

August 24, 2018

SEC Ratifies Appointment of ALJs and Lifts Stay on Pending Administrative Proceedings

The Securities and Exchange Commission (“SEC” or “Commission”) has issued an order clearing the way for cases to proceed before its own administrative law judges (“ALJs”), notwithstanding a Supreme Court decision issued earlier this year that declared the SEC’s prior appointment of ALJs to be unconstitutional. Respondents in nearly 200 SEC proceedings with pending cases will now be granted the opportunity to have their case reheard by a different ALJ. Through the ratification order, the Commission has also attempted to comply with the Appointments Clause of the Constitution. Whether this *post hoc* ratification passes constitutional muster, however, remains to be tested in the courts.

On August 22, 2018, the SEC issued an order (the “Order”) lifting its stay on all pending administrative proceedings and reaffirming its November 30, 2017 order ratifying the constitutional appointment of certain ALJs (the “Ratification Order”). The SEC imposed the stay in June 2018 following the Supreme Court’s decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), in which the Court held that the SEC’s ALJs are “officers” pursuant to the Constitution’s Appointments Clause and thus must be appointed by the President, “Courts of Law,” or “Heads of Department.” In issuing the Order, the SEC purports to address several questions left unanswered by *Lucia* regarding the impact of the decision on current administrative proceedings.

First, the Court in *Lucia* declined to address the validity of the SEC’s Ratification Order, and one of the open questions post-*Lucia* included the extent to which the SEC would pursue the Ratification Order as an avenue for rendering its appointment of ALJs constitutional. The August 22, 2018 Order “reiterates” the Commission’s “approval of [the ALJs’] appointments as [its] own under the Constitution.” In other words, the Order attempts to confirm that the SEC has appointed those ALJs as per the Appointments Clause of the Constitution, and that the ALJs may adjudicate cases.

Second, the Order addresses the *Lucia* majority’s only definitive command regarding a remedial scheme—that Lucia be afforded the opportunity for a new hearing in front of a *different* ALJ than the one who had previously decided his case. In fact, the Order grants all respondents in the newly un-stayed proceedings the “opportunity for a new hearing before an ALJ who did not previously participate in the matter,” and remands all cases pending before the Commission to the Office of the ALJs “for this purpose.” Moreover, the Order vacates “any prior opinion” the Commission has issued in nearly 130 matters pending before the Commission, listed in Exhibit A to the Order. Chief ALJ Brenda P. Murray confirmed via notice on August 23, 2018 (the “Notice”) that another nearly 70 cases pending before ALJs prior to the Order would be reheard pursuant to the Order. As a result of this Order, respondents (and possibly the SEC) who received a negative initial decision from an ALJ prior to the SEC’s Ratification Order but have not yet exhausted their appeal, will now get a fresh “bite at the apple” and a completely new hearing before a different ALJ.

Finally, the Order outlines a set of procedures and deadlines for all cases that will be assigned to a new ALJ pursuant to the Order, thereby vacating any pending deadlines in those cases. The new ALJs are instructed not to “give weight or otherwise presume the correctness” of any prior ruling from the previous ALJ. The new ALJs must also issue an order within 21 days of assignment directing the parties to “submit proposals” for further proceedings, at which point the new ALJ will conduct a new hearing. Parties who do *not* submit proposals for further proceedings may be subject to a default ruling or sanctions. Parties can opt out of being assigned to a new ALJ or propose an alternate procedure by submitting an express written agreement to the Chief ALJ by September 7, 2018. Indeed, Chief ALJ Murray

stated in her Notice that parties can “agree[] that the proceeding remain with the previously designated administrative law judge.”

In ordering that all respondents in proceedings before ALJs and the Commission be given the opportunity to have a new hearing before a different ALJ, the SEC has undertaken a hefty administrative burden in rehearing pending cases for a second time. However, the constitutionality of these developments remains to be seen.