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U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

To: Agency General Counsels

From: The Solicitor General

Subject: Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.)

This memorandum supplements our legal guidance to agencies that employ administrative law judges (ALJs) in the wake of the Supreme Court's decision in *Lucia v. SEC*, No. 17-130 (S. Ct.) (June 21, 2018), the President's recent Executive Order related to ALJs, and OPM's guidance related to that Executive Order.[1]

In light of *Lucia*, we offer the following legal advice to agencies with ALJs appointed under 5 U.S.C. 3105 and, as discussed below, similarly situated administrative judges. Our advice is designed to reduce litigation risk in the wake of *Lucia*, but we do not expect that these steps will insulate all administrative proceedings from challenge. We also recognize that agency-specific questions will arise. We encourage affected agencies to raise their specific issues with us, and we have provided a list of contacts for such questions at the end of this memorandum.

As discussed below, to the extent feasible and consistent with law, we advise agencies (1) to arrange promptly for the appropriate Department Head to ratify and approve the appointment of existing ALJs and similarly situated adjudicatory officers; (2) to fill new ALJ vacancies in the manner provided by the President's recent

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[1] The *Lucia* decision is available at https://www.supremecourt.gov/opinions/17pdf/17-130_4f14.pdf. The President's recent Executive Order placing the position of ALJ in the excepted service is available at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/. OPM's guidance regarding that Executive Order is available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service.

Executive Order; (3) in pending cases in which no Appointments Clause challenge was timely made and preserved, to argue that any such challenge is forfeited; and (4) in pending cases in which an Appointments Clause challenge was timely made and preserved, to seek a voluntary remand to the agency to provide a hearing before a different, properly appointed ALJ, consistent with *Lucia*. We also address the minimum contours of the "new hearing" required by *Lucia*, as well as the prospect of separation-of-powers challenges based on the statutory "for cause" removal protection for ALJs.

A. *Lucia* And Its Implications For Other ALJs And Similarly Situated Administrative Judges

A threshold question is who exactly is covered by the Supreme Court's decision in *Lucia*. Although the Court's specific holding is narrow, its reasoning sweeps more broadly. For the reasons discussed below, we conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause, and that Department Heads should ratify and approve the appointments of existing ALJs and administrative judges accordingly.

1. *SEC ALJs, and other ALJs who exercise similar powers, are inferior officers and must be appointed as such.* The Supreme Court held in *Lucia* that ALJs of the Securities and Exchange Commission are inferior officers, not regular employees, for essentially the same reasons that the special trial judges of the Tax Court were held to be inferior officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The Court emphasized that SEC ALJs possess "the four specific (if overlapping) powers *Freytag* mentioned": they take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. Slip op. 8-9. In this sense, the Court observed, SEC ALJs "have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges." *Id.* at 8. In addition, at the conclusion of the adversarial proceedings over which they preside, SEC ALJs issue initial decisions "containing factual findings, legal conclusions, and appropriate remedies," which can become the final decision of the agency without further review. *Id.* at 9. On that basis, the Court held that SEC ALJs are inferior officers of the United States who must be appointed in the manner required by the Appointments Clause.

The Supreme Court's holding in *Lucia* only addresses the constitutional status of the SEC's ALJs. The Department of Justice understands the Court's reasoning, however, to encompass all ALJs in traditional and independent agencies who preside over adversarial administrative proceedings and possess the adjudicative powers highlighted by the *Lucia* majority. All such ALJs must be appointed (or have their

prior appointments ratified) in a manner consistent with the Appointments Clause, as discussed in Part B below.

2. *Other ALJs should likewise be appointed as inferior officers.* The Court's decision in *Lucia* does not directly address the constitutional status of administrative law judges appointed under 5 U.S.C. 3105 who do not preside over adversarial administrative hearings or possess powers equivalent to those of the SEC ALJs in *Lucia.* For example, *Lucia* does not squarely resolve the status of ALJs who preside over ex parte hearings for applicants seeking federal benefits. Nonetheless, much of the reasoning of *Lucia* applies with equal force to such ALJs: while they may not preside over adversarial trials, they do take testimony, preside over hearings, receive and weigh evidence, and employ various mechanisms for obtaining compliance with their orders. Accordingly, taking into account both the Supreme Court's reasoning in *Lucia* and the importance of ensuring the President's oversight of the execution of the laws, the Department of Justice no longer plans to argue that such ALJs are employees rather than inferior officers. Agencies should appoint all ALJs as inferior officers.

