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Cleanup on Title 5: Executive Agencies and Courts Begin to Unpack *Lucia*, as Litigants Eye Challenges to the Administrative State

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On June 21, 2018, the Supreme Court decided *Lucia v. SEC*, No. 17-130, 138 S. Ct. 2044, holding that the SEC's Administrative Law Judges (ALJs), appointed under Title 5 of the U.S. Code, were "Officers of the United States," that the Appointments Clause of the Constitution requires those ALJs to be appointed by the President, a court of law, or the Commission itself, and that an SEC order following a hearing before an improperly appointed ALJ was invalid. The Supreme Court, however, expressly declined to resolve several other constitutional questions raised by the case.

Immediately following the Supreme Court's decision, the SEC issued a stay of all pending administrative proceedings that were commenced before an ALJ. On August 22, 2018, however, the SEC lifted the stay, remanded all proceedings to the Office of Administrative Law Judges, and provided procedures for proceedings on remand—setting the stage for litigants to begin to make constitutional challenges to the SEC's adjudicative process based on the questions unanswered by *Lucia*.

Below we describe the *Lucia* ruling, track its impact as subsequent litigation works through proceedings at various administrative agencies, review the key questions the decision raises, and identify important considerations for future challenges to regulatory or enforcement actions before various agencies.

The *Lucia* decision raises more questions than it answers, although what seems clear is that the decision has begun to have far-reaching effects and will likely sponsor waves of litigation concerning the legitimacy of administrative enforcement proceedings that rely on ALJs or similar hearing officials at multiple agencies. For the SEC, key unanswered

questions include whether the SEC's "ratification" of an unconstitutional ALJ appointment cures the constitutional defect. Recognizing this uncertainty, on the same day of the Supreme Court's order, the SEC stayed all pending administrative proceedings before ALJs and subsequently ordered them reheard by a new ALJ whose appointment was ratified by the SEC in the interim. However, the uncertainty extends beyond the SEC. As explored below, the Federal Trade Commission (FTC), Federal Regulatory Commission (FERC), Occupational Safety and Health Review Commission, Department of the Interior, Environmental Protection Agency (EPA), Federal Mine Safety and Health Review Commission, Department of Health and Human Services, and Consumer Financial Protection Bureau (CFPB), among others, all use ALJs or similar hearing officials in connection with administrative enforcement proceedings. Administrative enforcement proceedings at each agency are subject to similar challenges under *Lucia*.

BACKGROUND ON ALJ HIRING

Historically, federal agencies have made appointments of ALJs through a competitive-service application and examination process administered by the Office of Personnel Management (OPM). Federal statutes authorized the President to delegate his or her authority over competitive examinations to the director of OPM but barred the director from further delegating that authority, even though the director could delegate other authority to heads of agencies. 5 U.S.C. § 1104(a).

Federal regulations have provided that "[a]n agency may appoint an individual to an administrative law judge position only with prior approval of OPM, except when it makes its selection from the list of eligibles provided by OPM." 5 C.F.R. § 930.204. OPM generally has required that agencies appoint "one of the top three highest scoring applicants interested in that geographical location." Even when an agency "is insufficiently staffed with administrative law judges," federal statutory law provides that the agency can use ALJs appointed by other agencies, but only if selected by OPM and with the consent of the other agencies. 5 U.S.C. § 3344. Moreover, a federal statute provides that, once appointed by an agency, an ALJ may be removed "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." *Id*. § 7521.

FACTS AND HOLDING OF *LUCIA*

The SEC has five ALJs who preside over almost all administrative proceedings in which the SEC seeks to enforce federal securities laws. *Lucia*, 138 S. Ct. at 2049. Staff members, rather than the Commission itself, have selected all of the ALJs from the list of eligible candidates identified by OPM. *Id*. The ALJs have the power to issue subpoenas, hear evidence, and impose sanctions. *Id*. The ALJs issue "initial decisions" that set out findings of fact and conclusions of law, which can be challenged on appeal to the full Commission, or which the Commission can review *sua sponte*. *Id*. In either case, the Commission can choose to review the ALJ's decision or adopt the ALJ's decision as final. *Id*.

