

A Future Without SEC Tolling Agreements? Some Say “Not So Fast”

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Natalie A. Napierala



Katelyn M. Sandoval

The SEC routinely requests individuals who may be the subjects or targets of investigations to execute agreements that delay or suspend the time period in a statute of limitations for an agreed period (commonly referred to as “tolling agreements”). This practice generally benefits both parties: the SEC can investigate at its own pace, and the putative subjects or targets have more time to argue why the SEC should not bring an enforcement action against them.

So, what's the problem? Turns out, these tolling agreements may not be enforceable under federal jurisprudence. Under 28 U.S.C. § 2462, “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.”

Pending before the Second Circuit Court of Appeals is an issue of first impression. In *SEC v. Fowler*, Donald Fowler argues that section 2462 imposes a jurisdictional time limit on a court’s ability to hear cases, including those involving tolling agreements. He argues that such agreements cannot be used 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.

This novel argument rests, in part, on the statute’s rather unconventional wording, which focuses not on the plaintiff’s obligation to bring a case within a certain time period but rather on the court’s inability to “entertain” a case brought outside the statutory five-year period. This language is unusual in run-of-the-mill statutes of limitations.

If the Second Circuit agrees with Fowler’s arguments, the SEC, as well as potential subjects and their counsel, may find themselves in a tenuous position: the SEC may hasten its investigations and bring claims that it might not have otherwise, while targets will have even less negotiating power and less time to present their arguments.