

## SEC Administrative Judges Risk Being Sidelined Under Paul Atkins

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The US Supreme Court dealt a near-fatal blow last year to the Securities and Exchange Commission's already weakened administrative law judge program. The expected return of Paul Atkins as SEC chairman will likely weaken the ALJ program even further, relegating the in-house judges to the fringe of any enforcement activities.

Before *SEC v. Jarkesy*, the agency enjoyed an advantage in its in-house ALJ proceedings, boasting a decade ago a 90% success rate in contested cases from 2010 to 2015 versus its 69% success rate in federal court.

The SEC used ALJs to impose industry bars or revoke registrations, but they also ordered disgorgement and civil penalties. The median fine defendants paid in ALJ-decided actions between 2013 and 2023 was about \$20,000, but some defendants were ordered to pay millions of dollars.

Now the SEC must seek civil penalties for securities fraud in federal court before a jury, not with one of its ALJs. It can no longer rely on ALJs to efficiently resolve lower-stakes violations, even though its reliance on ALJs diminished in recent years. As a result, SEC will struggle to secure judgments against defendants quickly.

Atkins' expected return to the SEC further signals the decline of ALJs. Initial ALJ decisions hit a record high of 205 in 2015, but ALJs issued only 169 total decisions from 2002 to 2008—the same years Atkins served as commissioner.

Since the end of President Donald Trump's first term in 2020, only 10 ALJ initial decisions have been issued. This was likely due to former chairman Gary Gensler devoting enforcement resources to testing new theories of liability in federal court, including crypto cases and shadow trading. Unsurprisingly, in the anticipation and wake of *Jarkesy*, no initial decisions were issued in 2024.

### SCALED-BACK PRIORITIES

Trump has lauded Atkins as "a proven leader for common sense regulations," and Atkins is expected to steer the agency away from Gensler's ambitious enforcement and rulemaking agenda. The SEC is likely to return to traditional

enforcement priorities, such as investor protection and stock manipulation cases.

The SEC will be run by a Republican majority. GOP Commissioners Mark Uyeda and Hester Peirce both served as counsel to Atkins during his previous tenure as commissioner, and the three are likely to align on reforming enforcement activity.

Peirce has criticized the “enforcement first” strategy that has “become a cash cow for the SEC.” Similarly, Atkins opposed a regulation-by-enforcement approach when he was a commissioner. He disavowed the Division of Enforcement playing “gotcha” with defendants and warned against enforcement actions becoming “the way in which the SEC clarifies grey areas of the law.”

Both Atkins and Uyeda have supported expanding opportunities for retail investors. Atkins has long criticized large corporate penalties because they tend to punish the wrong parties—that is, shareholders, not the individual wrongdoers. He previously recommended that the SEC act more predictably when pursuing corporate penalties and settlements, proposing that the agency adopt an “open jacket policy” to discourage it from bringing evidence-deficient cases.

As chairman, Atkins may go further than his predecessors in reforming the Division of Enforcement. He previously called for an evaluation of the enforcement program through an advisory committee, paying special attention to corporate penalties, defendants’ rights, resource expenditure, and efficiency.

With his Republican commissioners’ backing, Atkins may be able to modernize and reframe the SEC’s enforcement strategy.

## FUTURE OF ALJS

Under Atkins’ leadership, the SEC’s enforcement priorities will inevitably evolve. The SEC is likely to pursue enforcement actions more sparingly, instead investing agency resources to issuing clearer rules. Even so, the agency is expected to focus on investor protection cases.

If the SEC seeks civil penalties, it must now do so in federal court. The SEC has largely defaulted to the federal courts when pursuing penalties since the Supreme Court’s decision in *Lucia v. SEC*, the precursor to *Jarkesy*. That trend will continue.

Historically, ALJs would most often impose monetary fines for material misstatements and omissions, fraudulent schemes, and investment advisory fraud. These violations, if serious enough, will now be litigated in federal court.

Because Atkins disfavors large corporate penalties, the SEC focus away from companies to more closely scrutinize individual defendants. While this could signal an opportunity for ALJ involvement, they still will likely be used sparingly.

Atkins appears sensitive to how enforcement actions impact professionals, having stressed the importance of defendants’ rights and due process; fair, expeditious investigations; and the SEC pursuing only meritorious cases.

As a result, the SEC is more likely to pursue clearer-cut violations of federal securities laws and be more transparent in its investigations. If ALJs are used at all, their decisions will be limited to imposing non-monetary remediation, such as industry bars, cease-and-desist orders, and revoking registrations.

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