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Expert Analysis

FCPA Remedies: Where Do We Stand?

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The end of 2017 marked both the 40th anniversary of the Foreign Corrupt Practices Act (FCPA) and a $965 million FCPA settlement with Swedish telecommunications company, Telia Company AB. That staggering figure included a $457 million disgorgement order from the Securities and Exchange Commission (SEC) and $508 million in penalties imposed by the Department of Justice (DOJ), with offsets for payments to Swedish and Dutch authorities. As we begin the new year, FCPA watchers will be closely monitoring how remedies such as these evolve under both SEC and DOJ authority, in light of other 2017 developments.

SEC

In June 2017, the Supreme Court held in *Kokesh v. Securities and Exchange Committee* that SEC disgorgement claims are subject to the five-year statute of limitations set forth in 28 U.S.C. 2462 for "any civil fine, penalty, or forfeiture." 137 S. Ct. 1635 (2017). Unlike civil penalties, which the SEC can seek by statute, courts have used their "inherent equity powers" to order disgorgement at the SEC's request. Given that context, the court included a footnote clarifying that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." Id. at 1642 n.3.

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That said, the court rejected the SEC's view of disgorgement as a "remedial" measure that restores the status quo, noting that in some cases disgorgement may exceed profits gained or fail to take into account expenses, leaving a defendant "worse off." Instead, the Court determined that disgorgement is a "penalty" under §2462 because it is (1) sought for violations that harm the United States, not an aggrieved individual; (2) imposed for a punitive purpose, namely deterrence; and (3) not always compensatory, often going to the U.S. Treasury instead of to victims. Accordingly, the court held that disgorgement in a securities enforcement action is a "penalty" under §2462 are thus subject to the five-year limitation. Id. at 1643-45.

As the co-director of the SEC's Enforcement Division noted in a recent speech, the *Kokesh* decision will have "particular significance" on the SEC's FCPA activities, where disgorgement is a typical remedy. *Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act*, Steven R. Peikin, Co-Director, Enforcement Division, New York University School of Law (Nov. 9, 2017) (FCPA Reflections). Indeed,

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in addition to Telia, the SEC ordered significant disgorgement in several other 2017 FCPA resolutions as well. See SEC Enforcement Actions: FCPA Cases (Halliburton Company: $14 million; Orthofix International NV: $2.9 million; Biomet, Inc.: $5.8 million). The international components of FCPA cases make them inherently complex and slow in developing. In light of *Kokesh*, the SEC has signaled that it has "no choice but to respond by redoubling our efforts to bring cases as quickly as possible." FCPA Reflections.

In the meantime, FCPA defendants have already started advancing statute of limitations arguments based on *Kokesh*. In *SEC v. Cohen*, currently before Judge Garaufis in the Eastern District, the SEC charged two former executives at Och-Ziff Capital Management Group with various FCPA and Investment Advisers Act violations. 17 Civ. 430 (E.D.N.Y.). The SEC seeks injunctive relief, civil penalties, and disgorgement of "ill-gotten gains." In their motions to dismiss, the defendants highlight that most of the subject transactions occurred nearly a decade ago—well outside the five-year limitations period and applicable tolling agreements—and therefore, under *Kokesh*, ineligible bases for the monetary relief sought. They add that *Kokesh*'s logic would also deem injunctive relief a "penalty" and be similarly time-barred.

The SEC opposes due to the tolling agreement and calls the motions premature because §2462 applies to remedies, not liability. It contends that discovery will reveal what remedies are available within the limitations periods. The SEC also contends that the injunctive relief it seeks is remedial not punitive, making *Kokesh* inapplicable. Id. Dkt. No. 44 (citing, inter alia, *SEC v. Collyard*, 861 F. 3d 760 (8th Cir. 2017), a post-*Kokesh* opinion). The SEC makes the same arguments as to any industry bar they may seek and contends these two timely remedies—injunction and bar—allow the case to move forward now, even if disgorgement and civil penalties are later deemed time-barred.

