

[Securities Regulation Daily Wrap Up, ENFORCEMENT—D.C. Cir.: Attorneys challenging SEC’s use of ALJs invoke recent CFPB decision, \(Oct. 14, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Kevin Kulling, J.D.](#)

Attorneys for Raymond Lucia, a former investment adviser who lost his challenge to the SEC’s administrative enforcement regime, have submitted to the U.S. Court of Appeals for the D.C. Circuit a letter invoking language found in the court’s recent decision that held the Consumer Financial Protection Bureau’s single director structure was unconstitutional in an attempt to bolster Lucia’s request for a rehearing. The Lucia letter urges the court to bring its Appointment Clause jurisprudence into line with the Constitution, Supreme Court precedent, and historical practice.

Petition for rehearing. In the [letter](#), Lucia’s attorneys refer to language by the majority in the [CFPB](#) case that "in separation of powers cases not resolved by the constitutional text alone, historical practice matters a great deal in defining the constitutional limits on the Executive and Legislative Branches."

Lucia’s attorneys argue in their citation of supplemental authorities that the Lucia panel’s decision contravenes that principle. The letter argues that "consistent historical practice spanning nearly two centuries establishes that non-Article III adjudicators with authority to implement federal law are Officers of the United States, regardless of whether they possess final decision making authority." The government’s insistence that SEC ALJs were not subject to the Appointments Clause because they did not have final decision making authority thus represents a gross departure from our constitutional traditions, the letter said.

Lucia knocked out. On August 9, 2016, a panel of the D.C. Circuit [held](#) in favor of the SEC over whether the agency’s administrative law judge who heard a case against Lucia was properly appointed to the position. Lucia [argued](#) that the Appointments Clause of the U.S. Constitution required that the ALJ be appointed. The panel determined that the SEC ALJ’s decisions were not final, but subject to review by the Commission. Therefore, there was no requirement that the ALJs be appointed.

Lucia sanctioned. Lucia, a former investment adviser, was found by an ALJ to have violated the Investment Advisers Act by misleading investors about "backtesting" results of an investment strategy called "buckets of money." Lucia presented his investment strategy in webinars and claimed that it would produce superior returns in a sharp market decline. The ALJ held that Lucia and his firm committed securities fraud during his presentations. The SEC then upheld the decision of the ALJ.

The Commission imposed civil penalties of \$50,000 on Lucia and \$250,000 on his firm. Finding his conduct to be egregious, the Commission also barred Lucia from associating with any investment adviser or broker-dealer.

Attorneys: Mark A. Perry (Gibson Dunn & Crutcher LLP) for Raymond J. Lucia Co., Inc. Michael Andrew Conley for the SEC.

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