

## Resources

### Deadline Looms for Pending Cases in Front of Administrative Law Judges, per SEC Orders

September 5, 2018

On June 21, 2018, the Supreme Court issued its opinion in the matter of *Lucia v. SEC*, 585 U.S. \_\_\_\_ (2018), which held that administrative law judges of the U.S. Securities and Exchange Commission (SEC) are considered Inferior Officers of the United States, therefore subject to the Appointments Clause (Article II, Sec. 2) of the U.S. Constitution. The Supreme Court ruled in favor of Mr. Lucia, 7-2, agreeing with his position that Administrative Law Judges (ALJs) are officers of the United States because they are effectively being given judicial power. Accordingly, administrative law judges must be appointed by the President or other delegated officer pursuant to the requirements of Inferior Officers, rather than hired as federal employees, which had been standard practice for ALJs. *Lucia* called into question cases pending before all of the SEC's ALJs, all five of whom were hired as federal employees and none of whom served in their positions pursuant to Inferior Officer appointment requirements. Because of that, and in advance of the *Lucia* opinion being issued, on November 30, 2017, the SEC ratified the appointments of all five of its ALJs and stayed ALJ-pending cases until the Supreme Court ruled on *Lucia*.

Here is what you need to know: on August 22, 2018, the Secretary of the SEC issued an order to tackle three issues. Chief ALJ Brenda Murray issued a follow-up order on August 23, 2018, imposing a September 7, 2018, deadline for affected cases. Taken together, these orders convey the following information:

1. **Ratification Reiterated** – the Order reiterated the Commission's ratification of the appointments of its five ALJs, now, post-*Lucia*, which ruled that such an action was required.
2. **Stays Lifted** – effective the same day, August 22, 2018, the Order lifted the stay of all pending administrative proceedings.
3. **Mulligans Offered** – the Order set out an option for respondents in any pending proceedings to take a mulligan. Essentially, respondents in any matter pending before an ALJ, including those at the Commission level pending a vote, were given the opportunity for a new hearing "before an ALJ who did not previously participate in the matter," such that the Secretary would remand any proceedings currently pending before the SEC to the Office of Administrative Law Judges, vacate prior opinions in such proceedings, vacate any scheduling order and due dates, and reassign the matter to a new ALJ for a completely new evaluation.
4. **Creative Flexibility** – the Order allowed for increased flexibility for the parties to stipulate to acceptable procedures to resolve pending matters. Importantly, the order stated that the assigned ALJ "shall exercise the full powers conferred by the Commission's Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter." The ALJ is required to issue an order directing the parties to submit proposals for the conduct of further proceedings within 21 days of being assigned to the proceeding. After considering the parties' submissions, the ALJ "shall hold a new hearing and prepare an initial decision." If a party fails to submit such a proposal, the ALJ may enter a default against that party.
5. **September 7, 2018, Deadline** – On August 23, 2018, Chief ALJ Brenda Murray issued an order stating that parties who agree to alternative procedures, "including agreeing that the proceeding remain with the previously designated administrative law judge," shall notify her in writing by September 7, 2018, of such a request. If the parties do not submit

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a written notification, Chief ALJ Murray will assign a new ALJ by September 21, 2018, as required by the Commission's order issued August 22, 2018. Attached to Chief ALJ Murray's order was a list of 194 impacted administrative proceedings: 68 cases pending before ALJs before the Commission's general stay and an additional 126 cases remanded from the Commission's review docket on August 22, 2018.

If you have any questions regarding the consequences of the *Lucia* case, recent orders issued by the SEC, or a pending investigation or examination by the SEC, please contact Ferdose al-Taie, Jason Ross, or your Dykema relationship attorney.

## Attorneys

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