

Securities Regulation Daily Wrap Up, ENFORCEMENT—President Trump removes ALJs from competitive hiring rules, (Jul. 11, 2018)

Securities Regulation Daily Wrap Up

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By [John M. Jascob, J.D., LL.M.](#)

In the wake of the Supreme Court's decision in *Lucia v. SEC*, President Trump has issued an executive order excepting federal administrative law judges (ALJs) from the competitive service. The order states that removing ALJs from competitive hiring and selection rules will mitigate concerns about undue limitations on their selection, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation on these issues. The [order](#) also states that the president's action will provide agency heads with additional flexibility to assess prospective appointees, including with respect to their work ethic, judgment, and ability to meet agency needs.

In exercising his authority under 5 U.S.C. 3302, President Trump noted that in addition to holding that ALJs are "inferior officers" of the United States, [Lucia](#) may also raise additional 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. Even if the competitive service selection procedures do not violate the Appointments Clause, excepting ALJs from competitive hiring rules, and examinations will give agencies greater ability and discretion to assess critical qualities in candidates, the order observes.

A White House [news release](#) stresses the efficiency benefits to be gained from the new ALJ appointment process. The release begins with a quote from President Trump at a [budget meeting](#) in February 2017: "We're going to run government smoothly, efficiently, and on behalf of the very hardworking taxpayers." The release also describes the new process for selecting ALJs as being very similar to the process agencies currently use to hire attorneys throughout the executive branch.

Ranking Member Richard Neal (D-Mass) of the House Ways and Means Committee [blasted](#) the president's action, however, saying that the order will allow the chief executive to appoint ALJs based on ideology and political orientation, rather than through a competitive examination process based on merit and fitness for office. "This executive order is yet another example of President Trump putting special interests and loyalists ahead of American families' wellbeing," Neal said. "When it comes to filling these consequential positions, candidates' intellect and integrity should be the rule – not ideology and fealty to a particular Administration."

According to [information](#)published by the U.S. Office of Personnel Management, federal agencies employed 1,931 ALJs as of March 2017, with 1,655 of those being employed by the Social Security Administration. The SEC currently employs five ALJs: Chief Administrative Law Judge Brenda, Carol Fox Foelak, Cameron Elliot, James E. Grimes, and Jason S. Patil. Collectively, the SEC's ALJs [issued 121 initial decisions](#) in fiscal year 2017, resulting in the imposition of over \$3 million in disgorgement and over \$1 million in civil penalties.

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