In 2012, the SEC initiated an administrative proceeding against investment advisor Raymond Lucia and his investment company, alleging in the order instituting proceedings that Lucia misrepresented back-tested returns of fictional investment portfolios in his presentations, and thereby deceived prospective clients in violation of the Investment Advisers Act of 1940. After a hearing, the ALJ ruled that Lucia and his company had violated the Advisers Act and revoked their investment adviser registrations. *See* Initial Decision on Remand, *In re* Raymond J. Lucia Companies Inc., et al. (S.E.C. Dec. 6, 2013). The ALJ imposed a cease-and-desist order, a civil penalty of $50,000 against Lucia, a civil penalty of $250,000 against Lucia's company, and a permanent industry-wide bar against Lucia. *Id*. at 58–61. Lucia appealed to the SEC, arguing among other things that the ALJ had not been constitutionally appointed because he was an officer of the United States under the Appointments Clause. *See* Respondent's Motion to Stay Appeal and for Leave to Submit Additional Briefing, *In re* Raymond J. Lucia Companies Inc., et al., at 1–2 (June 12, 2015). The Commission rejected the argument, finding that "ALJs are not 'inferior officers' under the Appointments Clause." Order of the Commission, *In re* Raymond J. Lucia Companies Inc., et al., at 33.

Lucia then filed a petition for review in the Court of Appeals for the D.C. Circuit. A three-judge panel denied Lucia's petition, holding that the SEC's ALJs were not "Officers of the United States" pursuant to the Appointments Clause because, among other things, they "neither have been delegated sovereign authority to act independently of the Commission nor, by other means established by Congress, do they have the power to bind third parties, or the government itself, for the public benefit." See *Raymond J. Lucia Cos., Inc. v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016). After granting rehearing *en banc*, the full D.C. Circuit denied the petition for review by an equally divided court. *Raymond J. Lucia Cos., Inc. v. S.E.C.*, 868 F.3d 1021 (D.C. Cir. 2017). When Lucia petitioned for certiorari in the Supreme Court, the government switched positions and asked the Supreme Court to grant certiorari and rule in favor of Lucia. The Supreme Court granted certiorari.

The Supreme Court reversed the D.C. Circuit, holding that the SEC ALJs were "Officers of the United States" under the Appointments Clause. The Supreme Court held that the test in determining whether ALJs are officers was twofold: whether the official (1) occupied a "continuing" position established by law, and (2) "exercised significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051–52. The Supreme Court concluded that *Freytag v. Commissioner*, 501 U.S. 868 (1991), which held that the Tax Court's special trial judges (STJs) are Officers of the United States, was dispositive. Relying on *Freytag*, the Supreme Court determined that the SEC's ALJs hold a continuing position as they "receive[] a career appointment to a position created by statute." *Lucia*, 138 S. Ct. at 2053. In addition, the Supreme Court concluded that the ALJs share the same four powers on which the *Freytag* Court relied in holding that STJs were officers: (1) they "take testimony" by receiving evidence and examining witnesses; (2) they "conduct trials"; (3) they "rule on the admissibility of evidence" and thus "critically shape the administrative record"; and (4) they "have the power to enforce compliance with discovery orders," including by punishing contemptuous conduct. *Id*. at 2053–54. If anything, the Supreme Court concluded, ALJs are *more* clearly officers than STJs because they are more autonomous; whereas the Tax Court must review certain STJ decisions, the SEC need not review any particular ALJ decisions. *Id*. at 2053–55.

Turning to the issue of remedies, the Supreme Court held Lucia was entitled to relief because he filed a timely challenge to the validity of the ALJ's appointment "before the Commission, and continued pressing that claim in the Court of Appeals." *Id*. at 2055. Noting precedent holding that "the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official," the Court concluded that the new hearing official cannot be the same ALJ who heard the case originally. *Id*. Even if the ALJ who decided the case below had received a constitutional appointment in the interim, the Supreme Court held that the ALJ during the initial hearing cannot be the hearing official on remand because that same ALJ "cannot be expected to consider the matter as though he had not adjudicated it before." *Id*.

