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ACCOUNTANTS AND LAWYERS BEWARE: THE FUTURE OF SEC RULE 102(e) PROCEEDINGS AFTER *JARKESY*

The Supreme Court's decision in SEC v. Jarkesy *has significantly impacted the SEC's use of its in-house administrative forum, including for Rule 102(e) proceedings against the professionals who appear and practice before it. The SEC is now seeking similar relief in federal court that it traditionally sought through Rule 102(e) proceedings, raising new legal questions and challenges. This article discusses the use of Rule 102(e) and conduct-based injunctions in federal court.*

By Jimmy Fokas and Bari R. Nadworny *

Following the Supreme Court's decision in *SEC v. Jarkesy*, the U.S. Securities and Exchange Commission ("SEC" or the "Commission") has been forced to limit its use of its in-house administrative forum. While *Jarkesy* held that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud, it did not specifically address other types of relief the SEC has traditionally sought through its administrative forum. The SEC has authority under Rule 102(e) of its Rules of Practice to censure, suspend, or bar certain professionals, including lawyers and accountants, from appearing or practicing before it — relief the SEC is only authorized to seek through an administrative proceeding. Yet in light of *Jarkesy*, the SEC has more recently attempted to seek similar relief outside the administrative forum in federal district court. In a handful of actions that do not reference Rule 102(e), with possibly more to come, the SEC has sought a conduct-based injunction, invoking the court's equitable powers, to essentially bar accountants from appearing or practicing before it. This type of relief could also be brought against lawyers. Suspending, and especially barring, a professional from appearing or practicing before the SEC often causes significant personal strife, financial loss, and professional and reputational damage. While the goal of the relief sought is not new for the SEC, the forum in which it is now requesting this relief and the mechanism by which it is being requested are new. Questions remain open as to whether this practice will continue, what standards should and do apply, and whether this will survive likely legal challenges.

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RULE 102(e) PROCEEDINGS

Rule 102(e) of the SEC's Rules of Practice authorizes the SEC to censure, suspend, or bar certain professionals from the privilege of appearing or practicing before it.[1] Although, on its face, the Rule applies to any person, the Rule makes specific reference to attorneys, accountants, engineers, or other professionals or experts,[2] and is most often applied to attorneys and accountants. The SEC may censure, suspend, or bar these professionals if they (1) do not possess the requisite qualifications to represent others; (2) lack in character or integrity, or have engaged in unethical or improper professional conduct; or (3) have willfully violated, or willfully aided and abetted the violation of any provision of the federal securities laws or the rules and regulations thereunder.[3] Practicing before the Commission is construed broadly, and includes, but is not limited to, transacting any business with the Commission and preparing any statement, opinion, or other paper filed with the Commission in any registration statement, notification, application, report, or other document with the consent of the professional.[4] The Commission adopted Rule 102(e) as a "means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence."[5]

With respect to accountants, the Rule specifies that "improper professional conduct" means: (1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards or (2) either of the following two types of negligent conduct — a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.[6]

The standard for "improper professional conduct" for accountants was added to the Rule by amendment in 1998. The release adopting the final rule explained that the amendment was intended to reach violations of applicable professional standards that demonstrate that an accountant lacks competence to practice before the Commission.[7] The release further explained: "An accountant who acts intentionally or knowingly, including recklessly, or highly unreasonably when heightened scrutiny is warranted, conclusively demonstrates a lack of competence to practice before the Commission. By contrast, when the Commission brings a Rule 102(e) proceeding for repeated instances of unreasonable conduct, it will also have to find that the conduct indicates a lack of competence."[8]

In adopting this amendment to Rule 102(e), the Commission noted that "accurate financial reporting is the bedrock of our capital markets" and accountants "play a vital role in assuring issuers' compliance with reporting requirements."[9] The Commission further observed that investors have come to rely on the accuracy of financial statements of public companies when making investment decisions, but because the Commission has limited resources, it cannot closely scrutinize every financial statement.[10] The Commission must therefore "rely on the competence and

[1] 17 C.F.R. § 201.102(e).

[2] *Id*. § 201.102(e)(2), (e)(3)(i), (f)(2).

[3] *Id*. § 201.102(e)(1).

[4] *Id*. § 201.102(f).

[5] Amendment to Rule 102(e) of the Commission's Rules of Practice, Rel. No. 33-7593 (1998) (quoting *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979)), https://www.sec.gov/rules-regulations/1998/10/amendment-rule-102e-commissions-rules-practice.

[6] 17 C.F.R. § 201.102(e)(1)(iv).

[7] Amendment to Rule 102(e) of the Commission's Rules of Practice, Rel. No. 33-7593 (1998), https://www.sec.gov/rules-regulations/1998/10/amendment-rule-102e-commissions-rules-practice.