3. *Similarly situated administrative judges should also be appointed as inferior officers.* The *Lucia* decision addresses only ALJs appointed under 5 U.S.C. 3105. Many agencies, however, use other non-ALJ officials—often termed "administrative judges" or "administrative appeals judges"—to preside over hearings and issue initial or appellate decisions in agency adjudications. While there will be case-by-case questions, we anticipate that many of these adjudicative officials will qualify as inferior officers under *Lucia*, especially if they preside over adversarial hearings and have the four specific forms of authority highlighted by the Court in *Lucia.* Again, taking into account both the Supreme Court's reasoning in *Lucia* and the importance of ensuring the President's oversight of the execution of the laws, the Department does not expect to defend the appointment of such officials by individuals other than the Department Head on the ground that they are mere employees. Accordingly, we recommend that agencies appoint such non-ALJ adjudicators as inferior officers in the same manner as ALJs, consistent with the advice in this memorandum, or contact us with further questions, as appropriate.

B. The Mechanics Of Appointing And Ratifying ALJs After *Lucia*

1. *In general—appointment by Department Head required.* As discussed, all ALJs and similarly situated adjudicative officers should be appointed in a manner consistent with the Appointments Clause. In most cases, this means the ALJ's appointment must be made or approved by the "[H]ead[]" of the relevant Executive "Department[]." U.S. Const., Art. II, sec. 2, cl. 2. The Department Head must have authority derived from a statute (or from a valid regulation promulgated through

statutory authority) to make the appointment. Although the Department Head may rely on agency human resources officials or other staff to vet applications, conduct interviews, and the like, the final appointment must be made or approved by the Department Head personally; this authority cannot be delegated.

For independent agencies headed by multi-member bodies, such as the SEC, the Department Head for Appointments Clause purposes is typically the multi-member body itself, acting by majority vote, rather than (for example) a commission chairman. For traditional agencies in the Executive Branch, the relevant Department Head is the head of the Executive Department to which your agency or office belongs. If you have questions about the identity of the appropriate Department Head, or if you have concerns about the appropriate authority for ALJ appointments under your agency's organic statute, please contact the Department of Justice at the email address below.

2. *New appointments.* On July 10, 2018, President Trump signed an Executive Order entitled "Excepting Administrative Law Judges from the Competitive Service." The Executive Order is available at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/. OPM guidance regarding that order is available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service. The Executive Order places the position of ALJ in the excepted service, and OPM will no longer administer competitive examinations for ALJ appointments. By the terms of the order, Department Heads may begin making Schedule E appointments to vacant ALJ positions immediately. For questions regarding the effect of the Executive Order, please contact the Office of Personnel Management using the contact information in the OPM guidance.

The Executive Order does not address the appointment of non-ALJ adjudicators, such as administrative judges. Vacancies in such positions should be filled using existing authorities, taking care to ensure that the Department Head personally makes or approves the appointment under proper authority.

3. *Ratification and approval of prior appointments.* Consistent with our advice during the pendency of the *Lucia* case, many Department Heads ratified the prior appointments of their agencies' ALJs. We now advise all Department Heads to ratify the prior appointments of any ALJs or similar adjudicative officials whose appointments have not yet been ratified. The ratification decision need not take any particular form, and it may be brief, but it should be properly memorialized, and it should make clear that the appropriate Department Head endorses and accepts responsibility for the prior appointments. We suggest appropriate language below.

We also recommend that Department Heads make clear in ratifying an ALJ's prior appointment that the Department Head not only accepts the prior appointment as of the time it was made, but also approves that appointment *today*. The Department Head's present approval therefore can satisfy the Appointments Clause, even if the retroactive ratification were for some reason held invalid. Again, we suggest appropriate language below.

Regardless, agencies should anticipate that ratifications will be challenged in court. Indeed, the *Lucia* petitioners challenged the SEC's ratification of the prior appointment of its ALJs. As we argued to the Supreme Court (Reply Br. 19-21), ratification is an established principle under the common law, and we have good arguments that ratification by the Department Head cures any constitutional defect in the initial appointment. *See Edmond* v. *United States*, 520 U.S. 651 (1997); *CFPB* v. *Gordon*, 819 F.3d 1179 (9th Cir. 2016); *Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). The Supreme Court in *Lucia* did not address the validity of the SEC's ratification order, however, concluding it was unnecessary to reach that question. Slip op. 13 n.6. Thus, there remains risk that a court might determine in a future case that a ratification was ineffective. Nevertheless, we strongly urge Department Heads to ratify and approve the prior appointments of ALJs and similarly situated adjudicators in order to limit litigation exposure and permit the important work of ALJs to continue.

4. *Model ratification language and practice.* As noted, a ratification order or decision need not take any particular form. As a guide, however, we offer the following model language.

For agencies that have not previously ratified the appointment their ALJs, we recommend language along the following lines:

> I hereby ratify the prior appointment of Jane Doe [or "the individuals listed below"] to the office of administrative law judge in [agency], and I today approve her appointment [or "these appointments"] as my own under the Constitution.

