

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 87226 / October 4, 2019

Admin. Proc. File No. 3-15755

In the Matter of

MARK FEATHERS

ORDER

On November 18, 2014, the Commission issued an opinion and order finding that respondent Mark Feathers had been permanently enjoined by a federal district court from future violations of the antifraud and registration provisions of the federal securities laws, and that it was in the public interest to bar Feathers from the securities industry.¹ While Feathers's appeal was pending in the United States Court of Appeals for the Ninth Circuit, the Supreme Court held in *Lucia v. SEC* that Commission administrative law judges are inferior officers for purposes of the Appointments Clause of Article II of the Constitution.² The Court held that "the 'appropriate remedy' for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official" other than the ALJ who heard the case initially.³ On May 14, 2019, the Ninth Circuit vacated the Commission's opinion and order and remanded to the Commission "with the direction that if it chooses to proceed, it must order a new hearing before a different and properly appointed law judge."⁴ The court's mandate issued on July 26, 2019.⁵

We now direct the conduct of further proceedings consistent with this order, the Ninth Circuit's mandate, and the Supreme Court's decision in *Lucia*. We order that Feathers be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter. We remand this proceeding to the Office of Administrative Law Judges for that purpose and vacate any prior opinions and orders we have issued in the matter.

¹ *Mark Feathers*, Exchange Act Release No. 73634, 2017 WL 66592 (Nov. 18, 2014).

² 138 S. Ct. 2044 (2018).

³ *Id.* at 2055 (citations omitted).

⁴ *SEC v. Feathers*, 774 F. App'x 354, 2019 WL 2121072, at *2 (9th Cir. 2019).

⁵ *SEC v. Feathers*, No. 15-70102 (9th Cir. July 26, 2019).

Absent express agreement by the parties regarding alternative procedures, the Chief Administrative Law Judge shall by rotation to the extent practicable designate an ALJ who did not previously participate in this matter to be the presiding hearing officer.⁶ Any agreement by the parties regarding alternative procedures shall be submitted to the Chief Administrative Law Judge by November 1, 2019. Otherwise, the Chief Administrative Law Judge shall designate a presiding ALJ no later than November 15, 2019.

The assigned ALJ shall exercise the full powers conferred by the Commission's Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.⁷ Within 21 days of being assigned to the proceeding, the ALJ shall issue an order directing the parties to submit proposals for the conduct of further proceedings. After considering the parties' submissions, the ALJ shall hold a new hearing and prepare an initial decision; but if a party fails to submit a proposal, the ALJ may enter a default against that party pursuant to Rule of Practice 155 or impose another appropriate sanction under Rule of Practice 180.⁸

The Rules of Practice as amended on July 13, 2016 shall govern this proceeding,⁹ unless the presiding ALJ determines, after giving the parties notice and an opportunity to be heard, that application of a particular amended rule would not be just and practicable or otherwise would work a manifest injustice under the circumstances of the case, in which case the former rule applies.

⁶ 17 C.F.R. § 200.30-10(a)(2).

⁷ *E.g.*, Rule of Practice 111, 17 C.F.R. § 201.111; 5 U.S.C. § 556.

⁸ 17 C.F.R. §§ 201.155, .180.

⁹ This proceeding was instituted before the effective date of the amended Rules of Practice, and we directed the ALJ to issue an initial decision within 210 days of service of the order instituting proceedings. *Mark Feathers*, Exchange Act Release No. 71565, 2014 WL 606596, at *2 (Feb. 18, 2013) (order instituting proceedings). For purposes of applying the amended Rules of Practice, this proceeding shall be deemed to be one under the 75-day timeframe as specified in Rule of Practice 360(a)(2). The ALJ shall compute the deadlines for scheduling a hearing and issuing an initial decision as specified in amended Rule of Practice 360(a)(2) from the date the proceeding is assigned to a hearing officer pursuant to this order, rather than the date of service of the OIP. The deadlines stated in this order, like those in Rule of Practice 360, confer no procedural or substantive rights on any party, and the presiding ALJ may, for good cause shown, modify any of them, including the date by which the initial decision must be issued. This grant of authority allowing the presiding ALJ to modify the deadlines stated in this order supersedes the provisions in Rule of Practice 360(a)(3)(i) and (ii) governing the circumstances under which the deadlines to issue initial decisions may be extended.

This order does not preclude the Commission from subsequently assigning the proceeding to the Commission itself or to any member of the Commission at any time.

By the Commission.

Vanessa A. Countryman
Secretary