

SEC Tolling Agreements Upheld: Second Circuit Lifts Tollgate

January 11, 2022

This article supplements our April 2021 Expect Focus article, [“A Future Without SEC Tolling Agreements? Some Say ‘Not So Fast.’”](#) In that article, we addressed a case of first impression, *SEC v. Fowler*, which was pending in the Second Circuit Court of Appeals. Fowler argued that, under federal jurisprudence, 28 U.S.C. § 2462 imposes a five-year statute of limitations on a court’s ability to hear cases, including those involving tolling agreements. Thus, he concluded, the SEC should not be able to use tolling agreements to circumvent the statute’s plain language and evade the statute’s purpose, i.e., to bar courts from “entertaining” claims brought outside a five-year period.

The Second Circuit has now weighed in: tolling agreements, which are generally thought to be beneficial to both the SEC and its targets or subjects, do not violate the five-year statute of limitations and can be enforced in federal courts. The court found that section 2462 is a nonjurisdictional statute of limitations and, as such, the parties can toll it. This first precedential decision is consistent with a few other federal appellate courts that have indirectly addressed this issue.

In its holding, the Second Circuit explained that neither the statutory nor the legislative history of section 2462 showed any congressional intent to substantively change the long-standing precedent that filing deadlines are “quintessential claim-processing rules,” which should not be treated as jurisdictional. Thus, a 1948 change to the wording of section 2462 did not transform the statute from nonjurisdictional to jurisdictional. As such, the Second Circuit upheld the enforceability of the parties’ tolling agreement and the district court’s authority to hear the case.

Fowler has filed for a writ of certiorari from the U.S. Supreme Court. For now, the Second Circuit’s precedential ruling on the enforceability of tolling agreements is a big win for the SEC and, perhaps, its targets and subjects. This commonly used and important tool for managing the timeliness of SEC investigations is likely here to stay.

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