UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of **Britax Child Safety, Inc.**	CPSC Docket No. 18-1 August 24, 2018

Order on Motion for Disqualification

Respondent Britax Child Safety moved for my disqualification as the presiding officer in this matter on August 3, 2018, and Complaint Counsel responded on August 17. Britax argues that my appointment as presiding officer in this matter did not meet constitutional requirements. I disagree. Britax's motion to disqualify is DENIED.

As a preliminary matter, Complaint Counsel asserted that the motion was procedurally defective. Under the Consumer Product Safety Commission's rules of practice, a motion for disqualification should be "supported by affidavit(s) setting forth the alleged grounds for disqualification." 16 C.F.R. § 1025.42(e)(2). Britax's motion was originally unaccompanied by an affidavit, and Complaint Counsel argued that the motion should be denied on this basis alone. On August 20, 2018, Britax filed an affidavit, making this argument moot. In addition, as Britax notes, its grounds for disqualification are "predominately legal" arguments about what constitutes a valid appointment under the Constitution. Mot. at 8 n.6. The facts of my appointment are documented in the record of this proceeding or are susceptible to official notice. I therefore turn to the motion's substantive question.

In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that administrative law judges of the Securities and Exchange Commission are inferior officers of the United States whose appointments must conform to the Appointments Clause of the Constitution. This holding seemingly applies with equal force to an administrative law judge acting as a presiding officer for the Consumer Product Safety Commission. *But see* 16 C.F.R. § 1025.38 (the Commission, but not an administrative law judge, has authority to issue subpoenas). And for my appointment to be valid, I must be appointed by, as relevant here, the "Head[] of Department[]." U.S. Const. art. II, § 2, cl. 2. For a multimember agency like the Consumer Product Safety Commission the head of department is the Commission acting as a body. *See Lucia*, 138 S. Ct. at 2050; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512-13 (2010).

On April 23, 2018, the Commission "approved" my April 19, 2018, appointment by the Acting Chairman as presiding officer. Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer, Doc. No. 16. I find the Commission's vote to be sufficient to satisfy the constitutional requirements.

Britax argues that the Commission impermissibly delegated its appointment authority. Britax notes that the Commission requested an administrative law judge to be loaned from the SEC and that the SEC chief administrative law judge selected me for this task. Britax argues that the Commission "merely signed off on" the SEC chief administrative law judge's selection. Mot. at 12. Britax, however, has not demonstrated a constitutional infirmity with this process.

The purpose of the Appointments Clause is to "preserve political accountability." *Edmond v. United States*, 520 U.S. 651, 663 (1997); *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) ("[T]he Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones."). It does this by requiring the President and Senate to agree on the appointment of principal officers and, in the case of inferior officers, limiting the appointment and supervisory authority to certain principal officers.

This accountability purpose is satisfied by the Commission's vote unambiguously and publicly approving my appointment. The Commission made the appointment. The ultimate authority and responsibility for the decision was the Commission's: the buck stopped there. That someone else made the initial selection does not change this. The Commission had the full authority to reject that selection or select someone else. There was no improper delegation of appointment authority by the Commission.

In support of the argument that there was an impermissible delegation of appointment authority, Britax relies on a document that appears to be a confidential legal guidance memorandum provided to agency general counsels by the Solicitor General's office. *See* Mot. at 7 n.5 (citing Reuters.com). According to Britax, the memorandum "admonishes agencies not to delegate their authority … and cautions that, at most, agencies may merely 'rely on agency human resources officials or other staff to vet applications, conduct interviews, and the like . . . .'" However, even if this unsigned and undated memorandum represents the Department of Justice's final legal guidance to agencies, it simply outlines legal strategy and is not a statement of policy or otherwise binding. And Britax quotes selectively from it. In quoting the sentence of the memorandum providing a limited role for human resources officials, Britax left out the end of the sentence stating that "the final

appointment must be made or approved by the Department Head personally; this authority cannot be delegated." That is exactly what happened here.

A contrary rule—one requiring the appointing authority to become deeply involved in the selection as well as appointment—is simply impractical. The President appoints thousands of principal and inferior officers. Every commissioned officer in the United States armed forces, for example, is an officer. *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring). Those in lower grades are appointed by the President alone and in higher grades by the President with Senate confirmation. 10 U.S.C. § 531(a). Any system in which the President does not make these appointments based on approving selections made by someone else would be unworkable. There is no constitutional infirmity with this system, and there is likewise no constitutional infirmity with the process by which the Commission appointed me. *Cf. Weiss*, 510 U.S. at 176 (holding that commissioned military officers are validly appointed officers of the United States and therefore do not need a second appointment to serve as military judges).

Britax also questions my status as an administrative law judge appointed and employed by the Securities and Exchange Commission. This is likely irrelevant, because this is a Commission proceeding, not an SEC proceeding, and the Commission properly appointed me. In any event, I have also been properly appointed by the SEC. On November 30, 2017, the SEC issued an order ratifying the appointments of its administrative law judges in order to "put to rest any claim that administrative proceedings pending before, or presided over by, [SEC] administrative law judges violate the Appointments Clause." *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724, at *1. In an order issued August 22, 2018, the SEC noted that it had ratified the appointments of its administrative law judges and "reiterate[d] our approval of their appointments as our own under the Constitution." Securities Act Release No. 10536, 2018 SEC LEXIS 2058, at *1 (Aug. 22, 2018). The lower federal courts have held that ratification can cure an original appointments clause defect. *See, e.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016); *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 796 F.3d 111, 118 (D.C. Cir. 2015). The Supreme Court declined to rule on the SEC's ratification in *Lucia* because the matter was not properly before the Court. *Lucia*, 138 S. Ct. at 2055 n.6. I conclude that the SEC's ratification order cured the prior unconstitutional appointment and that I am a properly appointed administrative law judge.

I issued one order—scheduling the first prehearing conference—before the Commission appointed me. As this was not a substantive order and

because neither party challenged the order at the time or in response to my invitation in the Order Regarding Appointment, I ratify the scheduling order.

Finally, Britax renews its motion for a stay while the motion for disqualification is pending. I decline to stay the proceeding. The matter of my disqualification is automatically reviewed by the Commission. 16 C.F.R. § 1025.42(e)(2) ("If the Presiding Officer does not disqualify himself/herself, the Commission shall determine the validity of the grounds alleged, either directly or on the report of another Presiding Officer appointed to conduct a hearing for that purpose . . . ."). Since this issue is in the Commission's hands and the Commission has the authority to stay the proceeding, I defer to the Commission to decide whether a stay is necessary.

I request that the Secretary serve Britax's motion for disqualification and this order on the Commission.

Cameron Elliot
Administrative Law Judge