[8] *Id.*

[9] *Id.*

[10] *Id.*

independence of the auditors who certify, and the accountants who prepare, financial statements. In short, both the Commission and the investing public rely heavily on accountants to assure corporate compliance with federal securities law requirements and disclosure of accurate and reliable financial information."[11]

ADMINISTRATIVE PROCEEDINGS AND *JARKESY*

Rule 102(e) provides that before the Commission may censure, suspend, or bar a professional from appearing or practicing before it, the professional must be given "notice and opportunity for hearing in the matter."[12] This notice and opportunity for hearing is done through the SEC's administrative process. SEC administrative proceedings are governed by the SEC's Rules of Practice as opposed to the Federal Rules of Civil Procedure or the Federal Rules of Evidence, which apply in federal court.[13] The Commission initiates an administrative proceeding by issuing an Order Instituting Proceedings, which contains the Division of Enforcement's allegations against one or more respondents.[14]

In recent years, the SEC has largely refrained from using its administrative forum in light of various constitutional questions left unanswered after the Supreme Court's decision in *SEC v. Jarkesy*.[15] In *Jarkesy*, the Supreme Court held that when the SEC seeks civil penalties for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.[16] As the Supreme Court noted, the "SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC."[17] The Supreme Court further elaborated that in federal court, a jury finds facts, depending on the nature of the claim, an Article III judge presides, and the litigation is governed by the Federal Rules of Evidence, and the ordinary rules of discovery. In contrast, when the SEC adjudicates a matter in-house, there are no juries, and the Commission presides and finds facts while the Division of Enforcement prosecutes the case. The Commission may delegate its role as judge and factfinder to one of its members or to an administrative law judge, and the Commission or its delegee determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court. Judicial review is available once the proceedings have concluded but any such review is deferential as the reviewing court must treat the agency's factual findings as conclusive if sufficiently supported by the record. With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, the SEC was permitted to seek civil penalties in both federal court or through its administrative forum. And in this case it sought civil penalties against George Jarkesy, Jr. for securities fraud in its administrative forum, leading to the legal challenge and the Supreme Court's decision curtailing the ability of the agency to use its in-house forum when seeking civil penalties.

Jarkesy did not specifically address Rule 102(e) proceedings, which can only be brought administratively. Following *Jarkesy*, however, the SEC began dismissing without explanation a number of litigated administrative proceedings pending against auditors and accountants.[18] While some of these cases involved a claim for civil penalties — thus falling within *Jarkesy*'s ambit — not all of them did. The perceived concern is that a suspension or bar, and the severe professional consequences that result, is more analogous to a penalty as opposed to an equitable remedy that may also trigger the right to a jury not afforded in the administrative process.

CURRENT STATUS

Following *Jarkesy* and these dismissals, it was unclear how, or if, the SEC would continue to rely on its

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[11] *Id.*

[12] 17 C.F.R. § 201.102(e)(1).

[13] U.S. Sec. & Exchange Comm'n, *Information for Respondents in Administrative Proceedings* (Aug. 2024), https://www.sec.gov/enforcement-litigation/administrative-proceedings/information-respondents-administrative-proceedings.

[14] *Id.*

[15] 603 U.S. 109 (2024).

[16] *Id.* at 120.

[17] *Id.* at 116-17.

[18] *See, e.g.*, Division's Unopposed Mot. to Dismiss Administrative Proceeding, *In the Matter of Alan Markowitz, CPA*, Admin Proc. File No. 3-21314 (Aug. 2, 2024); Mot. to Dismiss Proceedings, *In the Matter of Halpern & Associates, LLC and Barbera Halpern, CPA*, Admin. Proc. File No. 3-20794 (Aug. 8, 2024); Mot. to Dismiss, *In the Matter of Paul L. Chancey, Jr., CPA*, Admin. Proc. File No. 3-20394 (Aug. 9, 2024); Division of Enforcement's Mot. to Dismiss, *In the Matter of Ira S. Viener, CPA*, Admin. Proc. File No. 3-21139 (Aug. 12, 2024); Mot. to Dismiss Proceedings, *In the Matter of Jia Roger Qian Wang, CPA and Wang Certified Public Accountant, P.C.*, Admin. Proc. File No. 3-21298 (Aug. 19, 2024).

in-house forum for litigated matters. While the SEC has continued to use its in-house forum primarily for settled matters, it has also turned to federal court to seek similar remedies. Rather than rely on an administrative proceeding to bar a professional, the SEC has been seeking this relief by asking the court, under its equitable powers, for a conduct-based injunction.[19] In its September 2024 complaint against Olayinka Oyebola and his accounting firm, Olayinka Oyebola & Co. (Chartered Accountants), for their roles in enabling and concealing a multi-year fraudulent scheme, the SEC, in its prayer for relief, sought to permanently prohibit the defendants "from acting in an accounting or financial reporting role at a public company in connection with the preparation of financial statements filed with the Commission, providing substantial assistance to a public company in the preparation of financial statements filed with the Commission, or acting as an auditor on a public company audit."[20] The request for relief defined "accounting or financial reporting role" as "participating in the preparation of financial statements; decisions about financial reporting; the creation or implementation of accounting policies; or decisions about accounting treatment," and defined "public company" as "a company, foreign or domestic, that files financial statements with the Commission."[21]

