

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5205 / October 26, 2017

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order Denying
Motion to Certify for
Interlocutory Review**

Respondent David Pruitt, CPA, asks that I certify for interlocutory review an order denying his motion to stay this proceeding. The Division of Enforcement opposes Pruitt's request. Because Pruitt has not met the standard for certification, his request is denied.

The Securities and Exchange Commission is not a fan of petitions for interlocutory review.¹ It will only grant a petition for interlocutory review "in extraordinary circumstances."² Ordinarily, it will not consider such a petition unless the presiding administrative law judge certifies the petition for review.³

Rule of Practice 400(c), which governs certification, prohibits an administrative law judge from certifying a petition unless, as is relevant

¹ See 17 C.F.R. § 201.400(a) ("Petitions by parties for interlocutory review are disfavored . . ."); *Charles L. Hill, Jr.*, Securities Exchange Act of 1934 Release No. 79459, 2016 WL 7032731, at *1 (Dec. 2, 2016).

² 17 C.F.R. § 201.400(a).

³ See *Harding Advisory LLC*, Investment Advisers Act of 1940 Release No. 3796, 2014 WL 988532, at *3 & n.12 (Mar. 14, 2014); see also 17 C.F.R. § 201.400(c) ("A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer and shall specify the material relevant to the ruling involved.").

here, two conditions are met.⁴ First, the ruling at issue must “involve[] a controlling question of law as to which there is substantial ground for difference of opinion.”⁵ Second, the administrative law judge must determine that “immediate review of the order may materially advance the completion of the proceeding.”⁶

In an order issued on October 5, 2017, I denied Pruitt’s motion to stay this proceeding pending possible Supreme Court “review of a petition arguing that the way the Securities and Exchange Commission appoints its administrative law judges violates the Appointments Clause of the Constitution.”⁷ Pruitt seeks interlocutory review of the order denying his stay motion. He argues that two circuits are divided on the status of the Commission’s administrative law judges and asserts that the Supreme Court is likely to rule this term that the Commission’s administrative law judges are inferior officers who have been appointed in a manner not consistent with the Appointments Clause.⁸

As to the first certification condition in Rule 400(c)(2), there *is* a substantial difference of opinion about whether administrative law judges are inferior officers.⁹ But my order did not directly address the status of the Commission’s administrative law judges. Instead, I decided whether a stay was warranted pending resolution of their status. And Pruitt does not claim there is a substantial difference of opinion about whether administrative proceedings should be stayed pending Supreme Court review of the issues presented in *Bandimere* and *Lucia*.

Even assuming a substantial difference of opinion, however, the second condition is not met; “immediate review” of the order denying Pruitt’s stay

⁴ 17 C.F.R. § 201.400(c)(2).

⁵ 17 C.F.R. § 201.400(c)(2)(i).

⁶ 17 C.F.R. § 201.400(c)(2)(ii).

⁷ *David Pruitt, CPA*, Admin. Proc. Rulings Release No. 5137, 2017 SEC LEXIS 3185, at *1; see *Raymond J. Lucia Cos., Inc. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (per curiam), *petition for cert. filed*, No. 17-130 (U.S. July 26, 2017); see also *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *reh’g denied*, 855 F.3d 1128 (2017), *petition for cert. filed*, No. 17-475 (U.S. Sept. 29, 2017).

⁸ Mot. 1–2.

⁹ See *David Pruitt, CPA*, 2017 SEC LEXIS 3185, at *1 nn. 1–2.

motion is not likely to “materially advance the completion of [this] proceeding.”

Only in exceedingly rare circumstances could review of an order denying a stay materially advance the completion of any proceeding. That is particularly true here, where the Commission has made clear that it will not generally stay administrative proceedings pending Supreme Court review of *Bandimere* and *Lucia*.¹⁰ A Commission order affirming denial of a stay would not materially advance this proceeding.

Pruitt also posits that if the Commission stays this proceeding and the Supreme Court rules that the Commission’s administrative law judges are inferior officers, the parties will “avoid litigating the same issues twice.”¹¹ Precedent suggests, however, that litigating this proceeding twice is not a likely outcome, no matter how the Supreme Court rules.¹² Pruitt’s supposition is thus not a basis to stay or certify.

James E. Grimes
Administrative Law Judge

¹⁰ See *Lynn Tilton*, Advisers Act Release No. 4735, 2017 WL 3214456, at *1–2 (July 28, 2017).

¹¹ Mot. at 2.

¹² See *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371–72 (D.C. Cir. 2017); *CFPB v. Gordon*, 819 F.3d 1179, 1190–91 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017); *State Nat’l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 182–86 (D.D.C. 2016).