FURTHER ORDERED that the Administrative Law Judge . . . issue an initial decision" within a prescribed period of time. *Id.* at 15-16.

As a general matter, and as the Commission has consistently recognized (*see* Respondents' 2/5/18 Letter at 2), a respondent may seek to establish a defense based on constitutional grounds, and the presiding ALJ may consider the merits of such a defense. There is therefore no merit to Respondents' suggestion that the Division has sought (or would seek) to deny them "a meaningful opportunity to have their constitutional arguments considered and adjudicated by SEC ALJs and the Commission in their administrative proceedings." *Id.*

Even if an ALJ agrees with a respondent's constitutional challenge and that challenge is within the agency's authority to decide, however, the administrative proceedings should not be dismissed outright. Rather, consistent with the Commission's rules of practice, the ALJ would issue an initial decision subject to review by the Commission. While initial decisions may "dismiss" a "proceeding" when the Division has failed to carry its burden of demonstrating that the alleged securities law violations have occurred, *see, e.g., Bolan and Ruggieri*, Initial Decision Release No. 877 (Sept. 14, 2015), <https://www.sec.gov/alj/aljdec/2015/id877jsp.pdf>, such dismissal is not effective unless the Commission so orders. That would be equally true where the respondent has succeeded in establishing a valid defense to the Division's allegations.¹

Here, Respondent has not presented any such defense that warrants dismissal. Accordingly, such defenses should be rejected.

Respectfully submitted,



Michael D. Birnbaum

¹ Of course, an ALJ's authority to consider such defenses cannot exceed the Commission's authority to consider constitutional challenges to congressional enactments. As the Commission has recognized, it lacks the authority "to invalidate the very statutes that Congress has directed [it] to enforce." *Milton J. Wallace*, Exchange Act Release No. 11252 (Feb. 14, 1975). This is consistent with the Supreme Court's recognition that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136 (2012). Accordingly, an agency (and, by extension, a presiding ALJ) can consider such challenges only to aid in understanding the statute's meaning or application in a particular context, and not "to determine the constitutionality of the statute itself." *Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988).