



GENERAL COUNSEL

**EXHIBIT C**  
**DEPARTMENT OF THE TREASURY**  
 WASHINGTON, D.C.

NOV 15 2018

**ACTION MEMORANDUM FOR SECRETARY MNUCHIN****FROM:** Brent J. McIntosh, General Counsel**SUBJECT:** Ratification of Administrative Law Judge Appointments

You recently ratified the appointment of several Administrative Law Judges (ALJs) used by two Treasury bureaus, IRS and TTB. The Office of the Comptroller of the Currency (OCC) has subsequently reviewed its use of ALJs, and Comptroller Otting now requests a similar ratification for ALJs used by OCC (see Attachment 2).

**RECOMMENDATION**

That you approve and sign the document, titled "Ratification of Administrative Law Judge Appointments" (see Attachment 1), which ratifies the appointment of two ALJs currently assigned to OCC.

**Approve**       **Disapprove**       **Let's Discuss**

**BACKGROUND**

ALJs are a class of federal employees hired specifically to perform administrative adjudication and subject to special personnel protections designed to ensure the independence of their decisions. A number of statutes and regulations require or permit agency adjudication to be performed by an ALJ, who typically holds a hearing and issues a recommended decision that may be adopted or rejected by the agency.

The Appointments Clause of the Constitution requires that Officers of the United States – a category of officials distinct from ordinary employees – must be appointed by the President, a court of law, or the head of a Department. In June of this year, the Supreme Court decided *Lucia v. SEC*, holding that for purposes of the Appointments Clause an ALJ at the Securities and Exchange Commission (SEC) was an Officer rather than an employee. Because the SEC ALJ had not been appointed as the Clause requires, the Court invalidated the agency action in which he had participated. (b) (5)

(b) (5)

OCC is a bureau of the Treasury Department, and the Comptroller of the Currency performs his duties under the general direction of the Treasury Secretary. However, OCC is independent from Treasury in certain respects, including a legal requirement that the Treasury Secretary generally not intervene in any enforcement proceeding before the Comptroller.

**FINAL DOCUMENT**

A provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 requires that OCC and certain other financial regulatory agencies share ALJs, and OCC has by regulation designated the ALJs employed by FDIC's Office of Financial Institution Adjudication (OFIA) to adjudicate its matters. Two ALJs are currently used by OCC under this arrangement.

OCC has now requested that you ratify the appointment and use of these two ALJs, C. Richard Miserendino and Christopher B. McNeil. We recommend that you ratify these appointments.

(b) (5)

#### **ATTACHMENTS**

1. Ratification of Administrative Law Judge Appointments
2. Memorandum from Comptroller Otting re: Appointment of Administrative Law Judges

**Action Memorandum Clearance Sheet**

Subject/Title: Ratification of Administrative Law Judge Appointments

Drafted: Deputy Assistant General Counsel – Michael Briskin

Approved: General Counsel – Brent McIntosh (11/9/18)

Cleared: Assistant General Counsel (GLER) – Brian Sonfield (11/9/18)

OGC Senior Advisor – (b) (6) 11/9/18)

Exec Sec – (b) (6) (11/13/18)

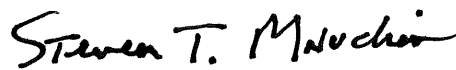
**Attachment 1**

RATIFICATION OF ADMINISTRATIVE LAW JUDGE APPOINTMENTS

I hereby ratify the assignment of C. Richard Miserendino and Christopher B. McNeil to the office of administrative law judge in the Office of the Comptroller of the Currency, under terms and conditions prescribed in Pub. L. 101-73, § 916 (12 U.S.C. § 1818 note) and 12 C.F.R. §§ 19.101 and 109.101, and I today approve their appointment as my own action under the Constitution.

NOV 15 2018

Date

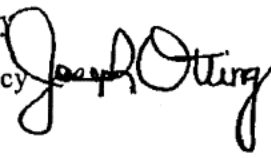


Steven T. Mnuchin  
Secretary of the Treasury



Office of the  
Comptroller of the Currency

# MEMORANDUM

**To:** Steven T. Mnuchin, Secretary of the Treasury  
**From:** Joseph M. Otting, Comptroller of the Currency   
**Date:** October 17, 2018  
**Subject:** Appointment of Administrative Law Judges as Officers for the OCC

Earlier this year, the U.S. Supreme Court issued its opinion in *Lucia v. SEC*, finding that the Securities and Exchange Commission's administrative law judges ("ALJs") are "Officers of the United States." Consequently, the Supreme Court held that these ALJs must be appointed by either the President, the "Courts of Law," or a "head of department" in order to comply with the requirements of the Constitution's Appointments Clause. (b) (5)

(b) (5)

(b) (5)

(b) (5)

On August 21, 2019, the Comptroller of the Currency issued an order ratifying its use of the ALJs in the interagency pool who have been re-appointed by the FDIC consistent with the *Lucia* decision.

