

## **Alert** | Securities Litigation

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### **SEC Order Seeks to Clarify Steps Forward Following *Lucia***

In a previous GT Alert, we summarized and analyzed the Supreme Court’s June 21, 2018, decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018). That GT Alert cited the SEC’s 30-day stay of “all administrative proceedings” “before an administrative law judge” and foretold continued uncertainty concerning the status of administrative law judges and their decisions. A subsequent 30-day stay was issued on July 20, 2018, and expired on Aug. 22, 2018. On that date, the SEC issued an order entitled *In re: Pending Administrative Proceedings* (the Order), summarizing the SEC’s position on, and reaction to, the *Lucia* decision.

The Order is clear in at least one respect. In response to the Supreme Court’s holding that complaining litigants are entitled to “a new ‘hearing before a properly appointed’ official,” the Order provides for “the opportunity for a new hearing before an ALJ who did not previously participate” in a pending proceeding. The SEC will provide such an opportunity through a “remand [of] all proceedings” and will “vacate any prior opinion” issued in these matters. In an exhibit to the Order, the SEC listed 126 proceedings that may be subject to remand.<sup>1</sup> The next day, the SEC’s Chief ALJ issued a subsequent notice identifying an additional 68 currently-pending cases for remand.

The Order also leaves some discretion to the litigants themselves. It solicits “express agreement[s] by the parties regarding alternative procedures” for assigning cases to the Chief ALJ for her consideration. The

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<sup>1</sup> Naturally, the enumerated cases include those involving Messrs. Lucia and Bandimere, both of whom challenged adverse rulings in the federal courts of appeals.

Chief ALJ's subsequent notice explained that the parties could also, upon mutual agreement, decide to "remain with the previously designated administrative law judge." The parties' decisions on these matters must be provided to the Chief ALJ no later than Sept. 7, 2018. She, in turn, will reassign cases no later than Sept. 21, 2018. Then, within 21 days of assignment, the parties may again "submit proposals for the conduct of further proceedings."

Finally, the Order seems to affirm the SEC's belief in the constitutional validity of its Nov. 30, 2017, ratification of its five administrative law judges (notwithstanding that their initial appointments were carried out by SEC staff). It states that "in an abundance of caution and for avoidance of doubt, we today reiterate our approval of their appointments as our own under the constitution."

While the Order's grant of new hearings to complaining litigants seems straightforward enough, its two other features – giving litigants a say in their fates moving forward and affirming the constitutional validity of the Nov. 30, 2017, ratification – raise several questions. What will be the nature of these alternative procedures? Will those litigants accept ratification of the current crop of ALJs whose initial appointments gave rise to the challenge ultimately heard by the *Lucia* Court? If the litigants demand adjudicators other than those five ALJs, how might the SEC react? In short, it seems possible that these lingering questions may lead to further uncertainty and, perhaps, to further litigation.

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