KEY CONSTITUTIONAL QUESTIONS THE COURT DECLINED TO RESOLVE IN *LUCIA*

In reaching its decision, the Supreme Court declined to address several other constitutional arguments raised by the parties or by *amici* relating to the work of ALJs or the administrative state more broadly. For instance, the Court declined to resolve:

- **Whether ratification of previously-appointed ALJs cures any constitutional deficiency**. Although Lucia's case was pending, the Commission entered an order purportedly "ratifying" the prior ALJ appointments made by SEC staff members. The Supreme Court did not decide whether the SEC's order purportedly "ratifying" its ALJs cured the Appointments Clause violation. The Court explained that it would not address the issue because the SEC did not identify whether an ALJ or the Commission itself would hear the case on remand. at 2055 n.6.
- **Whether statutory restrictions on removal of ALJs are constitutional.** The Supreme Court also declined to decide whether the statutory restrictions on removing ALJs were constitutional, noting that no lower courts had

addressed the issue. at 2050 n.1. The solicitor general argued before the Supreme Court that if ALJs constitute Officers of the United States, then the statutory restrictions on removing ALJs are unconstitutional restrictions on the President's executive oversight authority under Article II. The Supreme Court also expressly declined to decide the issue. Given the open question, a presidential administration or private litigants may seek to challenge the removal restrictions on ALJs or similar hearing officers in future litigation, including if it disagrees with the ALJ's legal reasoning. Elimination of the removal restrictions would allow a presidential administration or executive agency to exert significant control over ALJs and other civil servants who currently operate with certain amounts of independence. As Justice Breyer noted in his opinion concurring in part and dissenting in part, holding that the protections from removal for ALJS, for example, are unconstitutional, "would risk transforming [them] from independent adjudicators into dependent decisionmakers," contrary to the "substantial independence" that was "a central part" of the scheme of the Administrative Procedures Act. *Id*. at 2060 (opinion of Breyer, J.).

Additionally, the Supreme Court left open the possibility that a private litigant may contend that it has standing to challenge the constitutionality of the removal restrictions in an attempt to have an enforcement action declared invalid. Although no lower court has yet addressed the removal restriction on ALJs, on July 16, 2018, the Fifth Circuit issued a key ruling in a case styled *Collins v. Mnuchin*, citing *Lucia* and holding that the removal restrictions on the Federal Housing Finance Agency's director were unconstitutional. No. 17-20364, 2018 WL 3430826, at *11–25 (5th Cir. July 16, 2018). Private litigants seeking to challenge decisions by ALJs or officials in similar capacities are likely to rely on *Collins* as support for the proposition that they have standing to challenge the constitutionality of the removal restrictions because the petitioners in *Collins* were private parties challenging governmental actions. *See id*. at *1. The government, however, may rely on *Collins* to contend that the appropriate remedy for any constitutional infirmity in removal restrictions is to strike the removal limitations and not to invalidate any previous action, as the Fifth Circuit held that the remedy for the unconstitutional structure of the Federal Housing Finance Agency was to invalidate the removal restrictions on the agency's director while "leav[ing] intact the remainder of [its] past actions." *Id*. at *26.

- **Whether the ALJs are *principal* officers who may be appointed only by the President with Senate consent.** The Supreme Court assumed, but did not hold, that ALJs were *inferior* Officers of the United States—and not *principal* officers who can be appointed only by the President, with Senate consent, under the Appointments Clause.

The Court's express decision not to resolve these issues signals to current and future litigants that they could raise these arguments in future challenges to administrative actions that were subject to a hearing before an ALJ or a similarly situated hearing officer.