(b) (5)

## RECOMMENDATION

That you approve and sign the document, titled "Appointment of Administrative Law Judges as Inferior Officers for the Office of the Comptroller of the Currency and Ratification of the Comptroller's Order" (Attachment 1), which appoints as officers the ALJs currently assigned to hear OCC administrative proceedings.

\_\_\_\_\_ Approve      \_\_\_\_\_ Disapprove      \_\_\_\_\_ Let's Discuss

## BACKGROUND

The Federal Deposit Insurance Act provides that hearings conducted in the context of enforcement proceedings under 12 U.S.C. § 1818 “shall be conducted in accordance with the provisions of chapter 5 of Title 5” of the Administrative Procedure Act (“APA”). 12 U.S.C. § 1818(h)(1). Longstanding practice under this section has been for the banking agencies to designate an ALJ appointed pursuant to 5 U.S.C. § 3105 to preside over the taking of evidence, 5 U.S.C. § 556(b)(1), and to prepare an initial ruling for submission to the relevant agency head, 5 U.S.C. § 557(b). *See also* 12 U.S.C. § 1818(h)(1). To that end, agencies are authorized to “appoint as many [ALJs] as are necessary” to preside over such proceedings. 5 U.S.C. § 3105. The vast majority of ALJs serving in the federal sector were hired as employees via competitive service appointments.<sup>1</sup>

(b) (5)

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Since the early 1990s, the OCC has shared its ALJs with the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve, and the National Credit Union Administration (collectively, the “Federal Banking Agencies”). This arrangement was established as part of section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. Law No. 101-73, § 916, 103 Stat. 183, 486 (1989) (“FIRREA”). Prior to the enactment of FIRREA, the individual Federal Banking Agencies borrowed ALJs from other agencies because they did not have enough work to justify employing their own dedicated ALJs. FIRREA directed the Federal Banking Agencies to establish a pool of ALJs for their own use. The current arrangement among the Federal Banking Agencies is that the FDIC is the nominal employer of two ALJs and the other agencies use their services. The Federal Banking Agencies share the cost of the ALJs’ salaries and office space. Currently, two ALJs—C. Richard Miserendino and Christopher B. McNeil—serve in this capacity and are stationed within an entity known as the Office of Financial Institution Adjudication (“OFIA”).

(b) (5)

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<sup>1</sup> On July 10, 2018, President Trump signed an Executive Order entitled “Excepting Administrative Law Judges from the Competitive Service.” The Order places the position of administrative law judge in the excepted service and directs the U.S. Office of Personnel Management to pursue any necessary revisions to its regulations. *See Executive Order 13843- Excepting Administrative Law Judges from the Competitive Service.*

<sup>2</sup> U.S. CONST. Art. II, § 2 cl. 2.

(b) (5)

ALJs Miserendino and McNeil have already been appointed as officers by the Board of Directors of the FDIC, the Board of Governors of the Federal Reserve, and the Board of Directors of the National Credit Union Administration. On August 21, 2018, the Comptroller of the Currency issued an order re-affirming the OCC's decision to utilize the OFIA ALJs in OCC enforcement proceedings. (b) (5)

(b) (5)

(b) (5)

This is consistent with section 3344 of the APA, 5 U.S.C. § 3344, which allows agencies to borrow ALJs from other federal agencies on a temporary basis.

(b) (5)

(b) (5)

Therefore, by signing Attachment 1, you will appoint these ALJs for the OCC and ratify the Comptroller's Order in response to *Lucia*.

#### ATTACHMENTS

1. Appointment of Administrative Law Judges as Inferior Officers for the Office of the Comptroller of the Currency and Ratification of the Comptroller's Order.
2. Order in Pending Enforcement Cases in Response to *Lucia v. SEC*, issued by the Comptroller of the Currency on August 21, 2018.

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<sup>3</sup> See *Morrison v. Olson*, 487 U.S. 654, 676-77 (1988). See also *Ex parte Siebold*, 100 U.S. 371, 397 (1879).

(b) (5)

# **ATTACHMENT 1**





## **ATTACHMENT 2**

**UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
OFFICE OF THE COMPTROLLER OF THE CURRENCY**

**In re:**

**Pending Administrative Proceedings**

**ORDER IN PENDING ENFORCEMENT CASES IN RESPONSE TO *LUCIA V. SEC***

The Comptroller of the Currency, as the chief officer of the Office of the Comptroller of the Currency (“OCC”), issues the following Order in light of the Opinion of the Supreme Court of the United States on June 21, 2018, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

WHEREAS, in *Lucia* the Supreme Court determined that administrative law judges (with respect to one or more particular individuals, “ALJ” or “ALJs”) performing adjudicative duties for the federal government are inherently “inferior officers of the United States” and therefore must be appointed as provided in the Appointments Clause of the Constitution, Article II, sec. 2;

