Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Ratification, removal questions lurking in Lucia's and government's briefs in SEC ALJ case, (Feb. 22, 2018)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

Raymond Lucia's merits brief in his case disputing the constitutionality of the SEC's administrative law judges again asks the court to upend the D.C. Circuit's holding that the SEC's ALJ's were employees beyond the reach of the U.S. Constitution's Appointments Clause and would have the court remand the matter with instructions to either dismiss the proceeding against Lucia or provide a constitutional tribunal. The government likewise argues that the D.C. Circuit's decision should be reversed (the government had previously ceased to defend the SEC's ALJs). Despite this agreement, Lucia and the government emphasize different arguments, including with respect to the impact of the SEC's attempted ratification of its ALJs and the question of how ALJs can be removed from their positions. But perhaps the most anticipated brief in the case, that of the court-appointed amicus curiae defending the judgment below (i.e., the SEC's ALJs are employees), is expected to be filed by late next month (*Lucia v. SEC* (Government's brief), February 21, 2018).

Ratification ineffective. Lucia's and the government's briefs begin by stating identical questions presented: "Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause." They also cite mostly the same cases, although Lucia leans on *Marbury v. Madison* (delivery of a commission is the signature evidence of appointment) and other cases for the proposition that the SEC never took the necessary steps to appoint its ALJs and, thus, the SEC currently has no constitutionally appointed ALJs. As a result, Lucia said, the SEC's order purporting to "ratify" the prior actions of its ALJs in then-pending cases was without force because there were no prior appointments to ratify. Citing agency law, Lucia backs up its assertion by arguing that a principal cannot ratify an act that would have been invalid for the principal.

The government, by contrast, addressed the ratification issue by footnote only. The SEC issued its ratification order soon after the Solicitor General had confessed error in its response to Lucia's petition for certiorari. The government cited Exchange Act Section 25 ("jurisdiction ... becomes exclusive on the filing of the record") for the proposition that the case was already under judicial review and the SEC's ratification order had no effect on the ability of the court to hear Lucia's case.

The removal question. At the certiorari stage of the case, the government had asked the Supreme Court to either reframe the question presented or find that the existing question presented is broad enough to include the related question of the removability of the SEC's ALJs. Meanwhile, Lucia filed a reply brief urging the justices to forebear deciding the removal question, although noting that Lucia might raise that issue as a defense in a later proceeding. Lucia noted then that the removal question could entail a decision on whether the SEC's commissioners enjoy for cause removal. In granting certiorari in Lucia's case, however, the Supreme Court did not limit the question presented or explicitly revise the question presented as it sometimes does. Only the government wrote at length about the removal question in its merits brief.

According to the government, Congress has not defined "good cause" removal, but that the question of ALJs' appointment cannot be decided without also tackling the removal question. The government said the issue of removal is potentially more problematic at independent agencies like the SEC, where there may be multiple layers of tenure protection.

To avoid these problems, the government would have the justices interpret the relevant provision in the Administrative Procedure Act to allow the removal of an ALJ by an agency where the ALJ has engaged in "personal misconduct" or has failed "to follow lawful agency directives or to perform his duties adequately." The government conceded that its view would leave in place multiple layers of tenure protection, but it would nevertheless comport with the president's constitutional obligation to faithfully execute the laws. The government also noted that the Supreme Court has rejected "stringent" good cause standards, although without developing a "comprehensive" standard.

Significant authority. Both briefs re-trace arguments made countless times in the many cases challenging the SEC's ALJs. Both Lucia and the government look to language in the Supreme Court's opinion in *Buckley v. Valeo* defining an officer as someone who wields "significant authority." Both briefs note that *Buckley*'s test sits atop a long history cited by America's founders that, based on America's colonial-era experiences, political executives tend to abuse their appointment powers if not constitutionally limited. Lucia and the government then provide detailed lists of the many ways in which they believe the SEC's ALJs exercise significant authority.

Lucia posits that *Buckley*'s understanding of "officer" is "sweeping" and that the Appointments Clause itself is "intentionally inclusive" such that very few individuals would not be officers. In the case of the SEC's ALJs, Lucia further argues that non-Article III adjudicators in adversarial proceedings are officers regardless of their finality. Moreover, Lucia said the Supreme Court has "*never*" (emphasis in original) held that "federal adjudicator[s] who preside[] over adversarial proceedings" are employees.

Likewise, the government notes the "exhaustive" modes of appointment under the Appointments Clause for principal and inferior officers, the latter having their appointment vested by Congress in the president, courts of law, or heads of departments. The government also observed that the Appointments Clause does not apply to all federal jobs, and it can be difficult to discern the line between officers and employees. Still, the government said *Buckley* provides a workable test.

Both Lucia and the government take issue with the D.C. Circuit's *Landry* opinion, which formed the basis for the D.C. Circuit's decision upholding the SEC's ALJs' constitutionality. The government, for example, noted that the Supreme Court's tax court decision, *Freytag*, rejected finality as the basis for officer status; *Freytag* also held, as the concurring judge in *Landry* had suggested, that the Supreme Court, alternatively, could have found the special trial judges at issue there to have been officers even if their powers regarding initial decisions were less significant.

As further support for the proposition that the SEC's ALJs are officers, the government notes how these ALJs exercise an executive function and that they are akin to trial judges. Lucia makes similar arguments and notes, citing the Tenth Circuit's *Bandimere* opinion (ALJs are officers; petition for certiorari still pending before the Supreme Court), that the Commission never fully reviews up to 90 percent of the initial decisions issued by SEC ALJs.

The case is No. 17-130 (Petitioner's brief; Government's brief).

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