

## [Securities Regulation Daily Wrap Up, SEC NEWS AND SPEECHES— Enforcement staff had access to Adjudication memoranda while matters were pending, \(Apr. 6, 2022\)](#)

Securities Regulation Daily Wrap Up

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The Commission's review found no evidence that Enforcement staff investigating and prosecuting two matters saw or took any action based on the memoranda.

The SEC issued a statement disclosing that Enforcement personnel were able to access memoranda drafted by Adjudication staff for pending cases. According to the statement, certain databases were not configured to restrict access by Enforcement staff, who then sent internal Adjudication memoranda to other administrative staff, who then uploaded the files into Enforcement databases. The [statement](#) summarizes the Commission's ongoing review of the matter and notes that there was no evidence that the staff members investigating and prosecuting two identified enforcement matters accessed the Adjudication materials.

The SEC has both investigatory and adjudicatory responsibilities and the APA separates those functions among agency staff. To that end, Commission rules give enforcement and adjudicatory functions to different sets of agency employees. Any parties to an enforcement proceeding, including staff of the Division of Enforcement (Enforcement), file motions and briefs with the Office of the Secretary and do not communicate directly with the Commission. The staff of the Office of the General Counsel's Adjudication Group (Adjudication), on the other hand, submit internal memoranda to the Commission to advise and assist the Commission in issuing adjudicatory opinions and orders.

**Database access.** The Commission discovered that Enforcement personnel were able to access memoranda drafted by Adjudication staff because certain databases maintained by the Office of the Secretary were not configured to restrict their access. As a result, administrative support personnel responsible for maintaining Enforcement's case files accessed Adjudication memoranda and then emailed the memos to other administrative staff who, in some cases, uploaded the files into Enforcement's databases.

**Internal review.** When the Commission discovered Enforcement staff's access to the memos, the Chair directed the implementation of remedial measures and an internal review. The remedial measures include enhanced access controls to restrict access to Adjudication's memoranda. The internal review team is supported by an outside consulting firm and is conducting a comprehensive review of the facts surrounding the control deficiency and assessing its potential impact on administrative adjudicatory matters.

The review team focused on two cases arising from Commission administrative proceedings that are currently pending in the federal courts. The team found that Enforcement administrative personnel accessed one or more Adjudication memoranda that were then accessible by all Enforcement staff, including the attorneys investigating and prosecuting these enforcement matters. The statement indicated that the remaining affected adjudicatory matters are still being assessed, and these findings will be released when the Commission is able to do so.

**SEC v. Cochran.** In 2016, CPA Michelle Cochran was charged with failing to comply with PCAOB auditing standards. After [Lucia v. SEC](#) was decided, Cochran filed suit to enjoin the proceedings against her, arguing that the ALJ was unconstitutionally insulated from the president's removal power. A Fifth Circuit panel [affirmed](#) the district court's dismissal of the case for lack of subject matter jurisdiction, but an *en banc* court [reversed](#). The SEC has [petitioned](#) the Supreme Court to overturn the Fifth Circuit's holding.

The review found that an Adjudication memorandum relating to the *Cochran* matter had been uploaded to the case file in the Enforcement database in late 2017, while the matter was pending before the Commission. The memo was uploaded, however, on the day after the Commission issued the order discussed in it, so the staff investigating and prosecuting the matter would not have been able to use the information provided. There was also no evidence that those investigating and prosecuting *Cochran* actually accessed the memo or that the availability of the memo had any effect on the Commission's adjudication of the proceeding.

**Jarkesy v. SEC.** In [Jarkesy v. SEC](#), George Jarkesy was one of several respondents who were charged with defrauding investors in two hedge funds. He sued the SEC seeking to stay the administrative proceeding for Due Process violations. The [D.C. Circuit](#) reviewed the applicable Supreme Court precedents and found that Congress intended for Jarkesy's claims to go through the administrative process before being appealed to an appellate court.

The review found that an administrative staff member in Enforcement sent 10 Adjudication memoranda relating to the pending *Jarkesy* matter to other personnel, who then uploaded the material to the Enforcement database. Interviews conducted by the review team found no evidence showing that the staff investigating and prosecuting the matter accessed any of those memoranda. As with *Cochran*, most of the memoranda were uploaded after the Commission issued the order discussed within. As for the remaining memo, the review found that Enforcement staff filed no documents between the time the memo was accessed and the time when the Commission issued its order.

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