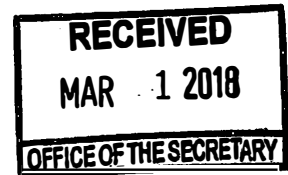


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDING  
File No.: 3-17184

In the Matter of  
  
CHRISTOPHER M. GIBSON,  
  
Respondent.



**RESPONDENT'S OPPOSITION TO DIVISION OF ENFORCEMENT'S LETTER  
DATED FEBRUARY 14, 2018**

On November 30, 2017, the Commission entered an order regarding pending administrative proceedings (the "Ratification Order").<sup>1</sup> In the Ratification Order, the Commission stated: "To put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause, the Commission-in its capacity as head of a department-hereby ratifies the agency's prior appointment" of its administrative law judges. The Ratification Order also remanded matters pending before the Commission to the ALJ who had issued an initial decision.<sup>2</sup> The Commission's Ratification Order further directed ALJs to (i) reconsider the record; (ii) issue an order granting parties an opportunity to submit new evidence; (iii) determine whether to ratify or revise all of his or her prior actions; and (iv) issue an order stating that he or she has completed the reconsideration and setting forth his or her determination regarding ratification.

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<sup>1</sup> *In re: Pending Administrative Proceedings*, Securities Act Release No. 10440 (November 30, 2017).

<sup>2</sup> The Ratification Order attached as Exhibit A, a list of such matters which included this matter.

On December 12, 2017, an order was entered in this matter directing the parties to file any new evidence by a specified date. The order further provided that each party may submit a brief explaining the relevance of its new evidence and identify any challenged rulings, findings and conclusions.<sup>3</sup> In accordance with the order entered on December 12, 2017 (as modified by the Order on Motion to Extend Time), Respondent filed new evidence that Respondent considered relevant to the administrative law judge's reexamination of the record in this matter. (Respondent's Exhibits 177, 178, 179, 180, 181 and 182). Respondent also submitted his Brief Regarding New Evidence and Challenged Rulings, Filings and Conclusions. The Division of Enforcement declined to file any new evidence and declined to file a brief regarding any challenged rulings, findings and conclusions.

Rather, the Division of Enforcement sent a letter to the administrative law judge who presided at the hearing in this matter. The Division of Enforcement's letter notes that the Commission's Ratification Order ratified the "prior appointment" of the Commission's ALJs and directed the ALJs to determine whether to ratify or revise in any respect the prior actions taken by the ALJ. The Division of Enforcement's letter asserts that "subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation" and cites several cases that discuss ratification of prior actions in various contexts.

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<sup>3</sup> *Order Regarding the Securities and Exchange Commission's Order on Pending Administrative Proceedings*, Administrative Proceedings Rulings Release No. 5371, December 12, 2017. On January 2, 2018, Chief Administrative Law Judge Brenda P. Murray entered an *Order on Motion to Extend Time*, which extended the time for the parties in this matter to submit new evidence and identify challenged rulings, findings and conclusions. Administrative Proceedings Rulings, Release No. 5429 (January 2, 2018).

The Division of Enforcement's suggestion that the Commission's failure to comply with the Appointments Clause may be remedied by the Commission's ratification of the "agency's prior appointment" of its ALJs and its remand of this matter to the ALJ who improperly presided at the hearing in this matter with a direction that the ALJ review the administrative record and determine whether to ratify prior rulings is incorrect. The Division of Enforcement ignores Supreme Court precedent regarding remedies for violations of the Appointments Clause. In *Ryder v. United States*, 515 U.S. 177, 188 (1995), the Court made clear that when a person who has not been appointed in accordance with the Constitution acts as an officer in presiding over an adjudicatory proceeding the proceeding is a nullity as a matter of constitutional law. Similarly, in *Freytag v. Commissioner*, 501 U.S. 868, 879 (1991), the Court indicated that a defect in "the appointment" of the adjudicator "goes to the validity" of the underlying proceeding. *See also United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (defect in the appointment of an Officer is "an irregularity" such that the "order should be set aside as a nullity"). And the decisions referenced in its letter do not support the Division of Enforcement's position. None of the cases cited by the Division of Enforcement involves the ratification of rulings of an administrative law judge who was not appointed in accordance with the Appointments Clause by the same administrative law judge.

Further, the Division of Enforcement's suggestion that the Commission's Ratification Order constitutes an appointment of its ALJs in accordance with the Appointments Clause is incorrect. The Commission's Ratification Order did not remedy the Commission's prior failure to properly appoint its ALJs. The Commission could not ratify the agency's prior appointment of its administrative law judges as the agency never appointed its ALJs. Rather, the Commission's ALJs were hired in connection with a process in which the Commission did not

participate. As the Commission was required to appoint its ALJs and as the Commission did not do so any process by which OPM, the chief administrative law judge and the Commission's Office of Human Resources purported to retain an ALJ is a nullity. And the Commission cannot ratify an action that it is not authorized to do. In *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994), the Supreme Court stated that "it is essential that the party ratifying should be able . . . to do the act ratified," both "at the time the act was done" and "at the time the ratification was made." As the Commission was prohibited from delegating its appointment power to its chief administrative law judge and its Office of Human Resources who hired its ALJs, the Commission acted improperly when it purported to ratify the hiring of its ALJs. Accordingly, the Commission's ALJs continue to hold their positions in violation of the Appointments Clause and are prohibited from reviewing their prior rulings, findings and conclusions and ratifying or revising them. *See, Newman v. Schiff*, 778 F. 2d 460, 467 (8th Cir. 1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start.")

In light of the foregoing, the Division of Enforcement's February 14, 2018 letter should be disregarded.

Dated: March 1, 2018

Respectfully submitted,



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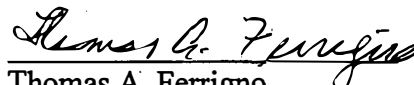
## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018:

- (i) an original and three copies of the foregoing Respondent's Opposition to Division of Enforcement's Letter Dated February 14, 2018 were filed by hand-delivery to the following address:

Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.,  
Washington, D.C. 20549

- (ii) a copy was sent via email to Gregory R. Bockin, at [bocking@sec.gov](mailto:bocking@sec.gov)
- (iii) a copy was delivered by hand to Gregory R. Bockin, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549; and
- (iv) a copy was sent via email to Brenda P. Murray, Chief Administrative Law Judge, at [ALJ@sec.gov](mailto:ALJ@sec.gov).

  
Thomas A. Ferrigno