

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 52 No. 3 February 6, 2019

IMPLICATIONS AND OPPORTUNITIES OF *LUCIA V. SEC*

In the Lucia case, the Supreme Court held that SEC ALJs were not validly appointed, compelling the Commission to reappoint them and to have their cases reheard before reassigned ALJs. In this article, the author discusses the case, the pressure it puts on the Commission, and the opportunities it creates for defense counsel.

By Brian Neil Hoffman *

In June 2018, the Supreme Court issued an opinion that could complicate enforcement efforts by the SEC and other federal agencies. The *Lucia v. SEC*¹ decision held that the SEC's in-house judicial offices, administrative law judges (ALJs), were not appointed to their posts in accordance with a clause of the U.S. Constitution. As a result, Mr. Lucia obtained a new administrative proceeding hearing before a properly-appointed ALJ.

Yet this seemingly straightforward decision could have far-reaching implications for federal agencies, including the SEC, that rely on ALJs. The opinion left questions unanswered, which in turn provide future potential SEC enforcement respondents with potential defensive opportunities. After an overview of the *Lucia* appeal and decision, this article briefly explores these implications and opportunities.

THE SEC'S ADMINISTRATIVE PROCEEDINGS (APs)

The SEC historically used APs for enforcement actions involving entities and individuals directly subject

to the SEC's oversight – investment advisers, broker-dealers, accounting firms, and their personnel. The SEC traditionally filed actions against other entities and individuals – such as public companies and their personnel – in the U.S. District Courts.

The choice of forum is meaningful for respondents/defendants. The SEC's AP procedures are decidedly unfavorable to respondents. Among other things, respondents are afforded little discovery in APs (until a recent change, virtually no discovery), little dispositive motion opportunities (until a recent change, virtually none), and are denied the various other protections of the Federal Rules of Evidence and Federal Rules of Civil Procedure.² In contrast, the SEC typically has had years to accumulate an investigative record, which is often quite voluminous, while providing respondents with little visibility into that information. Since APs proceed to hearing (trial) rather quickly,

¹ *Lucia v. Securities and Exchange Commission*, No. 17-130 (June 21, 2018).

² The SEC recently changed some of its rules of procedure to provide more discovery and dispositive motion opportunities than historically provided, although even the amended procedures provide less than those available under the Federal Rules of Civil Procedure.

* *BRIAN NEIL HOFFMAN*, formerly an SEC Enforcement attorney, is now with *Holland & Hart LLP*. His practice focuses on securities enforcement and litigation matters. At the *ALI-CLE Accountants' Liability Conference* in October 2018, Brian participated on a panel discussing the topics covered in this article. His e-mail address is bnhoffman@hollandhart.com.