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Stakes Go Up In SEC Administrative Proceedings

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The U.S. Court of Appeals for the D.C. Circuit [on August 9, 2016] upheld the constitutionality of SEC administrative proceedings in *Raymond J. Lucia Cos. v. Securities and Exchange Commission* .This is a significant victory for the SEC. In recent years, the SEC has brought increasing numbers of enforcement actions as administrative proceedings, rather than in federal court. A number of litigants have fought back and attempted to challenge the SEC's choice of forum, in part because the administrative process affords much more limited opportunities to conduct discovery and lacks other protections that exist in federal court.

The pivotal issue presented is whether administrative law judges are "officers of the United States" within the meaning of the Appointments Clause of Article II of the Constitution, or whether they are "lesser functionaries." Officers of the United States must be appointed by one of the methods specified in the Appointments Clause, which is not the procedure followed for the SEC's ALJs. The *Lucia* court was the first court of appeals to consider this issue on the merits, and it concluded that the ALJs are not officers of the United States, thereby rejecting the argument that they are improperly appointed. While other parties may continue to litigate this issue in other circuits, the *Lucia* decision will likely be influential and will be viewed by the SEC as a vindication of its increased use of the administrative forum.

A decision issued on August 5 by the SEC sitting as an appellate tribunal illustrates some of the perils of the administrative process. *In the Matter of John J. Aesoph, CPA and Darren M. Bennett, CPA*. The Commission upheld an ALJ's determination that a partner and a senior manager from a Big 4 audit firm engaged in improper professional conduct in their audit of a regional bank in 2008 and 2009. The ALJ had imposed time-limited suspensions from practicing before the Commission, for periods of one year for the partner and six months for the senior manager. The two respondents appealed the decision on the merits to the Commission. In a cross-appeal, the Division of Enforcement argued that the partner should be suspended for three years and the senior manager for two years.

The Commission found that both respondents had engaged in improper professional conduct. In addition, by a 2-1 vote (with two continuing vacancies on the Commission), the Commission determined to impose stiffer sanctions on appeal than its own Division of Enforcement was seeking. The Commission denied both accountants the privilege of appearing or practicing before it, with a right to re-apply for reinstatement (after three years and two years, respectively). Enforcement had not sought a re-application requirement to follow the period of suspension. As

Commissioner Piwowar explained in dissent, this requirement can add years to the process of reinstatement, thus making the impact on the respondents much more severe.

With the decision in *Lucia*, the trend of more cases in the administrative forum is likely to continue. Proceeding administratively also gives the Commission the ability to advance its programmatic goals more directly than it may be able to do in federal court.