LUCIA'S IMMEDIATE AFTERMATH

The SEC and the White House have both taken major actions related to ALJs in the wake of the *Lucia* decision.

On the day *Lucia* was decided, the SEC issued an order staying for 30 days all administrative proceedings commenced before ALJs. Order, *In re* Pending Administrative Proceedings (SEC June 21, 2018).

On July 10, 2018, President Trump issued an executive order exempting all ALJ positions from the rules governing civil service, including the competitive examination process. Executive Order Excepting Administrative Law Judges From The Competitive Service, 2018 WL 3359654, at *1 (July 10, 2018). The order relies on *Lucia*, stating that, "as recognized by the Supreme Court in *Lucia*, at least some—and perhaps all—ALJs are 'Officers of the United States' and thus subject to the Constitution's Appointments Clause, which governs who may appoint such officials." *Id*. The order further states that "*Lucia* may . . . raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs." *Id*. Noting that "there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing" ALJs, the order exempts ALJs from the competitive hiring

rules and examinations requirements in an effort to "mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised." *Id*.

The executive order also provides that "[e]xcept as required by statute, the Civil Service Rules and Regulations shall not apply to removals" of ALJs. *Id*. at *3. That provision, however, does not appear to alter the statutory restriction that ALJs may be removed only for good cause as determined by the Merit Systems Protection Board (MSPB) following a hearing. In a memorandum to heads of federal agencies and departments, OPM Director Jeff T.H. Pon stated that the statutory removal protections and related procedures prescribed by regulations will remain in effect. Dr. Jeff T.H. Pon, Memorandum for Heads of Executive Departments and Agencies (July 10, 2018), at 2. Further complicating the issue, on July 23, 2018, Reuters reported that a confidential Justice Department memorandum to top lawyers at federal agencies concluded that "the MSPB must be 'suitably deferential' to department heads who find an ALJ has failed to perform adequately or has not followed 'agency policies, procedures or instructions.'" Alison Frankel, *In Confidential Memo to Agency GCs, DOJ Signals Aggressive Stand on Firing ALJs*, Reuters.com, July 23, 2018.

On July 20, 2018, the SEC extended its stay order an additional 30 days until August 22, 2018. Order, *In re* Pending Administrative Proceedings (SEC July 20, 2018). On August 22, 2018, the SEC allowed the stay to expire; remanded all proceedings pending before the Commission; vacated all prior opinions in the 126 pending matters; and ordered that, to the extent practicable, the Chief ALJ by September 21, 2018 shall designate an ALJ who did not previously participate in the matter to be the presiding hearing officer. Order, *In re* Pending Administrative Proceedings (SEC Aug. 22, 2018). "Within 21 days of being assigned to the proceeding, the ALJ shall issue an order directing the parties to submit proposals for the conduct of further proceedings." *Id*. at 2. After considering the parties' proposals, the ALJ "shall hold a new hearing and prepare an initial decision" and "shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter." *Id*. If a party fails to submit a proposal, however, the ALJ may enter a default judgment. *Id*.

LUCIA'S IMPACT AND POTENTIAL FUTURE LITIGATION AGAINST THE ADMINISTRATIVE STATE

Lucia is likely to have varied impacts across a number of industries and practice areas. Businesses and individuals should consult with attorneys to assess Lucia's impact on their industry and their regulators. Nonetheless, Lucia raises several salient questions—which may inform potential constitutional challenges—for businesses and individuals facing enforcement actions before ALJs or similar hearing officers in any federal agency. Those questions include:

