

## CLIENT ALERT

### **By Appointment Only: Supreme Court Holds that SEC Administrative Law Judges are Officers Subject to the Appointment Clause of the Constitution; Opens Door to Similar Challenges Across the Federal Executive**

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On June 21, 2018, in *Lucia v. Securities and Exchange Commission*, the Supreme Court held that SEC Administrative Law Judges are “Officers of the United States” and not mere employees. Their appointment must therefore follow the Constitution’s Appointments Clause; and past appointments by SEC staff are unconstitutional.

In recent years, the SEC has increasingly turned to its staff-appointed “in-house” judges to decide enforcement matters. They did so in the case of Raymond Lucia, who argued in turn that his entire administrative proceeding was invalid because the ALJ selected for his case was not constitutionally appointed. Per Lucia, SEC ALJs exercise “significant authority pursuant to the laws of the United States,” and are therefore “Officers of the United States,” who must be appointed by the President, “Courts of Law,” or “Heads of Departments,” as the Constitution’s Appointment Clause commands. Six Justices of the Supreme Court agreed.

While expressing concerns over ALJ independence at oral argument, the majority opinion followed the straightforward path paved by the Court’s prior decisions. In *Freytag v. Commissioner*, the Court already held that special trial judges (STJs) of the United States Tax Court are officers because they occupy continuing positions specified by law, and because they possess significant authority and responsibility in adversarial hearings by taking testimony, ruling on evidence, and enforcing compliance with orders. SEC ALJs, the Court found, are “near-carbon copies” of *Freytag’s* STJs; they are officers too, and Lucia’s matter was presided over by a constitutionally infirm judge.

As Lucia’s adjudication was “tainted” with an Appointments violation, the remedy offered by the Majority was equally clear: a *new* hearing before a *different*, properly appointed official, or before the Commission itself.

Although deciding the narrow case of SEC ALJs, Lucia’s holding sends far reaching shockwaves deep into the federal administrative state. Many of the nearly 2000 judges employed by the various federal agencies (most in the Social Security Administration) play similar roles to the one played by SEC judges. They exhibit similar, if not identical levels of “authority”.

These ALJs must now be appointed the right way, demanding significant resources from the already over-extended “Heads of Departments.”

What is more, many litigants facing ALJs across the federal executive have already made their “Lucia” challenges in anticipation of the Court’s ruling. It is unclear how these cases—arguably adjudicated by improperly appointed ALJs—will be handled going forward. On its part, the SEC issued a 30-day stay to any pending administrative proceeding that was set to be heard by an SEC ALJ (including any such proceeding that is already pending before the Commission). Assuming a timely challenge to the constitutional validity of the appointment was made, cases that have already been decided will likely be remanded back to the

agencies for reassignment to new, properly appointed ALJs. Pending cases may receive a similar “do-over” remedy, or continue with a properly-appointed ALJ presiding.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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