Government & Internal Investigations / Securities Litigation ADVISORY ■

JULY 26, 2018

Decision Dismissing SEC FCPA Claims Extends Recent Supreme Court Rulings Curtailing SEC Enforcement Authority

by Edward Kang, Paul Monnin,* and *Benjamin Harmon

In a recent decision, *SEC v. Cohen, et al.*, No. 17-cv-430 (E.D.N.Y. July 7, 2018), Judge Nicholas Garaufis applied the five-year statute of limitations under 28 U.S.C. § 2462 to dismiss Securities and Exchange Commission (SEC) enforcement claims under the Foreign Corrupt Practices Act (FCPA). In doing so, Judge Garaufis confirmed that the Supreme Court's recent application of Section 2462's five-year limitations period to the SEC's requests for civil penalties and disgorgement in its traditional anti-fraud enforcement actions also extends to its FCPA enforcement activity.

Importantly, Judge Garaufis also concluded that the SEC's requests for prospective injunctive relief—so-called "obey the law" injunctions—which have traditionally been understood primarily as forward-looking and equitable in nature, are subject to Section 2462's five-year limitations period. To arrive at this result, the court applied the Supreme Court's reasoning in *SEC v. Kokesh*, 137 S. Ct. 1635 (2017), to find that, like disgorgement, prospective injunctions are at least partially punitive, rather than merely remedial. Additionally, they are aimed at redressing public, rather than individual, harm.

The *Cohen* opinion is also important in providing guidance on the procedural aspects of Section 2462's application to the SEC's FCPA claims. First, the court concluded that it is appropriate to consider a statute of limitations defense under Section 2462 at the motion to dismiss stage. Judge Garaufis disagreed with the SEC's argument that Section 2462 is directed primarily to remedies, which must await a finding of liability. To the contrary, the court reasoned that the statute prohibits district courts from "entertaining" any time-barred claim, warranting a decision on the pleadings if they make clear that an FCPA claim is time-barred.

Applying *Gabelli v. SEC*, 568 U.S. 442 (2013), the court also determined that an FCPA claim accrues—and hence that Section 2462's five-year limitations begins to run—when a defendant pays a bribe to obtain or to retain business, not when he realizes financial benefits from unlawful, corrupt payments. In this regard, the Supreme Court in *Gabelli* reasoned that, because the SEC's core enforcement function is to uncover corrupt financial activity, a fixed limitations period is required.

Finally, given the court's conclusion that the SEC's suite of FCPA enforcement remedies—from civil penalties to disgorgement to an "obey-the-law" injunction—are fundamentally punitive, Judge Garaufis also determined that the statute of limitations under Section 2462 is not subject to any form of equitable tolling. Indeed, the court concluded that tolling agreements are legally ineffective unless the allegedly corrupt activity purportedly subject to tolling is clearly within the scope of the subject matter specified in an agreement. In the *Cohen* case, a defendant had signed a tolling agreement specifying certain allegedly corrupt activity but not other alleged corruption that was part of the SEC's subsequent investigation and that was included in its complaint. Judge Garaufis found that the SEC's tolling agreement failed to preserve the latter corruption contentions. In short, in the absence of a clearly applicable tolling agreement, the SEC is required to bring its FCPA claims within five years of the allegedly corrupt activity.

More broadly, dismissal of the SEC's FCPA enforcement claims in *Cohen* represents an extension of the Supreme Court's reasoning that the SEC's remedial regime is inherently punitive and that, barring contractual tolling, the SEC is obliged to bring these claims within five years of the date of offense, rather than when the defendant realized his ill-gotten gains or when the SEC discovered the violation through a whistleblower or otherwise.

How the SEC responds to this decision in future cases—including the possibility that it may further particularize as well as broaden the scope of tolling agreements to cover a more extensive range of misconduct—will be a development to closely monitor.

You can subscribe to future *Government Investigations* and *Securities Litigation* advisories and other Alston & Bird publications by completing our **publications subscription form**.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Government & Internal Investigations

Edward T. Kang
202.239.3728
edward.kang@alston.com

William (Mitch) R. Mitchelson
404.881.7661
mitch.mitchelson@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

Michael R. Hoernlein
704.444.1041
michael.hoernlein@alston.com

William H. Jordan
404.881.7850
202.756.3494
bill.jordan@alston.com

Meredith Jones Kingsley
404.881.4793
meredith.kingsley@alston.com

Jenny Kramer
212.210.9420
jenny.kramer@alston.com

Paul N. Monnin
404.881.7394
paul.monnin@alston.com

Jason D. Popp
404.881.4753
jason.popp@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Thomas G. Walker
704.444.1248
919.862.2212
thomas.walker@alston.com

Securities Litigation

Robert Long
404.881.4760
robert.long@alston.com

Gidon M. Caine
650.838.2060
gidon.caine@alston.com

Charles W. Cox
213.576.1048
charles.cox@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

Susan E. Hurd
404.881.7572
susan.hurd@alston.com

Brett D. Jaffe
212.210.9547
brett.jaffe@alston.com

John A. Jordak, Jr.
404.881.7868
john.jordak@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

Cara M. Peterman
404.881.7176
cara.peterman@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ 404.881.7000 ▪ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ▪ Place du Champ de Mars ▪ B-1050 Brussels, BE ▪ +32 2 550 3700 ▪ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ 704.444.1000 ▪ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ▪ 18th Floor ▪ Dallas, Texas, USA, 75201 ▪ 214.922.3400 ▪ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ 213.576.1000 ▪ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ 212.210.9400 ▪ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ 919.862.2200 ▪ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ 415.243.1000 ▪ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ▪ 5th Floor ▪ East Palo Alto, California, USA, 94303-2282 ▪ 650-838-2000 ▪ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ 202.239.3300 ▪ Fax: 202.239.3333