- What constitutes a "timely challenge" for litigants who have already appeared before invalidly appointed ALJs, and are there grounds for excusing the untimeliness of a challenge?
  - In *Jones Brothers, Inc. v. Secretary of Labor*, the Sixth Circuit held that a petitioner challenging penalties imposed by an ALJ for the Mine Safety and Health Administration had forfeited its challenge by merely stating that "currently a split among the Circuit Courts of Appeal" exists regarding whether ALJs are inferior officers, but that "extraordinary circumstances" existed under the Mine Act, allowing the court to excuse the forfeiture. No. 17-3483, 2018 WL 3629059, at *6–7 (6th Cir. July 31, 2018).
  - By contrast, the United States District Court for the Central District of California has refused to consider four separate petitioners' Appointments Clause challenges to the appointment of ALJs employed by the Social Security Administration because the petitioners "fail[ed] to raise it during [their] administrative proceedings." *See, e.g., Trejo v. Berryhill*, No. 17-0879-JPR, 2018 WL 3602380, at *3 n.3 (C.D. Cal. July 25, 2018).
  - Are the ALJs or hearing officers at other regulatory agencies "Officers of the United States," like the SEC's ALJs, or are their roles sufficiently different such that they might not be subject to the Appointments Clause?

- If the ALJs are Officers of the United States, who actually appointed them? Is that person a head of department as required by Article II?
- If the ALJs were invalidly appointed, were their appointments ratified by the head of department? Did the "ratification" of the appointment of the ALJ cure any constitutional infirmity?
  - In *Jones Brothers*, the chief administrative law judge, rather than the Federal Mine Safety and Health Review Commission (Mine Commission), appointed the ALJ who heard the petitioner's case. 2018 WL 3629059, at *5. However, on April 3, 2008, while the case was pending before the Sixth Circuit, the Mine Commission issued an order purporting to "[r]atify the prior appointments of, and appoint," all 13 active ALJs employed by the Mine Safety and Health Administration, including the ALJ who heard the petitioner's case. Mine Commission, Notice (Apr. 3, 2018). The Sixth Circuit concluded that the ALJ had been improperly appointed and that ratification did not cure the constitutional defect, and held that "Jones Brothers is entitled to a new hearing before a constitutionally appointed administrative law judge." *Jones Bros.*, 2018 WL 3629059, at *7–8. The Sixth Circuit further held that, even if the previous ALJ "has since received a constitutional appointment," the new hearing "must be before a new official." at *8.
- Did OPM limit the head of department's appointment discretion? If so, does that limitation on the head of department's authority raise additional constitutional concerns? Do private litigants have standing to challenge any potential constitutional infirmity related to this issue?
- If the ALJs are Officers of the United States, are they *inferior* officers or are they *principal* officers who can only be appointed by the President with Senate consent?
- Are the statutory restrictions on the removal of the ALJs constitutional? Do private litigants have standing to challenge the statutory restrictions on the removal of the ALJs?
- If there are no ALJs whose appointment satisfies the constitutional requirements, does the rule of necessity, as discussed in a footnote 5 in *Lucia*, permit the head of department to conduct the proceedings to remedy the constitutional infirmity?

As demonstrated below, the answers to these questions could impact a variety of industry areas.

POTENTIAL IMPACT ON SECURITIES REGULATION AND ENFORCEMENT

Lucia has had a significant impact on pending SEC administrative proceedings, but its impact on future proceedings before SEC ALJs remains to be seen. Even after the SEC ordered re-hearings of pending proceedings before new ALJs, *Lucia* highlights several potential additional arguments under the Appointments Clause that litigants can raise in an attempt to beat back enforcement actions. Those arguments include that: (1) even if litigants receive a new hearing before an ALJ whose appointment has been "ratified" by the SEC or another agency, the new ALJ was still not properly "appointed" because *ratification* is different from *appointment*; (2) the statutory removal restrictions on ALJs are unconstitutional; and (3) the SEC ALJs are principal officers who must be appointed only by the President with Senate consent.

