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FCPA Defendants: "May Their Sins Be Forgotten?"

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As is well recognized, anticorruption investigations can take years to complete and often concern conduct in the distant past. The antibribery and accounting provisions of the Foreign Corrupt Practices Act ("FCPA") do not specify a statute of limitations. Accordingly, the five-year limitations period of 28 U.S.C. § 2462 governs actions seeking civil penalties, and the five-year limitations period of 28 U.S.C. § 3282 governs criminal violations of the Act. The government, however, asserts it can reach conduct beyond the five years based on a number of theories, including equitable tolling doctrines, conspiracy allegations, and the inapplicability of the limitations period to certain forms of equitable relief.

While some of the government's contentions are uncontroversial and based on clear statutory language, others constitute aggressive legal theories. FCPA enforcement actions would thus appear to raise tricky statute of limitations issues. Until now, however, that was rarely the case in practice. The reasons were simple. Virtually all FCPA enforcement actions are settled; thus, limitations questions typically remain dormant, beyond judicial scrutiny. Further, corporations under investigation frequently enter into tolling agreements with the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), the two agencies with overlapping jurisdiction to enforce the FCPA.

The Supreme Court's February 27, 2013 opinion in *Gabelli v. SEC*, 568 U.S. __ (2013), and the increasing number of individual enforcement actions may increase the significance of limitations defenses in FCPA investigations. This article reviews *Gabelli*, its potential implications and related developments.

Gabelli v. SEC

In *Gabelli*, the Court unanimously held that the five-year statute of limitations under 28 U.S.C. § 2462 governing government actions for civil penalties begins to run when the alleged fraud is complete. The Court refused to apply the "discovery rule" available in private actions, which can delay the accrual of a fraud-based claim until the claim is, or should have been, discovered.

In 2008, the SEC brought enforcement actions against Bruce Alpert, chief operating officer of Gabelli Funds, LLC, and Marc Gabelli, portfolio manager for Gabelli Global Growth Fund ("GGGF"), under the antifraud provisions of the Investment Advisers Act of 1940. The SEC asserted that from 1999 to 2002, Alpert and Gabelli allowed an investor to engage in "market timing" in GGGF. The SEC asserted claims for civil penalties and for an injunction and disgorgement. Only the claim for civil penalties was before the Supreme Court, which the defendants moved to dismiss as untimely under § 2462:

> Except 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 if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The district court held that the action was indeed untimely. The Second Circuit reversed, holding that "because the underlying violations sounded in fraud, the 'discovery rule' applied to the statute of limitations."

On appeal to the Supreme Court, Alpert and Gabelli argued that "a claim based on fraud accrues – and the five-year clock begins to tick – when a defendant's allegedly fraudulent conduct occurs." The Court concurred. The Court reasoned that the "standard rule" that "a claim accrues when the plaintiff has a present cause of action" advances

> "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." … We have deemed them "vital to the welfare of society," and concluded that "even wrongdoers are entitled to assume that their sins may be forgotten."

The Court rejected the SEC's argument that the discovery rule should apply on two grounds: the government is "a different kind of plaintiff," and "it seeks a different kind of relief."

With respect to the former, the purpose of the discovery rule is "to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury." Because "[m]ost of us do not live in a state of constant investigation," if an injury is self-concealing, "private parties may be unaware that they have been harmed." By contrast, the "'central mission' of the Commission is to 'investigat[e] potential violations of the federal securities laws.'" The

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agency has "many legal tools at hand to aid in that pursuit."

On the latter, the Court emphasized that, unlike a private plaintiff who seeks compensation for a harm suffered, the SEC sought penalties intended to "punish" the defendants and label them "wrongdoers." Quoting Chief Justice Marshall, the Court observed, "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'"

After *Gabelli*, the discovery rule should not apply in FCPA civil enforcement actions. The Court's decision may have broader ramifications for the government's limitations contentions as well, as illustrated by *SEC v. Jackson* and *SEC v. Straub*.

SEC v. Jackson

On February 24, 2012, the SEC charged Mark Jackson, the former CEO of Noble Corporation, and James Ruehlen, a current Noble employee, with FCPA violations based on alleged improper payments to Nigerian officials in connection with temporary import permits for oil rigs. *SEC v. Jackson*, __ F. Supp. 2d __, No. H:12-00563 (Dec. 8, 2012). The defendants moved to dismiss on limitations grounds. There was no dispute that at least Jackson's challenged conduct occurred more than five years before the SEC initiated its civil enforcement action.

