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CLIENT ALERT

Time is not on the SEC's Side: EDNY Issues New Statute of Limitations Ruling in the Wake of *Kokesh*

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On July 12, 2018, the U.S. District Court for the Eastern District of New York dismissed, as time barred, a civil complaint filed by the Securities and Exchange Commission against two hedge fund managers accused of a "sprawling scheme" to bribe various public officials in Africa. *SEC v. Cohen*, Civil Action No. 17-cv-430 (E.D.N.Y. Order entered July 12, 2018). While the allegations focused on activity that took place between 2007 and 2011, the SEC failed to file a complaint until January 26, 2017. The oldest transaction identified in the complaint allegedly took place in Libya when it was under the rule of Colonel Muammar Gaddafi. One of the defendants was alleged to have met with a son of Colonel Gaddafi who had influence into the Libyan Investment Authority. The complaint stated that a $3.75 million "deal fee" was charged in connection with the decision by the Libyan Investment Authority to invest $300 million in the defendants' fund. That arrangement netted the fund a reported $100 million in management fees. The complaint also alleged similar transactions in countries including the Democratic Republic of the Congo; Chad; Niger; and Turks and Caicos.

Since the Foreign Corrupt Practices Act does not contain its own statute of limitations, the court applied 28 U.S.C. § 2462, which states that, unless Congress has provided otherwise, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" must be brought within five years of the day that the claim first accrued. While many courts have held that an SEC disgorgement action did not implicate § 2462, the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) held that SEC disgorgement constituted a "penalty" because it was a consequence of violating public laws, serves a punitive purpose, and in many cases disgorgement funds are remitted to the Treasury Department rather than being paid to victims.

The Cohen court also extended *Kokesh* by holding that the "obey the law" injunction requested by the SEC would operate "at least partially as a penalty," and is therefore subject to § 2462. *SEC v. Cohen* No. 17-cv-430 at 25. The "obey the law" injunction would have imposed no additional legal duties on the defendant beyond their existing duty to comply with the law. However, as the court noted, the injunction would also "mark Defendants as lawbreakers and 'stigmatize [them] in the eyes of the public.'" *Id.* at 30. Since that stigmatization goes beyond compensating victims, it is more than "strictly remedial;" it is a penalty. *Id.* A remedy is a penalty subject to the five-year statute of limitations in § 2462 if it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *Kokesh* 137 S. Ct. at 1645.

The SEC argued that its claims against the defendant were timely because it had entered into tolling agreements with the defendants where both parties agreed to extend the statute of limitations. The court disagreed. While there were tolling agreements in place, their terms clearly applied to only two of the nine transactions identified in the complaint. Both of those transactions occurred in Libya and the tolling agreements themselves had expired by their own terms by the time the complaint was filed. Importantly, the court held that the tolling agreement only tolled the statute of limitations for *actions* that arose out of Libyan investigation, but not additional *investigations* that were commenced because of facts learned during the Libyan investigation.

Finally, the court rejected the argument that the statute of limitations clock restarted every time the defendants received ill-gotten gains as a result of the allegedly corrupt transactions. Rather, it held that the statute of limitations clock begins to run when the claims fully accrue, meaning when the defendants engaged in misconduct not when they received money attributable to that misconduct. Since the claims had fully accrued more the five years before the SEC filed its complaint, the court dismissed the SEC's claims as time-barred by 28 U.S.C. § 2462.

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