Lucia also may impact regulation and enforcement in the commodities and cryptocurrency markets by the Commodity Futures Trading Commission. Although it eliminated the use of ALJs, the CFTC authorized the use of a "judgment officer" and "presiding officers" for various proceedings, with each type of officer performing many of the same functions as the SEC's ALJs. *See* 17 C.F.R. § 10.8 (providing that the presiding officer shall have the same authority and obligations as an ALJ, including the authority to issue subpoenas, receive evidence, examine witnesses, rule on motions, and sanction parties for noncompliance with orders); *id*. § 12.2 (providing that a judgment officer "is authorized to

conduct all reparations proceedings"). Although the presiding officers are appointed for the purpose of "a particular proceeding," 17 C.F.R. § 10.2(n), the judgment officer "is authorized to conduct all reparations proceedings" in the CFTC, *id*. § 12.2. Earlier this year, the CFTC issued an order ratifying the prior appointment of its judgment officer, though the CFTC did not specify *who* appointed the judgment officer. Ratification and Reconsideration Order, *In re Pending Administrative Proceedings* (CFTC Apr. 9, 2018). Any challenge to the constitutionality of the judgment officer's appointment relying on *Lucia* is likely to turn on two questions: (1) *who* appointed the judgment officer, and (2) whether courts find the ratifications process to be sufficient to cure any constitutional defects. That said, CFTC litigants also might argue that the appointment was unconstitutional because the judgment officer is a *principal* officer, or that the removal restrictions on the judgment officer are unconstitutional. Similar questions may be raised by litigants appearing before presiding officers, though the limited appointment of such officers appears to reduce the risk of constitutional challenges in future proceedings.

POSSIBLE IMPACT ON DATA PRIVACY AND SECURITY REGULATION AND ENFORCEMENT

The Federal Trade Commission exercises the most significant data privacy and regulatory and enforcement authority among federal agencies. The FTC generally brings enforcement actions before an ALJ, and parties can appeal to the full Commission, although the FTC may also choose to prosecute claims in federal district courts. *See LabMD, Inc. v. F.T.C.*, No. 16-16270, 2018 WL 3056794, at *8 (11th Cir. June 6, 2018). The FTC has only one ALJ, which, like the SEC's ALJs, was appointed by staff and not the Commission itself. (For details on ALJs in various departments, click here.) The FTC's ALJs have powers that appear to be analogous to those held by the SEC ALJs, upon which the Supreme Court relied to conclude that they were Officers of the United States:

- The FTC ALJ has the power to "administer oaths and affirmations," "take depositions," and "rule upon offers of proof and receive evidence." 16 C.F.R. § 3.42(c)(1), (3), (5).
- Like SEC ALJs who have the power to conduct trials, the FTC ALJ has the power and "duty to conduct fair and impartial hearings." § 3.42(c).
- The FTC ALJ has the power to rule on the admissibility of evidence, § 3.43(d), (g), and to shape the administrative record through both control of the proceedings, *id*. § 3.43(g), (i), and supervision of the creation of the record, *id*. § 3.44.
- The FTC ALJ has the power to "regulate the course of the hearings and the conduct of the parties and their counsel therein," § 3.42(c)(6), and "suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct," *id*. § 3.42(d).

In 2015, after a party challenged the constitutionality of the appointment of the FTC's ALJ, the FTC issued an order "ratifying" the appointment of its ALJ. *See* Order Denying Respondent LabMD, Inc.'s Motion to Dismiss, Exhibit A (Docket No. 9357, Sept. 14, 2015).

FTC litigants with ongoing proceedings may have different responses to *Lucia* depending upon when they appeared before an ALJ. For those who appeared before an ALJ *prior* to the ratification order where the proceeding remains ongoing, the party may be able to obtain a new initial hearing based on *Lucia*. Parties who appeared before the FTC ALJ *after* the ratification order may argue that the ratification did not cure the Appointments Clause violations discussed in *Lucia*.

POSSIBLE IMPACT ON FINANCIAL SERVICES REGULATION AND ENFORCEMENT

The Consumer Financial Protection Bureau utilizes one ALJ in its work, and two ALJs exercise authority under the Office of Financial Institution Adjudication. Like the FTC's ALJ, the CFPB's ALJ appears to share the same key characteristics with the SEC's ALJs:

- The CFPB ALJ has the power to receive evidence. *See* 12 C.F.R. §§ 1081.103, 1081.303(g).
- The CFPB ALJ has the power to conduct trials. *See id.*§ 1081.302, 1081.303.
- The CFPB ALJ has the power to rule on the admissibility of evidence, § 1081.303(g), and thus shape the administrative record, *see id*. §§ 1081.303(h), 1081.304.
- The CFPB ALJ has the power to issue orders for the "exclusion or suspension of counsel from the proceeding" for "[d]ilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudication proceeding." 12 C.F.R. § 1081.107.