For agencies that previously ratified the appointment of their ALJs, it is not necessary to do so again after *Lucia*. Agencies that can do so easily and consistent with their practice, however, may wish to issue a supplemental order along the following lines:

> On [date], we ratified the appointment of Jane Doe to the office of administrative law judge in [agency]. In an abundance of caution and for avoidance of doubt, we today reiterate our approval of her appointment as our own under the Constitution.

Additionally, it would be fitting for the ratifications to be accompanied by an appropriate degree of public ceremony and formality. To the extent consistent with law and agency practice, for example, a Department Head might re-administer the oath of office to incumbent ALJs in a public ceremony, or on the record of a regular public hearing or meeting. These steps are not strictly necessary, but they will underscore that the Department Head has satisfied the purposes of the Appointments Clause by accepting public responsibility for the appointment of specific persons to the office of ALJ.

C. Recommended Steps In Pending Proceedings

1. *Agencies should no longer argue that ALJs are employees.* As noted above, in light of *Lucia,* the Department of Justice will no longer argue that ALJs or similarly situated adjudicators are employees rather than inferior officers. We urge agencies to take steps to ensure that enforcement staff or other agency representatives in pending administrative proceedings conform their arguments accordingly.

2. *Agencies should request voluntary remands in cases in which an Appointments Clause challenge has been timely made and preserved.* In *Lucia*, the Supreme Court explained that the "appropriate remedy" for "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is "a new hearing before a properly appointed official." Slip op. 12 (quotation marks omitted). The petitioner in *Lucia* made such a timely challenge, the Court stressed, because "[h]e contested the validity of [the ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court." *Id.*

Accordingly, in light of *Lucia*, the Department of Justice will seek voluntary remands of matters pending in federal court in which an invalidly appointed ALJ participated, but *only* in those cases in which an Appointments Clause challenge to the ALJ was timely raised and preserved both before the agency (consistent with applicable agency rules) and in federal court. The Department of Justice will not argue that any Appointments Clause defect constituted harmless error, or that a court of appeals can nevertheless affirm the final decision of an agency in a case where an improperly appointed ALJ participated and the issue was properly preserved. This is

true even in cases (like *Lucia* itself) in which the ALJ's initial decision was reviewed de novo by the Department Head. In short, we construe *Lucia* to require a remand in all cases in which a timely Appointments Clause challenge was raised. We recommend that agencies with independent litigating authority follow the same practice.

We stress that where a challenger has failed to properly raise and preserve an Appointments Clause challenge, agencies should consider arguing that any such challenge has been forfeited. Errors in the appointment of agency officials do not go to the jurisdiction of courts reviewing those officials' decisions. See, *e.g.*, *GGNSC Springfield LLC* v. *NLRB*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 878-79 (1991)). Especially in light of the *Lucia* Court's emphasis on the need for a timely objection, we have strong arguments that Appointments Clause challenges to ALJs are subject to the usual principles of waiver and forfeiture. See, *e.g.*, *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); see also *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). The Supreme Court's decision in *Lucia* therefore should not upset final administrative decisions made without a proper challenge to the appointment of any ALJ involved.

In this regard, we understand that agencies have different practices concerning when and how a party must raise a challenge for it to be properly considered by the agency and preserved for judicial review. See, *e.g.*, 15 U.S.C. 78y(c)(1) (Securities and Exchange Commission requires legal objections to be raised before the Commission itself). Each agency should evaluate whether an Appointments Clause claim has properly been raised in its own proceedings. To the extent possible, moreover, we encourage agencies to construe or clarify their rules to require the presentation of Appointments Clause claims in administrative proceedings. No principle of law prevents an administrative agency from entertaining such claims in the first instance, as the SEC did in *Lucia* itself, or from reassigning the case to an adjudicator who was appointed by the Department Head in order to avoid an Appointments Clause challenge. Requiring the timely presentation of such claims to the agency will reduce the ability of parties simply to await the outcome of their administrative proceedings and then, if dissatisfied, raise an Appointments Clause claim in federal court to secure a remand.

3. *Administrative proceedings with preserved Appointments Clause challenges should be assigned to a different ALJ for a new hearing.* As noted, the Supreme Court in *Lucia* stated that a person who raises a timely objection is entitled to "a new hearing before a properly appointed official." Slip op. 12. The Court additionally specified that this

new hearing could not be conducted by the same ALJ who heard the case initially, even if that ALJ subsequently received a constitutional appointment. *Id.* "To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing[.]" *Id.* at 12-13.

