SUPREME COURT OFFERS OTHERS A CHANCE FOR A SECOND BITE AT THE APPLE IN FEDERAL ADMINISTRATIVE ADJUDICATION PROCEEDINGS – BUT THE CLOCK IS TICKING

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INTRODUCTION

On June 21, 2018 the U.S. Supreme Court ruled in *Lucia et al. v. Securities and Exchange Commission*, [1] that the appointment of certain administrative law judges ("ALJs") was unconstitutional, and that those with matters currently before or recently heard by improperly appointed ALJs can have their cases reheard by a new judge. Given the large number of cases heard by ALJs across the federal government, the Supreme Court's decision may offer a great number of parties an opportunity to have their cases reheard, and those who have currently pending or recently decided cases before an administrative law judge should consider whether rehearing of their particular matter may be possible and/or advantageous under the circumstances of their case.

Set forth below is a summary of the *Lucia* case, an outline identifying other potentially impacted agencies, and an example analysis of the potential impacts *Lucia* may have on ALJs in a different agency, the Environmental Protection Agency ("EPA").

LUCIA V. SEC – BACKGROUND AND HOLDING

Lucia stems from an enforcement action brought by the U.S. Securities and Exchange Commission ("SEC") against petitioner Raymond Lucia. Pursuant to SEC regulations, the matter was assigned to SEC ALJ Cameron Elliot for adjudication. Following nine days of testimony and argument, Judge Elliot issued an initial decision finding Lucia in violation of securities laws, imposing monetary sanctions, and barring Lucia for life from working in the investment management industry. Lucia appealed the decision to the SEC, and among other things argued that the administrative proceeding was invalid because Judge Elliot's appointment was unconstitutional. Specifically, Lucia argued that Judge Elliot was an "Officer of the United States" under the Appointments Clause of the U.S. Constitution, Art. II, § 2, cl. 2, and thus could only be appointed by the President, a court of law, or a head of department. Lucia argued that because Judge Elliot had been appointed by SEC staff, his appointment and subsequent enforcement decision were invalid. The initial decision was reviewed by the SEC, which issued it as a final order over the dissent of two of the five Commissioners. Lucia appealed the final decision to the U.S. Court of Appeals for the DC Circuit, renewing his argument regarding Judge Elliot's appointment. The DC Circuit

rejected the argument, and Lucia appealed the issue to the Supreme Court. Significantly, Lucia's appeal did not involve the merits of the ALJ's interpretations of the securities laws he deemed Lucia to have violated.

A 6–3 majority held that the SEC ALJ who heard the case was an "Officer[] of the United States" subject to the appointments clause because he (1) "occup[ied] a continuing office" and (2) had "significant authority" within the SEC. In so ruling, the Court vacated the underlying SEC decision, and required that Lucia be given a new hearing before a different, appropriately appointed ALJ. The Court's decision relies heavily on its previous opinion in *Freytag v. Commissioner*, 501 U.S. 868 (1991) (holding that "special trial judges" of the U.S. Tax Court are "Officers" subject to the appointments clause). Specifically, the Court held that the ALJ's authority to conduct trials, control evidence, issue contempt orders, and issue opinions (even if reviewable by an agency head) accorded him "significant authority," and therefore rendered him subject to the Appointments Clause. In effect, the Supreme Court gave Lucia a "do-over" of his hearing before a different ALJ, for which he will be better informed about the agency's arguments and litigation strategy. In addition, in the event that he is again unsuccessful in obtaining a favorable result from the second ALJ, he will have future *de novo* review of that decision by a new set of Commissioners andl, ultimately, another appellate review by the DC Circuit.

This decision necessarily implicates a broad swath of recently decided or currently pending enforcement actions before hundreds of ALJs serving across federal agencies, and may pose a unique opportunity for a party to seek rehearing of any recent adverse decision rendered by an agency adjudicatory body. [2]

OTHER POTENTIALLY IMPACTED AGENCIES

Across the federal agencies, ALJs and other similar adjudicatory officers are appointed pursuant to 5 U.S.C. § 3105, which provides that "each agency shall appoint as many ALJs as are necessary for proceedings required to be conducted." In general, ALJs are appointed by agencies through a process whereby the U.S. Office of Personnel Management ("OPM") provides a list of names to an agency that requests an ALJ. Agencies differ on whether staff or the head of the agency selects ALJs. To the extent an agency's staff appoints an adjudicatory officer through the OPM process, those ALJs may be subject to *Lucia*-type challenges.

