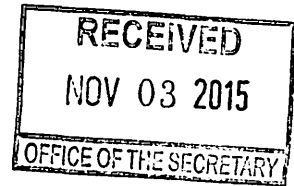


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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15168

In the Matter of

JOHN J. AESOPH, CPA, and
DARREN M. BENNETT, CPA

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**RESPONSE OF THE DIVISION OF ENFORCEMENT TO RESPONDENTS'
JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL**

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November 2, 2015

The Division of Enforcement respectfully submits this response to the Joint Supplemental Brief of Respondents John J. Aesoph, CPA and Darren M. Bennett, CPA. Respondents contend that this proceeding violates the Appointments Clause of Article II because the Administrative Law Judge (ALJ) who presided over the hearing below was not properly appointed. But, as the Commission recently held, the Commission's ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *Raymond J. Lucia Cos., Inc.*, 2015 WL 5172953 (Sept. 3, 2015); *Timbervest LLC*, 2015 WL 5472520 (Sept. 17, 2015), *Bandimere*, Exchange Act Rel. No. 76308, at 28-33 (Oct. 29, 2015).

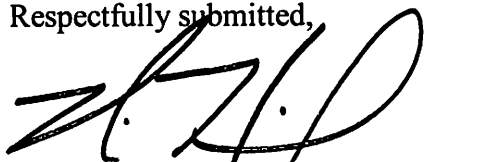
Respondents' brief does not call these decisions into question. The principal flaw in their criticism of these decisions stems from a misunderstanding of the Commission's review procedures. Respondents argue (Br. 12) that the Commission wrongly concluded that Commission ALJs do not issue the final decisions in its administrative proceedings. *See, e.g., Lucia*, 2015 WL 5172953, at *22; *Timbervest*, 2015 WL 5472520, at *24. Specifically, Respondents contend that there is a category of cases that automatically become the Commission's final decision. "[W]here the parties choose not to file a petition for review, and the Commission does not review on its own initiative," they assert, "the ALJ's Initial Decision is 'deemed the action of the Commission.'" Br. 12 (quoting 15 U.S.C. 78d-1). But, as the Commission noted in rejecting this very argument, "[u]nder our rules, no initial decision becomes final simply 'on the lapse of time' by operation of law; instead, it is 'the Commission's issuance of a finality order' that makes any such decision effective and final." *Lucia*, 2015 WL 5472953, at *22 (quoting Exchange Act Release No. 49412, 2004 WL 503739, at *12 (Mar. 12, 2004)); *accord Timbervest*, 2015 WL 5472520, at *24 ("Even where an aggrieved person fails to file a timely petition for review of an initial decision and we do not order review on our own

initiative, our rules provide that ‘*the Commission* will issue an order that the decision has become final,’ and it becomes final only ‘upon issuance of the order’ by the Commission.”) (quoting 17 C.F.R. § 201.360(d)(2)). Moreover, Respondents ignore the fact that when the Commission exercises its authority to *sua sponte* “bring a matter before the Commission for review” (17 C.F.R. § 201.411(c))—as it has done on numerous occasions, *see Lucia*, 2015 WL 5472953, at n.107 (collecting cases)—there has necessarily been an examination of the initial decision to assess *whether* to invoke that authority. It is only after determining that further review proceedings are unnecessary that the Commission issues a finality order. *Id.* at *22.

Respondents’ argument thus fails for the same reason as the claims made in *Lucia*, *Timbervest*, and *Bandimere*—Commission ALJs are employees, not inferior officers. Because there is no constitutional violation, the Commission need not consider Respondents’ argument (Br. 14) that the Commission’s *de novo* review would not cure any such a violation.

Dated: November 2, 2015

Respectfully submitted,



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Certificate of Service

On November 2, 2015, the foregoing RESPONSE OF THE DIVISION OF ENFORCEMENT TO RESPONDENTS' JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL was sent to the following parties and other persons entitled to notice as follows:

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