WHEREAS, the two ALJs of the Office of Financial Institution Adjudication (“OFIA”) currently perform duties as ALJs for the OCC, as set forth at 12 C.F.R. § 19.5, in five pending enforcement matters which are identified below;

WHEREAS, the Board of Directors of the Federal Deposit Insurance Corporation (“FDIC”), by resolution bearing Seal No. 085152, dated July 19, 2018, appointed C. Richard Miserendino and Christopher B. McNeil as ALJs for the FDIC pursuant to the appointment power granted to it as the Head of a Department by Article II of the United States Constitution, and by 12 U.S.C. § 1819(a)(Fifth) and 5 U.S.C. § 3105;

WHEREAS, that appointment operates to commission ALJs Miserendino and McNeil as “inferior officers of the United States” in compliance with Article II, section 2 of the Constitution as interpreted by the Supreme Court in *Lucia*, with the result that they are qualified to perform all the functions of an ALJ as provided by statute and regulation;

WHEREAS, the remedies ordered by the Court in *Lucia* included the Court’s direction that, after ALJs had been appropriately appointed in accordance with the opinion, any pending proceedings be reassigned, where practicable, to an ALJ who had not been previously engaged in the case, so as to avoid pre-judgment with respect to any aspect of the case. 138 S. Ct. at 2055 n.5; and

WHEREAS, the Comptroller of the Currency has the power to “perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.” 12 C.F.R. § 19.4.

NOW, THEREFORE, the Comptroller of the Currency orders the following:

1. Since ALJs Miserendino and McNeil have now been properly appointed in conformance with the Supreme Court's decision in *Lucia* and Article II of the United States Constitution, the Comptroller of the Currency reaffirms his decision to utilize the OFIA ALJs as ALJs for the OCC.
2. The following five pending enforcement cases, now assigned to ALJ McNeil, are hereby reassigned to ALJ Miserendino:

*In the Matter of Hiren Patel (The National Republic Bank of Chicago, Chicago, IL), OCC-AA-EC-2018-89 (ALJ Christopher B. McNeil);*

*In the Matter of Laura Akahoshi (Rabobank, N.A., Roseville, CA), OCC-AA-EC-2018-20 (ALJ Christopher B. McNeil);*

*In the Matter of Saul Ortega and David Rogers, Jr. (First National Bank, Edinburg, TX), OCC-AA-EC-2017-44 (ALJ Christopher B. McNeil);*

*In the Matter of Rohan Ramchandani (CitiBank, N.A., Sioux Falls, SD), OCC-AA-EC-2017-2 (ALJ Christopher B. McNeil);*

*In the Matter of Richard Usher (JPMorgan Chase Bank, N.A. Columbus, Ohio), OCC-AA-EC-2017-3 (ALJ Christopher B. McNeil).*

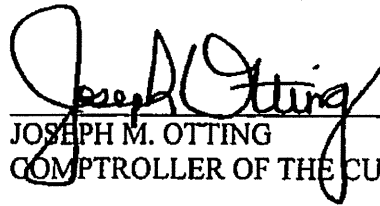
3. The following case, which has been finally adjudicated before the OCC but is currently pending decision on a petition for review in the United States Court of Appeals for the D.C. Circuit, is hereby reassigned to ALJ Miserendino in the event that there is a remand from the court.

*In the Matter of William R. Blanton (United Americas Bank, N.A., Atlanta, GA), OCC-AA-EC-2015-24 (ALJ Christopher B. McNeil).*

4. Promptly after reassignment, the newly assigned ALJ shall issue a Notice (with a copy of this Order attached) informing the parties of this order and providing each party an opportunity to file an Objection (with supporting law and facts) to such reassignment or to any of the actions taken by the prior ALJ. The Notice should provide an objecting party with a reasonable time (no less than 30 days after the issuance of the Notice) within which to file the Objection, and a page limit. The Notice shall also provide any party opposing the Objection with an equivalent reasonable time and page limit to file a response to the Objection. The Notice, Objection, and Response (if any) should be retained in the record of the case. The ALJ should thereafter issue a decision on reconsideration of the actions to which an Objection was filed, including any summary dispositions, taken by the preceding ALJ. With respect to actions to which no Objection is filed, the ALJ shall review the action and adopt or revise the action as the ALJ deems appropriate.

5. The Comptroller of the Currency takes no position on the merits of each case addressed herein. This Order is issued in light of the Supreme Court's recent decision in *Lucia*. Accordingly, an ALJ may, consistent with the procedure outlined in paragraph 4, reach the same recommendations as the previously assigned ALJ, but the ALJ is also free to reach different recommendations from those of the initial ALJ.

IT IS SO ORDERED, this 21 day of August, 2018.

  
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JOSEPH M. OTTING  
COMPTROLLER OF THE CURRENCY