

Jarkesy May Reshape SEC Enforcement Against Professionals

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For decades, the SEC has relied on its in-house administrative proceedings to enforce alleged violations under the federal securities laws, including under its own rules of practice. These in-house proceedings offer significant advantages to the SEC, including, among other things, limited discovery and the lack of a jury trial. And studies have reported that the SEC's success rate in administrative proceedings is approximately 90%, compared to 69% in federal court enforcement actions. In *SEC v. Jarkesy*, the U.S. Supreme Court dealt a blow to the SEC when the court's majority held that such proceedings violate a respondent's Seventh Amendment right to a jury trial when the SEC uses this forum to adjudicate claims that are "legal in nature," i.e., fraud and other claims imposing civil penalties. For more details about *Jarkesy* and the changing constitutional law landscape that provides its context, please refer to "[Breeze or Gale? Unanswered Questions at the Heart of the Supreme Court's Recent Administrative Law Decisions](#)," *Expect Focus – Life, Annuity, and Retirement Solutions* (September 2024). Emerging evidence shows that *Jarkesy* also may affect other types of in-house administrative actions, including, notably, proceedings under Rule 102(e) of the SEC Rules of Practice against accountants, attorneys, and other professionals appearing before the SEC who have allegedly engaged in unethical or otherwise improper behavior. In the months following the *Jarkesy* opinion, August through November 2024, the SEC dismissed seven Rule 102(e) proceedings against accountants pending in its in-house forum. Of these cases, four had sought civil penalties, thus falling within the purview of *Jarkesy*. But the three other SEC dismissals involved only remedial relief, which has raised questions about whether the SEC is applying *Jarkesy* more broadly. While the SEC has not formally explained the dismissal of these three cases in its administrative forum, the timing suggests a strategic response to *Jarkesy*. By proactively dismissing these cases, the SEC may seek to preempt constitutional challenges to its in-house proceedings that, unlike *Jarkesy*, are not limited to fraud and civil penalties. Such challenges could draw, for example, on statements in Justice Gorsuch's concurring opinion in *Jarkesy* to the effect that the Fifth Amendment's due process clause requires any action involving potential deprivation of life, liberty, or property be adjudicated through traditional court proceedings. In any event, professionals

who appear before the SEC will be closely scrutinizing how the agency responds to *Jarkesy* as it reconsiders the balance between its enforcement authority and constitutional safeguards.

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