

Client Alert: Fifth Circuit Holds SEC's In-House Forum is Unconstitutional

Publications

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When Congress passed the Dodd-Frank Act, it expanded the SEC's power to use its in-house administrative forum to bring enforcement actions. Supporters said this change promoted investor protection by giving the SEC a more efficient avenue in an expanded set of cases. Almost a decade after Dodd-Frank was passed, however, this benefit has not materialized. Instead, the SEC's in-house forum has been subject to repeated constitutional attacks and has been criticized for failing to serve as a fair forum to litigate cases to final judgment more quickly.

Most recently, a divided panel of the Fifth Circuit in *Jarkesy v. Securities and Exchange Commission*, No. 20-61007 (5th Cir. May 18, 2022), found that the use of in-house administrative law judges (ALJs) by the SEC is unconstitutional because it violates the Seventh Amendment's right to a jury trial, reflects an impermissible delegation of authority to the agency, and features adjudicators that are improperly insulated from removal. Each of these holdings is interesting in its own right and may provide fodder for other litigants seeking to cast doubt on the actions of ALJs used by the SEC and perhaps other federal agencies. This article describes the issues at play in the case and discusses how the continuing uncertainty of the constitutionality of the SEC's in-house forum may impact the agency going forward.

[Read the full alert here.](#)

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