The SEC offered two bases for avoiding the limitations bar – the equitable doctrines of fraudulent concealment and continuing violations. Citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1947), the district court stated, "[t]he doctrine of fraudulent concealment is read into every federal statute of limitations." To invoke the defense, the plaintiff must prove two elements: that the defendant actively concealed the conduct complained of and that, despite the exercise of due diligence, plaintiff failed to discover the basis of his or her claim. The court concluded that the SEC had satisfied the first requirement by pleading that when improper payments were approved, they were logged as legitimate operating expenses; and Jackson had signed personal certifications attached to Noble's public filings to the effect that he had disclosed to Noble's auditors and audit committee any fraud or material weaknesses in Noble's internal controls. The court held, however, that the SEC had not pled facts supporting the inference that it acted diligently in bringing the complaint, given the disclosures Noble made to the SEC in June 2007.

Defendants additionally argued that the alleged violations were a series of discrete acts, and not continuous in nature. The court noted there was disagreement whether the continuing violation doctrine applies to securities cases but indicated the "understanding" that the doctrine "simply [] require[s] pleading continuous, unlawful acts with at least one violation that is within the statute of limitations." The court, however, again held that the SEC failed adequately to plead such a violation.

On December 11, 2012, and thus prior to the *Gabelli* decision, the court granted the SEC leave to amend its complaint. On February 22, 2013, the defendants filed a new motion for partial dismissal, arguing that the amended complaint failed to remedy the deficiencies. The motion is currently being briefed.

Once issued, the court's ruling should prove instructive. *Holmberg* involved a suit between private parties. Although *Gabelli* noted that it was addressing only the discovery rule, the reasoning of the opinion casts doubt on the applicability of equitable tolling doctrines generally to civil enforcement actions. Moreover, the alleged cover-up constitutes little, if anything, more than the conduct constituting the underlying offense. As Judge Scheindlin recently observed in an FCPA case, albeit in a somewhat different context,"[i]llegal corporate actions almost always require cover-ups, which to be successful must be reflected in financial statements." *SEC v. Sharef*, __ F. Supp. 2d __, No. 11 Civ. 9073 (SAS) (Feb. 19, 2013). If the government is permitted, in effect, to merge alleged concealment with the substantive offense, the limitations period would become a nullity.

SEC v. Straub

On February 8, 2013, the district court in *SEC v. Straub*, __ F. Supp. 2d __, No. 11 Civ. 9645 (Feb. 8, 2013), denied a motion to dismiss an FCPA civil enforcement action against three executives of Magyar Telekom Plc ("Magyar") arising from alleged payments to Macedonian officials intended to hinder the issuance of a license to a mobile phone company that was to compete with Magyar.

The defendants moved to dismiss on limitations grounds. It was again undisputed that the conduct in question took place more than five years before the SEC filed suit. The SEC argued that, nevertheless, the limitations period of § 2462 had not run because the statute only applies "if, within the same period, the offender … is found within the United States in order that proper service may be made thereon," and the defendants had not been physically present in the United States within the five-year period.

Defendants responded that the purpose of the statutory language was to assure that proper service was possible and that the defendants had, in fact, been properly served abroad under the Hague Service Convention (though outside the limitations period). Moreover, if the SEC's interpretation were adopted, then foreign defendants would find themselves subject to an indefinite limitations period. In a decision of first impression, the court rejected those arguments stating that the plain language of the statute dictated that the defendant be "found" within the United States before the limitations period begins to run.

The defendants moved the district court to certify the order denying their motion to dismiss for interlocutory appeal to the Second Circuit. If given the opportunity to challenge the decision, the defendants will likely argue that the Supreme Court's language in *Gabelli* concerning the importance of repose supports their assertion that the limitations period of § 2462 should apply when a foreign defendant is subject to proper service abroad.

Conclusion

Due to the lack of case law, the government's aggressive limitations arguments remain largely untested. The state of affairs is beginning to change with the increasing number of individual prosecutions.

Gabelli does not portend a sea change with respect to the government's ability to pursue violations based on long-ago conduct. Corporations will continue to settle FCPA charges and to enter into tolling arrangements, and the government will continue to have a number of tools in its arsenal for extending the applicable limitations periods.

Still, for those cases that do not settle, it would appear that the government's options may be narrowing. The holding of *Gabelli* is important in and of itself. Application of the discovery rule to foreign bribery cases would mean the virtually automatic extension of the limitations period. If the *Gabelli* decision is extended to eliminate or restrict other equitable tolling doctrines, such as fraudulent concealment or continuing violations, its impact will be that much greater. Further, the Court's decision could conceivably serve as the basis for holding that, at least in certain circumstances, claims for equitable relief such as an injunction or disgorgement are not designed to compensate a victim and thus fall outside of the limitations period of § 2462, but are rather a penalty designed to "punish" a defendant and label him or her a "wrongdoer." Indeed, two weeks before *Gabelli* was decided, the SEC sought Supreme Court review of the Fifth Circuit's decision in *SEC v. Bartek*, an options backdating case, in which the court held the injunctions sought were penal in nature and thus subject to § 2462. *Bartek* might serve as an opportunity for the Supreme Court to build upon and expand *Gabelli*, with potentially significant further implications for FCPA enforcement.