The SEC has sought similar relief against accountants in other matters as well, including, for example, in its complaint against Connecticut-based furniture retailer The Lovesac Company and its former CFO and former controller for accounting violations in connection with expenses Lovesac incurred shipping its furniture to customers.[22] Donna Dellomo, The Lovesac Company's former CFO, and Yoon Um, former controller, have both challenged the SEC's request for the court to use its equitable power to bar them from practicing before the Commission as an accountant or in a financial reporting role, arguing that the request is unprecedented, with Dellomo noting that until 2024, this remedy was sought exclusively by the SEC in its administrative forum, pursuant to standards developed through rulemaking and fleshed out by the Commission through many adjudications and settlements.[23] In opposition, the SEC argued that Dellomo and Um's arguments were premature, as they should be properly raised at the remedies phase after a finding of liability, and, in any event, the arguments lacked merit given the court's inherent and statutory power to grant injunctive and equitable relief.[24] In her reply memorandum, Dellomo, through counsel, asked "why now?"[25] "After over 90 years of self-policing, which professionals can, and which professionals cannot, practice before it," counsel wrote, "what reason exists for the SEC to seek to surrender its judgment to federal courts to make that same determination? And what standards should the Court apply on this newly created judicial front to determine a person's ability to practice as a professional before the SEC?"[26]

The court ultimately denied the respective motions to strike the SEC's requested relief, without prejudice to renewal.[27] Acknowledging that a lifetime ban may not be warranted based on the facts of the case, the court declined to strike the SEC's requested relief from the complaint, considering the fact-intensive nature of the imposition of injunctions, particularly around the defendants' scienter and remorse.[28] The court stated that after discovery, the defendants may renew their arguments regarding the requested relief in the form of a motion to strike or other appropriate motion.[29] Discovery in the matter is due by the end of July 2026, leaving open the question of whether defendants will renew their arguments regarding the SEC's request for a lifetime ban and if they do, how the court will rule with a more complete record before it.

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[19] Securities Exchange Act of 1934 § 21(d)(5), 15 U.S.C. § 78u(d)(5).

[20] Complaint at 37, *SEC v. Oyebola, et al.*, No. 1:24-cv-07363 (S.D.N.Y. Sept. 30, 2024), ECF No. 1, https://www.sec.gov/files/litigation/complaints/2024/comp-pr2024-157.pdf.

[21] *Id.*

[22] Complaint at 30, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Oct. 29, 2024), ECF No. 1, https://www.sec.gov/files/litigation/complaints/2024/comp26166.pdf.

[23] Def. Donna Dellomo's Mem. of P. & A. in Supp. of Her Mot. to Strike at 1, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Jan. 24, 2025), ECF No. 41-1; Def. Yoon Um's Mem. of Law in Supp. of Mot. to Dismiss and, Alternatively, Strike Certain Relief at 39, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Jan. 24, 2025), ECF No. 42-1.

[24] Pl.'s Opp'n to Defs.' Mots. to Strike at 1, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Mar. 7, 2025), ECF No. 47.

[25] Def. Donna Dellomo's Reply to SEC's Opp'n to Her Mot. to Strike at 1, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Mar. 7, 2025), ECF No. 52.

[26] *Id.* at 1-2.

[27] Ruling and Order on Mots. to Dismiss and Mots. to Strike at 33, *SEC v. Dellomo, et al.*, No. 3:24-cv-01727 (D. Conn. Aug. 15, 2025), ECF No. 57.

[28] *Id.*

[29] *Id.*

Absent further guidance from the SEC or development through case law, the questions Dellomo posed regarding what standards the court should impose for a conduct-based injunction sought against accountants remain. As Dellomo noted, the standards applicable to a Rule 102(e) proceeding have been developed through rulemaking and, over the years, through adjudications and settlements. It will be up to the district court to determine whether to apply the same standards from administrative Rule 102(e) proceedings to conduct-based injunctions. It is also certain that there will be legal challenges to the scope of the district court's equitable authority to fashion conduct-based injunctions seeking to enjoin accountants, attorneys, and other professionals. While the authority to craft equitable remedies is typically broad,[30] it has not been subject to a great deal of judicial scrutiny. The one upside for defendants in these proceedings is that where an underlying enforcement action is the basis for seeking the conduct-based injunction, they will typically be entitled to a jury trial and not forced into the administrative process where cases are decided by an administrative law judge. Defendants will also benefit from the more expansive discovery in federal court as opposed to the administrative forum where discovery is greatly limited.

Following *Jarkesy*, the SEC has aimed to be more thoughtful, and potentially creative, regarding how it can now seek the same relief it typically sought through its administrative forum. While contested Rule 102(e) proceedings will likely remain dormant as the SEC seeks to avoid further judicial limits on its administrative process, it is clear the Commission is not ready to cede its authority to regulate professionals who practice before it. Whether its efforts, especially as to accountants and attorneys, will endure remains to be seen as defendants challenge these new approaches. ■

[30] *See, e.g.*, *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984) ("[O]nce the equity jurisdiction of the district court properly has been invoked, the court has power to order all equitable relief necessary under the circumstances.").