OPM's list of agencies and ALJs states as follows: [3]

AGENCY	AL-3	AL-2	AL-1	Total
Commodity Futures Trading Commission	0	0	0	0
Consumer Financial Protection Bureau	1	0	0	1
Department of Agriculture	2	1	0	3
Department of Education	2	0	0	2
Department of Health and Human Services/Departmental Appeals Board	5	0	0	5
Department of Health and Human Services/Food and Drug Administration	0	0	0	0
Department of Health and Human Services/Office of Medicare Hearings and Appeals	94	6	1	101
Department of Homeland Security/United States Coast Guard	5	1	0	6

Department of Housing and Urban Development	2	0	0	2
Department of the Interior	8	1	0	9
Department of Justice/Drug Enforcement Administration	2	0	0	2
Department of Justice/Executive Office for Immigration Review	1	0	0	1
Department of Labor	32	8	1	41
Department of Transportation/Office of the Secretary	2	1	0	3
Environmental Protection Agency	2	1	0	3
Federal Communications Commission	1	0	0	1
Federal Energy Regulatory Commission	12	0	1	13
Federal Labor Relations Authority	1	1	0	2
Federal Maritime Commission	2	0	0	2
Federal Mine Safety and Health Review Commission	14	0	1	15
Federal Trade Commission	1	0	0	1
International Trade Commission	6	0	0	6
Merit Systems Protection Board	0	0	0	0
National Labor Relations Board	30	3	1	34
National Transportation Safety Board	3	0	0	3
Occupational Safety and Health Review Commission	11	1	0	12
Office of Financial Institution Adjudication	2	0	0	2
Securities and Exchange Commission	4	1	0	5
Small Business Administration	0	0	0	0
Social Security Administration	1,642	13	0	1,655
United States Postal Service	1	0	0	1
TOTAL	**1,888**	**38**	**5**	**1,931**

As set forth in OPM data, the vast majority of ALJs in the federal government are placed with the Social Security Administration to oversee benefits cases, but ALJs are also used in enforcement and permit proceedings at many other agencies, including the Department of Transportation, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Department of Labor, Department of Education, National Labor Relations Board,

and Occupational Safety and Health Administration, among others. ALJs adjudicate cases covering a wide range of agency-specific subject matter that implicate substantial rights of the regulated community, including matters such as challenges to permit grants and denials, as well as enforcement actions. The vast majority of agency-related adjudications are handled by the agencies themselves in ALJ hearings, and only a small percentage of those cases are reviewed by judges in the federal judiciary. As a result, the impact ALJs have on the regulated community can be both pervasive and substantial.

APPLICATION OF *LUCIA* TO EPA AND OTHER AGENCIES

Lucia frames two questions regarding the applicability of the Appointments Clause: (a) is the person serving in a continuing position; and (b) does the person exercise "significant authority." Answering these questions requires a fact-dependent inquiry specific to the particular agency. To the extent that *Lucia* does apply to a particular agency's ALJs, any recent or pending decision may be subject to rehearing. Entities or individuals that may be affected by the *Lucia* decision should consider consulting with an attorney regarding potential options. An example of how the Lucia analysis might apply to another federal agency — in this case, the EPA — is set forth below. At EPA, the vast majority of its enforcement and permit decisions are handled by agency adjudicators. [4]

Are EPA's ALJs Affected by the Lucia Decision?

EPA describes its ALJs as having "decisional independence" pursuant to Section 557 of the APA, 5 U.S.C. § 557. [5] According to EPA, each ALJ was certified by the OPM, which is essentially the human resources agency of the Federal Government for hiring civilian employees. Id. These ALJs are appointed in accordance with 5 U.S.C. § 3105, the statutory provision that generally allows an agency to appoint as many ALJs as necessary to conduct the agency's business. *Id.* None appear to have been appointed as Officers of the United States by EPA's Administrator (or otherwise) pursuant to the Appointments Clause.

