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Justices Pass On Bid To Curb SEC Role In AML Enforcement

By **Jon Hill**

Law360 (November 8, 2021, 10:14 AM EST) -- The U.S. Supreme Court on Monday declined to hear an appeal from a penny-stock broker that argued the U.S. Securities and Exchange Commission has muscled its way into anti-money laundering enforcement territory where it doesn't belong.

The Supreme Court denied a **petition for review** filed by Alpine Securities Corp., which was **fined \$12 million** in 2019 after the SEC **sued it** over serious alleged lapses in its compliance with federal anti-money laundering reporting requirements.

According to Alpine, the SEC's case was illegitimate because the agency lacks the authority to enforce those requirements itself. Instead, Alpine has said that power belongs to the agency that wrote them, the U.S. Treasury Department's Financial Crimes Enforcement Network.

But the SEC, which **urged the high court** to turn down Alpine's appeal, has argued its authority to police broker-dealers' anti-money laundering reporting flows squarely from the federal securities laws that, among other things, empower the agency to prescribe and enforce recordkeeping standards for the securities industry.

As is customary, Monday's order list did not say how the justices voted or what their reasoning was.

Counsel for Alpine and representatives for the SEC did not immediately return requests for comment on Monday.

The denial of Alpine's petition comes even as the Supreme Court has shown an appetite lately for curbing regulatory agency power. Earlier this year, for example, **the justices curtailed** the Federal Trade Commission's ability to obtain monetary relief from lawbreakers in federal court.

The high court has also notably trimmed the SEC's sails on several occasions in recent years, forcing it to rework how it staffs its in-house courts and putting a five-year limit on how far back the agency can get disgorgement. Last year in *Liu v. SEC* ●, the justices tightened the screws further by restricting the agency's **pursuit of disgorgement** to no more than a lawbreaker's "net profits."

But Alpine's petition was **viewed as a long shot** by some legal observers, particularly given the lack of a circuit split on the SEC's anti-money laundering enforcement authority. Last year the Second Circuit ruled that the SEC's case against Alpine was properly **within the agency's authority** and not a thinly veiled, improper attempt to enforce the Bank Secrecy Act.

Administered by FinCEN, the Bank Secrecy Act and its related rules require broker-dealers, banks and other financial institutions to file suspicious activity reports, or SARs, with the government when they spot transactions that may involve illicit funds.

In the present case, filed in 2017, the SEC accused Alpine of failing to file these reports in compliance with the BSA. The SEC claimed this had accordingly violated its Exchange Act recordkeeping and reporting rules, which require compliance with BSA standards set by FinCEN.

A New York federal court eventually found Alpine liable in 2019 for more than 2,700 SAR filing violations and imposed a \$12 million civil penalty.

But Alpine has argued that what the SEC is really doing in cases like these is making a power grab: stepping into FinCEN's shoes and independently enforcing its BSA regulations, even though the SEC has never been expressly empowered to do so.

Although the SEC has authority to examine for BSA compliance, Alpine told the Supreme Court in its July petition this summer that the agency is improperly using its own recordkeeping rules, written 40 years ago, to bootstrap substantive independent enforcement authority over SAR filing requirements, which didn't extend to broker-dealers until the 2000s.

And when it does enforce them, the SEC does so under the Exchange Act's harsher framework of penalties and strict liability, while taking a "far more stringent view of the SAR requirements" than FinCEN has articulated, Alpine said.

The result is "dueling enforcement schemes" that burden the financial industry with uncertainty, weaken accountability and are counterproductive for anti-money laundering purposes, the company argued.

Alpine's petition received support from two former top FinCEN officials and the Cato Institute, a libertarian think tank, in its bid for Supreme Court review.

But the SEC has maintained its exercise of authority in this area is solidly rooted in its mandate as the federal securities regulator to ensure that broker-dealers comply with the requirements of the Exchange Act, which obligates them to keep any records the SEC "prescribes as necessary or appropriate ... for the protection of investors or otherwise in furtherance of the purposes of this chapter."

That authority to set recordkeeping requirements "plainly encompasses records and reports about the sorts of suspicious transactions at issue" in the Alpine case, the SEC told the justices in a brief last month.

According to the agency, the BSA itself also "does not preclude" the SEC from instituting suspicious activity reporting requirements for broker-dealers, nor was the Treasury assigned exclusive authority over anti-money laundering issues.

And while Alpine considered it problematic that the SEC's legal framework for enforcing SAR filing compliance "differs substantially" from that of FinCEN in liability standards and potential penalty amounts, the agency said that such differences "simply confirm" that its case against Alpine was "not an action to enforce the BSA."

Alpine is represented by Robert M. Loeb, Daniel Nathan and Lauren A. Weber of Orrick Herrington & Sutcliffe LLP, Maranda Fritz of Maranda E. Fritz PC and Brent R. Baker, Jonathan D. Bletzacker and Aaron D. Lebenta of Parsons Behle & Latimer.

The SEC has been represented by Brian H. Fletcher of the U.S. Office of the Solicitor General and by its own Michael A. Conley, Rachel M. McKenzie and Daniel Staroselsky.

The case is Alpine Securities Corp. v. U.S. Securities and Exchange Commission, case number 21-82, in the Supreme Court of the United States.

--Editing by Brian Baresch.

Update: This story has been updated with more information on the case.