UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-16182

In the Matter of	:
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PAUL EDWARD "ED" LLOYD, JR., CPA	:
	:
Respondent.	:
	:
	:

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT PAUL EDWARD "ED" LLOYD, JR.'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW

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Respondent Paul Edward "Ed" Lloyd, Jr.'s ("Respondent" or "Lloyd") brief in support of his renewed petition for review offers little new. In addition to arguing that the Commission's ratification of ALJ Cameron Elliot's appointment is of no effect in this matter, he rehashes his prior arguments that Judge Elliot was (1) not properly appointed as an "officer" for purposes of this proceeding and (2) improperly biased against him. He also argues that a cease and desist order is not appropriate because he is no longer in the securities industry. The Division of Enforcement ("the Division") fully addressed the bias argument in its December 10, 2015 Principal and Response Brief, and does not think it is necessary to repeat those arguments here. The Division responds to Lloyd's ratification and appointment and cease and desist arguments as follows.

A. The Commission's Ratification of Judge Elliot's Appointment Cured Any Deficiencies in the Underlying Proceeding

In its November 30, 2017 Order, the Commission "ratifie[d] the agency's prior appointment" of its ALJs. Ratification allows for the "adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 347 (2d ed. 1914); *Black's Law Dictionary* (10th ed. 2014) (ratification renders an act "valid from the moment it was done"). The "ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 545 (1890). A ratification "may be inferred" from the parties' conduct, 1 *A Treatise on the Law of Agency*, § 430, and may be "written or unwritten, express or implied," *A Treatise on the Law of Public Offices and Officers*, §§ 545, 547.

Two factors are critical in determining whether a principal has validly ratified an agent's previously unauthorized act. First, the principal must have had the authority to perform the act, both when the agent undertook it and at the time of ratification. *See* 1 *A Treatise on the Law of*

Agency, §§ 347, 354, 374; *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994); *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907); *Restatement (Third) of Agency* § 4.04(1) & cmt. b (2006). Second, the conduct of the principal must lead a third party to "reasonably . . . conclude that the act of another in [the principal's] behalf has been adopted and sanctioned" by the principal. Floyd R. Mechem, *A Treatise on the Law of Agency* § 146 (1888).

Those factors are satisfied here. Both at the time of the initial appointment and when it issued its November 30 Order, the Commission was authorized to appoint its ALJs. *See* 5 U.S.C. § 3105 (agencies "shall appoint as many administrative law judges as are necessary"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (Commission is a Head of Department empowered to appoint inferior officers.). The Commission indisputably could have made the initial appointments itself, and it is beyond doubt that it can, and has, "adopted and sanctioned" those actions when it "ratifie[d] the agency's prior appointment" of its ALJs.

Courts have uniformly endorsed ratification in analogous circumstances. In *Edmond v. United States*, 520 U.S. 651 (1997), petitioners sought to overturn convictions that had been affirmed by military judges whose appointments had been deemed invalid in an earlier decision. The Supreme Court rejected petitioners' challenge because an appropriate official had cured the constitutional error by "adopting" the judges' appointments "as judicial appointments of [his] own" before the judges had affirmed the convictions. *Edmond*, 520 U.S. at 654, 666. Other courts have likewise upheld ratifications following Appointments Clause and other constitutional challenges. *E.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115-

16, 118-19 (D.C. Cir. 2015); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

Respondent asserts (p. 12) that the ALJ "had no authority" to conduct the hearing because a hearing "may only be held by the Commission itself or an officer designated by it," but, as the Commission has observed, there is no indication that Congress intended for the term "officer" in the securities laws to be synonymous with the constitutional "officers" described in Article II; indeed, Congress uses the term "officer" synonymously with "employee" or "agent" when discussing agency staff members. *E.g., Timbervest LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *26 n.165 (Sept. 17, 2015). In any event, the Solicitor General has taken the position on behalf of the Commission in *Lucia v. SEC* that ALJs *are* inferior officers for constitutional purposes. *See* Br. for Respondent at 14-38, No. 17-130 (Feb. 21, 2018). And although Respondent contends (p. 13) that the Commission's ratification order has no effect because "ALJ Elliot was not an appropriately appointed officer; he was an employee of the Commission at the time," that ignores the entire purpose and effect of the ratification doctrine as described above.

Respondent's argument (p. 14) that "[t]here is no appointment to ratify" also fails because there was an initial appointment to ratify—the one made by agency staff on behalf of the Commission when it hired each ALJ. That hiring, by statute, is referred to as an appointment. *See* 5 U.S.C. § 3105 (agencies "shall appoint as many administrative law judges as are necessary"). Nor is the "delivery of a Commission" (p. 14) necessary for a valid appointment; an appointment is valid upon the "performance of such public act" that "create[s] the officer" and "enable[s] him to perform the duties" of the office, *Marbury v. Madison*, 5 U.S. 137, 156 (1803). While an appointment may be evidenced by a presidential commission, it also may be shown by

some other "open" and "unequivocal" act. *Id.* at 156-57. Here, the personnel actions approving the hiring of the ALJs satisfied the "public act" requirement and empowered the ALJs to exercise the functions of their office, as did the Commission's November 30 Order ratifying those appointments. And there is no support for Respondent's suggestion that the ALJs have not taken the oath of office; all Commission employees are given the oath on their first day of employment.

B. A Cease and Desist Order Remains Appropriate

Lloyd also contends that a cease and desist order is no longer necessary because he "is no longer an associated person of an investment adviser and all of his securities licenses have expired." (P. 15). But the Commission has previously found that the public interest supports associational restrictions even when the respondent is not formally associated with a registered entity. *E.g.*, *Victor Teicher*, 53 S.E.C. 581 (1998), *aff'd in part, rev'd in part*, 177 F.3d 1016 (D.C. Cir. 1999) (affirming Commission order barring Teicher but reversing bar order as to separate respondent). The same should apply to a cease and desist order. *See, Guy Riordan,* Securities Exchange Act Release No. 61153, 2009 WL 4731397 (Dec. 11, 2009) (despite respondent's retirement, Commission found cease and desist order was in the public interest because, among other things, respondent "has given no assurances that he will not seek to reenter the securities industry."). Absent a cease and desist order, there would be nothing to prevent Lloyd from engaging in the same type of conduct that he engaged in in this case.

Lloyd also argues that a cease and desist order is improper because it is essentially an impermissible "obey the law" injunction. (P. 16). The Commission has previously rejected this argument, reasoning that the governing statutes specifically empower the Commission to "impose a cease-and-desist order to prohibit 'any future violation of the [applicable] provision.'"

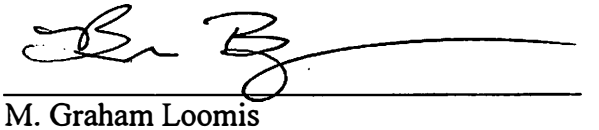
Montford and Company, et al., Advisers Act Release No. 3763, 2014 WL 1744130 at * 22 (May 2, 2014).

C. Conclusion

For the foregoing reasons, and for the reasons articulated in the Division's prior briefs to the Commission in this case, the Commission should find that Respondent violated the federal securities laws and impose the remedies that the Division has previously requested.

This 4th day of June 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the **DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S PAUL EDWARD "ED" LLOYD, JR.'S BRIEF IN SUPPORT OF RENEWED PETITION FOR REVIEW** by UPS overnight mail and electronic mail, to the individuals identified below:

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Dated: June 4, 2018

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