Last month, all parties filed notices of supplemental authorities further exploring the application of *Kokesh*. The SEC cited two decisions for the propositions that §2462 does not apply to injunctions and that it was premature to rule on disgorgement at the motion to dismiss stage (citing *SEC v. Mapp*, No. 4:16-CV-00246 (E.D. Tx. Nov. 8 and 9, 2017). The defendants called the SEC's new cases inapposite and stated that two courts had considered and rejected similar arguments. Specifically, in *Securities and Exchange Commission v. Gentile*, No. 16-1619, 2017 U.S. Dist. LEXIS 204883 (D.N.J. Dec. 13, 2017), the court rejected the argument that it was premature to rule on the statute of limitations on a motion to dismiss, held that a requested injunction was a penalty under *Kokesh*, and dismissed the complaint. In *Saad v. Securities and Exchange Commission*, 873 F.3d 297 (D.C. Cir. 2017), in reviewing an SEC administrative proceeding sustaining an industry bar imposed by FINRA, the Circuit remanded to the SEC for consideration of whether such a bar is punitive under *Kokesh*. As the *Cohen* defendants note, a concurrence in *Saad* stated that, in light of *Kokesh* "our precedents characterizing expulsions or suspensions as remedial are no longer good law." Id. at 304.

The *Cohen* court heard oral argument on the motions shortly thereafter and reserved decision. It is clear, however, that post-*Kokesh* courts in the FCPA context (and otherwise) will have to grapple with its application to fact-specific timing questions, such as tolling agreements, and to remedies other than disgorgement. Higher court review may well follow.

DOJ

While *Kokesh* will give certain FCPA defendants some reprieve in the SEC arena, at least as to disgorgement, financial consequences remain significant in DOJ resolutions, especially for corporations seeking declinations. In late November 2017, Deputy Attorney General Rod Rosenstein announced a revised FCPA Corporate Enforcement Policy that largely formalized the FCPA Pilot Program implemented in April 2016. *Remarks at the 34th International Conference on the Foreign Corrupt Practices Act*, Oxon Hill, MD (Nov. 29, 2017). The revised policy, now incorporated into the U.S. Attorneys' Manual, continues to incentivize voluntary corporate disclosures of FCPA violations. While leaving discretion to prosecutors, the policy provides a presumption that the DOJ will resolve a case through a declination "when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation." Id. Notably, though, to "qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue," although this obligation may be satisfied by a parallel resolution with another regulator, such as the SEC. U.S. Attorney's Manual 9-47.120—FCPA Corporate Enforcement Policy.

The Pilot Program included a similar requirement, and indeed every published declination under the program included disgorgement or other payment. See U.S. Department of Justice, Declinations. Some commentators have questioned, however, whether *Kokesh*'s footnote about disgorgement in SEC court proceedings also opens questions about the DOJ's authority to demand disgorgement for FCPA declinations. See Kokesh Raises Questions About Declinations With Disgorgement Under the FCPA Pilot Program.

In addition, as favorable post-'Kokesh' case law develops, more FCPA litigants facing a range of remedies will seek dismissals based on §2462.

Looking Forward

Despite these concerns, corporate defendants may continue to consider the cost of disgorgement worth the benefit of a declination. On the SEC side, *Kokesh*'s footnote may prompt the agency to rely more heavily on administrative proceedings, wherein the SEC is expressly authorized to seek disgorgement. See 15 U.S.C. §78u–2(e). Indeed, the SEC resolved all 2017 FCPA matters involving disgorgement, including Telia, administratively.

In addition, as favorable post-*Kokesh* case law develops, more FCPA litigants facing a range of remedies will seek dismissals based on §2462. An additional lingering question for FCPA defendants overseas is whether they can use §2462's final clause—limiting claims to "five years from the date when the claim first accrued if, within the same period, the offender or property is within the United States"—to their advantage. While not addressed in *Kokesh* (and scarcely by any court), a prior FCPA case interpreted this provision to mean the limit applies if "the defendant is present in the United States at any time during that five-year period … and does not toll while the defendant is absent from the United States," and "does not apply at all if the defendant is not present in the United States at any point during the five-year period." *SEC v. Straub*, 11 Civ. 9645 (RJS), 2016 U.S. Dist. LEXIS 136841, at *63 (S.D.N.Y. Sept. 30, 2016). FCPA defendants may argue, as those in *Cohen* did, that the five-year clock is triggered (and expired) even by a brief visit to the United States, making a host of remedies time-barred.