Litigants are likely to challenge the appointment of the CFPB's ALJ because, although it is unclear *who* appointed the CFPB's ALJ, even an appointment by the director of the CFPB might be unconstitutional. The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which established CFPB, structured CFPB *within* the Federal Reserve System, such that the CFPB director might not qualify as a "head of a department."

In addition, one commentator has noted that the Federal Reserve, the Office of Comptroller of the Currency, the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration do not individually appoint ALJs but nonetheless use the same two ALJs who are hired by the Office of Financial Institution Adjudication (OFIA). Barbara S. Mishkin, What Does the Supreme Court's Lucia Decision Mean for the CFPB and Federal Banking Agencies?, ConsumerFinanceMonitor.com, July 2, 2018. Accordingly, litigants are likely to challenge the validity of OFIA's appointments.

In 2017, the Fifth Circuit entertained such a challenge in *Burgess v. Federal Deposit Insurance Corp.*, 871 F.3d 297 (5th Cir. 2017). In *Burgess*, the Fifth Circuit granted a petitioner's interlocutory motion to stay an FDIC enforcement order finding that the petitioner was likely to succeed on the merits of his claim that an FDIC ALJ's appointment violated the Appointments Clause because the FDIC ALJs' position was established by law, and its duties were similarly important to those carried out by the STJs whom the Supreme Court determined to be officers in *Freytag*. *Id*. at 201–03. The court then stayed all proceedings pending the Supreme Court's decision in *Lucia*. Order, *Burgess v. Fed. Deposit Ins. Corp.*, No. 17-60579 (5th Cir. Jan. 22, 2018). On August 8, 2018, the FDIC filed an unopposed motion to remand the case to the agency for a new hearing. The Fifth Circuit granted the motion and remanded the case to the agency on August 20, 2018. Order, *Burgess v. Fed. Deposit Ins. Corp.*, No. 17-60579 (5th Cir. Aug. 20, 2018).

POSSIBLE IMPACT ON HEALTHCARE REGULATION AND ENFORCEMENT

Aside from the Social Security Administration, the Department of Health and Human Services (HHS) employs more ALJs than any other agency. Perhaps most significantly for healthcare providers, HHS utilizes ALJs in the five-level Medicare appeals system. Specifically, ALJs preside over the third level of the Medicare appeals system. There are more than 100 ALJs at the Office of Medicare Hearings and Appeals (OMHA) at HHS. The Medicare program depends heavily on the ALJs to adjudicate appeals. Medicare appeals are often material and may involve multi-million dollar extrapolated overpayments.

As of January 2018, OMHA had approximately 502,000 pending appeals before ALJs. Those ALJs (the OMHA Medicare ALJs) appear to share the two of key characteristics with the SEC's ALJs: (1) OMHA Medicare ALJs have the power to receive, review, and exclude evidence; and (2) OMHA Medicate ALJs have the power to conduct trials. *See* 42 C.F.R. §

405.1000(a)–(d); *id*. § 405.1002; *id*. § 405.1028(a)–(b); *id*. § 405.1030. However, the HHS regulations do not expressly authorize OMHA Medicare ALJs to issue sanctions as significant as those issued by certain other ALJs, *see id*. § 405.1030(b)(3), and the regulations further provide that the administrative record should include "any evidence excluded or not considered by the ALJ" *id*. § 405.1042(a)(2). Medicare appeal litigants who have received unfavorable ALJ decisions within technical appeal deadlines could potentially challenge those decisions based on the theory that the ALJ was improperly appointed. Providers typically have 60 days to appeal an ALJ's decision to the Medicare Appeals Council. *Id*. § 405.1102(a). These litigants may have grounds for applying *Lucia* to the ALJs working in OMHA, as OMHA ALJs have many similarities to the SEC ALJs—including authorization to conduct hearings at which they receive testimony and evidence, *id*. § 405.1030(b), and the ability to issue subpoenas, *id*. § 405.1036(f).