According to EPA, the current EPA ALJs have been acting in that capacity since 1996, 2012, and 2013. [6] This would suggest that EPA's ALJs are serving on an ongoing, rather than temporary basis, as was the case in *Lucia*. Thus, they appear to meet the first prong of the *Lucia* "Officers of the United States" test.

Second, do EPA ALJs exercise significant authority? In *Lucia*, the Court held that having powers arguably comparable to a federal district judge satisfied this standard. EPA ALJs take testimony, conduct trials, rule on the admissibility of evidence, and have the power to discovery orders. *See* Consolidated Rules of Practice, 40 C.F.R. Part 22. Accordingly, it is possible a court would find that EPA ALJs constitute Officers of the United States subject to the Appointments Clause under the *Lucia* analysis.

What does this mean for currently pending matters?

Based upon action taken by other agencies, [7] there is some likelihood EPA ALJs will temporarily halt hearing new cases until the EPA is able to address the issues raised by *Lucia*. The EPA Administrator may be able to satisfy this requirement by simply issuing a written directive appointing the current ALJs pursuant to the Appointments Clause. Indeed, as noted in *Lucia* the SEC took this step in November 2017, "ratifying" the prior ALJ appointments, and the Secretary for the Department of Labor did so in December 2017. [8] However, the *Lucia* Court did not address this issue, and thus left unclear whether such "ratification" is sufficient. If it is, and EPA decides to undertake a similar process, all cases currently pending could be re-assigned to a different ALJ after proper appointment by the Administrator, or simply to the Administrator himself. However, given the

uncertainty with respect to whether such ratification is sufficient, it is also possible that EPA may be inclined to further delay hearings until a decision on that issue is reached.

What does this mean for recently decided matters?

If a court were to determine that *Lucia* applied to EPA ALJs, any decision challenged within the 45-day appeal window would arguably be subject to a new hearing before a different and appropriately appointed ALJ. This opportunity for review could provide regulated parties not only an opportunity for rehearing before a different judge, but it could delay enforcement proceedings and provide parties an opportunity to consider settlement or other options prior to undertaking the adjudicatory process. Any party who is subject to such a recent decision should consider whether such a request for rehearing would be appropriate and advantageous.

What does this mean for older EPA ALJ decisions?

Although the majority opinion in Lucia does not provide a definitive answer, the decision suggests that the question of the constitutional validity of the officer who adjudicates a case must be timely challenged by a petitioner. *See Lucia* at *12. Thus, in cases where the 45-day window to appeal an ALJ opinion has already passed, it is unclear whether *Lucia* would require EPA to provide a new hearing.

What about EPA decision makers other than EPA ALJs?

While *Lucia* focuses on ALJs, the two-prong test could apply to other types of employees, so long as they are serving in an "ongoing" capacity and exercise "significant authority" under the still not clearly defined *Freytag* and *Lucia* tests. *See* note 2 above. This is fertile ground for potential future litigation, and is likely to lead to a variety of legal challenges to agency actions.

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[1] No. 17-130, 585 U.S. ___ (2018).

[2] The majority opinion leaves open the question of whether some agency employees outside of the adjudicatory process, such as those who make final decisions as to permit requests or patent applications, might also be considered to have "significant authority" and thus subject to the requirements of the Appointments Clause. *See Lucia* at *5-6.

[3] *See* https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. Many agencies also use other types of hearing officers, not formally called "Administrative Law Judges" who often perform exactly the same functions. *See* note 2, below.

[4] In addition to ALJs, EPA also employs regional judicial officers ("RJOs") who adjudicate a variety of agency-related issues. The analysis below is limited to ALJs; a separate analysis may well be appropriate with respect to RJOs.
https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/e2d1f35fbb02bc3f8525753f006961b0/7c1126a0949e9ab28525764f006dbae4!OpenDocument.

[5] *See* https://www.epa.gov/aboutepa/about-office-administrative-law-judges-oalj.

[6] *See* https://www.epa.gov/aboutepa/epas-administrative-law-judges.

[7] In light of *Lucia*, the SEC has issued an order staying for 30 days all pending administrative proceedings while the agency reviews the impact of the decision.

[8] *See* https://www.oalj.dol.gov/.

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