To the extent practical and permitted by law, therefore, all pending administrative proceedings—including proceedings remanded from the courts—in which litigants have properly raised Appointments Clause challenges should be assigned to a different, properly appointed ALJ for a "new hearing." (See below for advice concerning the minimum contours of that "new hearing.") This includes matters currently pending before ALJs, as well as matters on pending review before the agency itself. All such cases should be reassigned to a different, properly appointed ALJ—provided, again, that an Appointments Clause challenge to the presiding ALJ was duly raised and preserved under the agency's rules. For this purpose, a "properly appointed ALJ" includes either (1) a new ALJ appointed pursuant to the Executive Order, or (2) an ALJ whose prior appointment has been properly ratified by the Department Head.

We recognize that *Lucia*'s requirement that matters be assigned to different ALJs for further proceedings will pose a significant administrative burden, especially in those agencies with a high volume of cases. Some agencies, moreover, have only one ALJ, or only use ALJs on loan from other agencies. The Supreme Court stated in footnote 5 of the *Lucia* opinion that it was not "hold[ing] that a new officer is required for every Appointments Clause violation." Slip op. 12-13 n.5. But the Court appears to have contemplated deviations from that rule only in very narrow circumstances: the Court stated that the "rule of necessity would presumably kick in" if "no substitute decisionmaker" were available. *Id.* If your agency does not have a "substitute decisionmaker," or if reassigning cases would present similarly substantial obstacles, please contact us.

4. *The "new hearing" should include, at a minimum, a new opportunity for the parties to contest the admission, exclusion, or weighing of evidence, and must result in a new decision that does not presume the correctness of the prior ALJ decision.* Consistent with *Lucia*, the new decisionmaker should provide a "new hearing." Slip op. 13. While the Supreme Court did not elaborate on what the "new hearing" must entail, the Court plainly contemplated more than a perfunctory ratification of the prior ALJ's decision. If your agency is in a position to provide a full soup-to-nuts redo of the administrative proceeding, that will be the safest course. While litigants may be expected to argue otherwise, however, we do not believe a complete do-over is constitutionally required. We believe that a "new hearing" will be constitutionally adequate as long as the new ALJ is careful to avoid any taint from the prior ALJ's decision. Thus, we do not think

it is necessarily fatal if the new ALJ starts with the existing record in the proceeding (including hearing transcripts), much of which there would be little purpose in generating anew. But the new ALJ should at a minimum afford the parties a new opportunity to challenge the exclusion, admission, or weighing of particular evidence, thus ensuring that the final state of the record reflects the new ALJ's own judgment. Similarly, where credibility is at issue, it may be advisable for the new ALJ to rehear the disputed testimony of the relevant witnesses. The new ALJ should also issue a new decision in the proceeding. While the new ALJ may acknowledge and draw upon any opinion authored by the original ALJ, the new ALJ should make clear that she is not giving any weight to that earlier opinion or treating any factual finding or legal conclusion in that earlier decision as presumptively correct.

Agencies that wish to avoid any litigation over the issue in particular cases may prefer to conduct entirely new hearings.

5. *Agencies should notify the Department of Justice of challenges to the statutory removal restrictions for ALJs.* The Constitution not only specifies the manner in which officers of the United States must be appointed, but also limits the extent to which officers may permissibly be shielded from removal by the Department Head. *See generally Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Many litigants have already argued that ALJs are impermissibly shielded from removal because, by statute, ALJs can only be removed "for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). We expect more such challenges in the wake of *Lucia*. The Executive Order recently issued by the President does *not* alter ALJs' statutory removal protections, and will not insulate agencies from such challenges.

The Department of Justice is prepared to defend the constitutionality of Section 7521, as properly construed. As the government argued in the Supreme Court in *Lucia*, Section 7521's "good cause" standard for removal is properly read to allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions. Resp. Br. 50. An ALJ cannot, however, be removed for any invidious reason or to influence the outcome in a particular adjudication. As so construed, and provided MSPB review is suitably deferential to the determination of the Department Head, the Department of Justice will argue that Section 7521 gives the President a constitutionally adequate degree of control over ALJs. This is true of ALJs who work at independent agencies, as well as ALJs at traditional Executive Branch agencies.

If a plaintiff in one of your cases raises a removal-based challenge to an ALJ, please notify us immediately so that the Department of Justice may coordinate the government's arguments concerning the interpretation and validity of Section 7521.

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We recognize that there will be case-by-case and agency-specific questions that arise in connection with the implementation of this guidance and the challenges raised by individual litigants. We anticipate working closely with your agencies to resolve those questions and provide additional guidance as needed. In the interim, please do not hesitate to contact us with questions about the implementation of the Supreme Court's *Lucia* decision and the Executive Order.

For litigation-related questions about ratification, removal, or other matters currently pending in the courts of appeals: Contact the DOJ litigation team at ALJLitigation.Appellate@usdoj.gov.

For questions about the Executive Order or how to make a proper appointment of your ALJs: Consult OPM guidance regarding the Executive Order, available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service. The OPM guidance also includes several points of contact if you have additional questions.