

[Securities Regulation Daily Wrap Up, ENFORCEMENT—Commission mulls Lucia, temporarily stays pending administrative proceedings, \(Jun. 25, 2018\)](#)

Securities Regulation Daily Wrap Up

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The Commission promptly issued an order temporarily staying pending administrative proceedings until July 23, 2018, or further order of the Commission, following the Supreme Court's opinion holding that SEC administrative law judges (ALJs) are inferior officers of the U.S. The opinion in [Lucia v. SEC](#) left open several questions that could eventually return to the Court. Meanwhile, the Commission appears to be mulling the immediate, practical consequences of the Supreme Court's opinion (*In re Pending Administrative Proceedings*, [Release No. 33-10510](#), June 21, 2018).

Scope of order. Specifically, the Commission's order applies to "any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the Commission." ALJs in pending proceedings within the order's scope must in each proceeding issue notices acknowledging the stay. The Commission's order, however, would not bar the Commission from assigning proceedings pending before an ALJ to itself or to any member of the Commission.

The Supreme Court said in *Lucia* that "[t]his Court has held that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." The Court suggested that "timely" in this context would mean disputing the ALJ's appointment before the Commission and later asserting that claim in the appellate court. The relief granted in *Lucia* was that Raymond Lucia gets a new hearing before a constitutionally appointed ALJ, although the Court said it would also have to be a different ALJ because a hearing before a new ALJ furthers the goal of encouraging Appointments Clause challenges (citing [Ryder](#)). The Court clarified in a footnote that a new ALJ would not be required for all Appointments Clause violations.

Open questions. *Lucia* also left open several questions that may return to the Court. For one, the Court declined to address the question of what effect should be given to the Commission's earlier order ratifying the appointment of its ALJs in pending cases. But the Court did observe in a footnote that, with respect to *Lucia*, the Commission can hear the matter itself, or it can assign a new ALJ who was constitutionally appointed independent of the SEC's ratification order.

Second, the Court declined to address the question of whether the SEC's ALJs enjoy too many layers of tenure protection. In its 2010 opinion in *Free Enterprise*, the Supreme Court determined that two layers of tenure protection for members of the Public Company Accounting Oversight Board was unconstitutional; the solution was to strike the offending provisions in the Sarbanes-Oxley Act while otherwise upholding the validity of the PCAOB. Despite the government's effort to get the removal issue before the Court in *Lucia*, the justices never expanded their grant of certiorari to include it and the Court's opinion in *Lucia* declined to address the issue. Cases in the pipeline, however, could bring the removal issue back to the Supreme Court.

The release is [No. 33-10510](#).

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