HHS also uses ALJs in a variety of other matters, and each context will present different questions about *Lucia*'s impact. *Id*. § 498.5(l). For example, ALJs are used by the HHS Office of Inspector General in "exclusion" proceedings, in which HHS seeks to place an individual or an entity on a list of individuals and entities barred from participating in any federally funded healthcare programs. Here, *Lucia* could potentially be used to challenge the validity of the ALJ appointment in an attempt to obtain a new ALJ hearing. The precise vehicle and venue for such a challenge, however, is unclear because those ALJ decisions may not be "appealable" by statute or regulation.

POSSIBLE IMPACT ON ENERGY-RELATED REGULATION AND ENFORCEMENT

Lucia's most significant possible impacts in the area of energy regulation and enforcement are likely to be in proceedings before the Federal Energy Regulatory Commission (FERC) and the Department of the Interior. FERC currently utilizes 12 ALJs, and nine ALJs exercise authority within the Department of the Interior. The FERC chairperson has been making the ALJ appointments for FERC, and the FERC ALJs exercise many of the same powers as SEC ALJs. A key issue for FERC ALJs is whether the FERC chairperson is a "Head[] of Department[]" under the Appointments Clause. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court held that the entire Securities and Exchange Commission is a "Head[] of Department[]" under the Appointments Clause, suggesting that the SEC chairperson alone is not because the "Commission's powers . . . [were] generally vested in the Commissioners jointly, not the chairperson alone. 561 U.S. 477, 512–13 (2010). Using this precedent, litigants likely will contend that any ALJ appointments made by a chairperson, rather than by the entire commission, are invalid. The government, however, may argue that, unlike the SEC chairperson, the FERC chairperson is the "head[] of Department[]" because of the special authority given to the person in that role. For example, federal law provides that the FERC "Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission," including "the appointment and employment of" ALJs. 42 U.S.C. § 7171(c).

ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION AND ENFORCEMENT

Lucia also may have an impact in environmental, health, and safety regulation and enforcement. Specifically, litigants may raise constitutional challenges to proceedings brought before ALJs by the Occupational Safety and Health Review Commission, which currently employs 11 ALJs; the Department of the Interior, which utilizes nine; the Environmental Protection Agency, which utilizes three; the Federal Mine Safety and Health Review Commission, which utilizes 15; and the Departmental Appeals Board of the Department of Health and Human Services, which utilizes five.

As noted above, the Sixth Circuit has ruled that the appointment of ALJs by the chief ALJ of the Mine Safety and Health Administration was unconstitutional, and that those ALJs were required to have been appointed by the Federal Mine Safety and Health Review Commission. *Jones Bros*., 2018 WL 3629059, at *7–8. In addition, although the issues raised for businesses and individuals subject to environmental, health, and safety regulation and enforcement before other agencies will be varied, the key questions will be those identified above, common to all industry areas.

POSSIBLE IMPACT ON ANTITRUST REGULATION AND ENFORCEMENT

The FTC is the only governmental entity to utilize ALJs in the course of antitrust regulation and enforcement. There is no parallel mechanism at the Department of Justice's Antitrust Division, and the Antitrust Division must begin any proceedings it initiates in federal court. Accordingly, the impact of *Lucia* on antitrust regulation and enforcement is likely to be the same impact as on data privacy and security regulation and enforcement, detailed above.

CONCLUSION

The long-term effects of *Lucia* remain to be seen. As demonstrated above, however, in the near term, it is reasonable to expect additional challenges to the authority of ALJs or similar hearing officials in multiple administrative contexts.