White Collar Update: Solicitor General Sides with Opponents, Agrees SEC Administrative Law Judges are Unconstitutionally Appointed

December 5, 2017

On November 29, 2017, the Solicitor General filed a brief in the Supreme Court on behalf of the Securities and Exchange Commission ("SEC") reversing the agency's position and arguing that SEC administrative law judges ("ALJs") have been unconstitutionally appointed to their posts. The Solicitor General's brief was filed in response to Raymond Lucia's petition for a writ of certiorari after the D.C. Circuit Court of Appeals rejected a challenge to the constitutionality of the appointment of SEC ALJs (detailed here). The Solicitor General also raised questions regarding the validity of statutory restrictions that protect SEC ALJs from removal. The SEC did not sign the Solicitor General's brief; however, the Commission quickly took action to attempt to cure its potentially unconstitutional appointments through an order issued on November 30, 2017 that ratified the prior appointment of its current ALJs.

Solicitor General Changes Course, Calls ALJs "Officers"

As detailed in a prior alert, the D.C. Circuit and Tenth Circuit have split on the question of whether SEC administrative law judges are "inferior officers" subject to the requirements of the Constitution's Appointments Clause, which would require that SEC ALJs be appointed by either the President, the courts, or the SEC Commissioners. Parties in both cases are seeking Supreme Court review of the decisions creating the split.

In these cases, the SEC had maintained that its ALJs were not "officers" within the meaning of the Appointments Clause and, therefore, not subject to its requirements. The Solicitor General's filing, however, makes clear that it now stands beside the SEC's opponents, and it urges the Supreme Court to accept the case and hold that SEC ALJs are in fact officers. In articulating this new position, the Solicitor General cites "further consideration" of the matter as well as "the implications for the exercise of executive power under Article II" had the agency stayed the course.[1]

SEC Ratification of ALJ Appointments

On November 30, 2017, one day after the Solicitor General's filing, the SEC attempted to implement a quick fix to ensure that ongoing administrative actions pending before it are not disrupted. If ALJs are "officers" within the meaning of the Appointments Clause—as the Solicitor General now insists they are—then they must be hired by the process set forth in Article II of the Constitution.[2] One such method is to be appointed by the "head of a department" or agency. Accordingly, the Commission issued an order to "ratif[y]" the prior appointments of its ALJs, invoking its position as the "head of a department" essentially to re-appoint the ALJs in a constitutional manner.[3] In its order, the SEC also set forth a process intended

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[1] Brief for Respondent ("Resp't Br.") at 9-10, Lucia v. SEC, No. 17-130 (filed Nov. 29, 2017), available at https://www.supremecourt.gov/DocketPDF/17/17-130/21998/20171129155714442_17-130%20Lucia.pdf.

[2] *See* U.S. CONST. art. II, § 2, cl. 2.

[3] SEC Order at 1, available at: https://www.sec.gov/litigation/opinions/2017/33-10440.pdf.

to cure any constitutional concerns regarding the proceedings pending before the agency.[4] Specifically, the SEC has ordered that its ALJs must undertake the following actions:

- For cases where the ALJ has not issued an initial decision, the ALJ must "[r]econsider the record" and allow parties until January 5, 2018 to "submit any new evidence the parties deem relevant to the [ALJ's] reexamination of the record." Upon such reconsideration, the ALJ may decide to "ratify or revise" any prior actions taken by the ALJ in the proceeding. By February 16, 2018, the ALJ is expected to issue an order stating that the ALJ has complied with the reconsideration ordered by the SEC and set forth its determination regarding ratification.[5]
- For cases pending before the SEC in which an ALJ has already made an initial decision, the SEC has ordered these matters to be remanded back to the same ALJ who made the initial decision for the same reconsideration process.[6]

The SEC's attempted ALJ hiring-process fix does not address the more complicated issue of its ALJs' removal. Although that issue was not briefed in the *Lucia v. SEC* case and Lucia has disclaimed any need to address the issue, the Solicitor General has invited the Supreme Court to address the constitutionality of existing statutory restrictions on the removal of SEC ALJs from office. Citing concerns over "separation-of-powers principles," the Solicitor General suggests that ALJs, as officers, are too insulated from the President's authority because they enjoy two, and potentially three, levels of removal protections.[7]

Issues on the Horizon

It remains to be seen whether the Supreme Court will grant certiorari, in which case it would need to appoint an amicus curiae to argue the side formerly occupied by the SEC. While the SEC is not the first agency to grapple with curing an Appointments Clause problem, it is unclear whether the ratification process set forth in its November 30 order will adequately address any constitutional error—assuming the Court ultimately agrees one occurred. Even if the SEC's ratification process passes muster, the SEC Order applies to matters pending before the agency, not those that have been fully adjudicated or are already before a court. Furthermore, the SEC's ratification process only addresses the hiring, and not the firing, of ALJs. The Solicitor General's filing sets the stage for the lingering question of whether the restrictions on ALJs' removal are permissible, which may or may not be addressed by the Supreme Court if it takes the case, or left to be litigated in the lower courts in the first instance. The resolution of these issues may very well implicate ALJs and administrative proceedings across many federal agencies, and not just the SEC.

[4] Furthermore, the SEC's order lifted the stays that had been imposed by the agency on any cases which might have been appealed to the Tenth Circuit following the *Bandimere v. SEC* decision (described in more detail **here**).

[5] SEC Order at 1-2.

[6] SEC Order at 2.

[7] Resp't Br. at 19-20; *see* 5 U.S.C. § 7521(a) (providing that SEC ALJs may be removed by the SEC "only for good cause established and determined by the Merit Systems Protection Board"); 5 U.S.C. § 1202(d) (providing that members of the Merit Systems Protection Board "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

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