# CLIENT ALERT

## How Do You Solve A Problem Like *Lucia*?

**Jun.28.2018**

***Administrative Law Judges in Limbo: Open Questions After the Supreme Court's Lucia Decision***

Last week, the United States Supreme Court held that the Securities and Exchange Commission's method of hiring its administrative law judges (ALJs) violated the Constitution's Appointments Clause. The Clause requires that "Officers of the United States" be appointed by the President, the federal courts, or the "Heads of Departments." In *Lucia v. Securities and Exchange Commission*, the Court held that the SEC's ALJs — who were appointed by the Commission's staff and typically preside over proceedings against people alleged to have violated federal securities laws — are "Officers" who must be appointed in the manner prescribed by the Appointments Clause.

In reaching that conclusion, the Court relied almost entirely on its 1991 decision in *Freytag v. Commissioner*. *Freytag* held that special trial judges of the United States Tax Court were officers because they held "continuing office established by law" and engaged in significant duties like taking testimony, conducting trials, ruling on the admissibility of evidence, issuing subpoenas, and enforcing compliance with discovery orders. The *Lucia* majority decided that ALJs are materially indistinguishable from special trial judges because their positions are established by statute and because they exercise almost all of the "significant authority" as did special trial judges. Because the ALJ who adjudicated the dispute underlying the *Lucia* case was an officer but had not been appointed by the President, a court of law, or the head of a department, the Court remanded the matter with instructions that the ALJ's decision be vacated and the matter be reheard by a different ALJ — one appointed in the manner prescribed by the Appointments Clause.

Because it hews so closely to *Freytag*, the decision in *Lucia* breaks almost no new legal ground. Instead, it raises a number of significant questions without answering them. The most obvious one concerns the meaning of "significant authority." After *Freytag* and *Lucia*, it's clear that officials who perform all of the functions that special trial judges and SEC ALJs perform exercise the type of "significant authority" that is necessary to make one an officer. While the *Lucia* ruling is limited to SEC ALJs, nobody should seriously expect a different result where ALJs of a different agency are statutorily charged in all the same respects as SEC ALJs. Those cases (some of which are already making their way through the courts) will be the easy ones.

But what about officials who perform fewer, but still arguably significant, functions? Nothing in *Lucia* (or *Freytag*) suggests an easy answer to that question — *i.e.*, the irreducible minimum quantum of "significant authority" necessary for "Officer" status — which is why we expect new legal challenges seeking to resolve that question. Consider, for instance, that many ALJs (and, for that matter, other administrative adjudicators, such as "hearing officers") hold positions established by statute and exercise powers that may be somewhat different than the ones exercised by the ALJ in *Lucia*. These officials might or might not be "Officers" for purposes of the Appointments Clause; it depends on exactly where the "floor" is for "Officer" status. *Lucia* does not address that issue.

Perhaps the most practical question after *Lucia* is: What must agencies do to rectify existing Appointments Clause defects? Most obviously, the agency should read its enabling statute. If Congress did not grant the agency head the power to appoint ALJs, then that answers the question as a matter of statutory law, because an agency can only exercise those powers given to it by Congress.

If, however, Congress authorized the agency head (or heads) to appoint ALJs, the next question is whether that agency is a "Department." In *Free Enterprise Fund v. PCAOB*, the Court clarified that a "Department" is "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." For example, the Federal Energy Regulatory Commission (FERC) is an independent agency, but with a "dotted line" to the U.S. Department of Energy; so is FERC a "Department" for Appointments Clause purposes, or "subordinate to or contained within" a Department under *Free Enterprise Fund*? In general, if an agency does not qualify as a "Department," then its heads, even if acting officially under statutory authority, may not appoint the agency's ALJs as a matter of constitutional law.

For agencies that both have the statutory authority to appoint (via their heads) and the constitutional authority to appoint (*i.e.*, are "Departments"), solving the problem posed by *Lucia* is comparatively easy. Those agencies can do (and in some cases have done) exactly what the SEC has already done, which is to re-appoint or ratify the appointments of their current ALJs.

For other agencies, though, *Lucia* poses a bigger hurdle. While it's tempting to suggest that the President or a federal court could simply ratify the appointments of current ALJs, Congress would first have to authorize such an approach. By the same token, Congress could fix the problem through legislation authorizing the ratification or re-appointment of existing ALJs by a constitutionally appropriate "department" head. But counting on Congress to act with the necessary dispatch is something of a gamble — these days more than ever.

And then there remains the problem of how to handle cases that may have been decided by an ALJ (or are currently before an ALJ and yet to be decided) who was not appointed as required by the Appointments Clause. *Lucia* says that such cases (if timely challenged and arguments preserved) must be reheard by a properly appointed administrative law judge, and not the one who presided over the case the first time around. For an agency like the Social Security Administration, whose administrative law judges hear hundreds of thousands of cases each year, *Lucia*'s reassignment requirementcould pose a bureaucratic nightmare of epic proportions.

One side note to all this is the fact that ALJs play an important role within the civil service overseen by the Office of Personnel Management. It is typical in the career of an ALJ to serve at multiple agencies. For example, many ALJs start at or at least do tours through the Social Security Administration before moving on to other agencies. It is possible, therefore, that despite having the same qualifications as their peers, some ALJs appointed for service at one agency may not be constitutionally qualified to act but if they move to another agency, they would be. Go figure.

It will be years before the Supreme Court and the appellate courts answer all of the questions raised by *Lucia*. In the meantime, people and businesses embroiled in agency adjudications would do well to consider (or reconsider) all the ways in which the decision maker in their case might not satisfy the Appointments Clause's requirements.

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