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The Statute of Limitations Governing SEC Actions Against Foreign Defendants

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There is no express statute of limitations governing lawsuits instituted by the Securities and Exchange Commission (SEC), including for violations of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1, *et seq.*; thus, the federal "catch-all" statute of limitations, 28 U.S.C. § 2462, applies to any such claims for civil penalties. That statute provides: "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 Tolling Provision

Although targets of the SEC's FCPA investigations increasingly are foreign issuers and foreign defendants who never have resided in the United States, there is scant case law interpreting the tolling provision of § 2462 ("if … the offender is found within the United States … ."). Recently, a federal district court judge in the Southern District of New York issued an expansive interpretation of the tolling provision, effectively holding that the statute of limitations is tolled indefinitely so long as the foreign defendant is not found within the United States. We argue that this holding fails to sufficiently credit the stated and unambiguous purpose for which § 2462 was enacted, and ignores the important laudatory purposes of statutes of limitations, as recently reaffirmed in the Supreme Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013).

The Evolution of the Federal 'Catch-All' Statute of Limitations

Section 2462 "is a general statute of limitations, applicable … to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). The first precursor to § 2462 was passed in the 1790s. *Id.* at 1458, n.7. At that time, legislators could only authorize service of process within the borders of the United States; defendants located abroad were inaccessible and could not be served. Congress added the tolling provision — "if found within the United States" — in 1839 (*3M Co.*, 17 F.3d at 1458, n.7), and at least one court has determined that its purpose was to ensure that "in suits for pecuniary penalties there must have been, within the five years, an opportunity for personal service on the defendant." *United States v. Brown*, 2 Low. 267, 24 F. Cas. 1263 (D. Mass. 1873). The current version of § 2462 was adopted on June 25, 1948, and has not been revised or amended since.

A dramatic sea change occurred two decades later, in late 1969, with the ratification of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638 (1969), a multilateral treaty that provides for a simplified means for parties in signatory states to effect service in other contracting states. Approximately 68 countries, including the United States, are contracting states to the Hague Service Convention. The Convention was added to Fed. R. Civ. P. 4(f)(1) in 1993 as an authorized means of effecting service under the Federal Rules of Civil Procedure.

Even in the absence of an international treaty, service can still be made by other means, including as prescribed by the foreign country's law, through letters rogatory, or by mail with signed receipt (unless prohibited by the foreign country's law). *See* Fed. R. Civ. P. 4(f)(2)(B); *OS Recovery, Inc. v. One Groupe Int'l, Inc.*, No. 02 Civ. 8993, 2005 WL 1744986, at *1 (S.D.N.Y. July 26, 2005) (permitting direct service by mail on a party in Australia before that country had ratified the Hague Convention). Thus, since enactment of the tolling provision in § 2462, whose principal purpose was to permit service on the defendant before the statute of limitations begins to run, service is now possible on extraterritorial defendants.

A Troubling Interpretation

On Feb. 8, 2013, Judge Richard J. Sullivan issued an important FCPA ruling in *SEC v. Straub*, No. 11 Civ. 9645 (RJS),

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2013 WL 466600, (S.D.N.Y. Feb. 8, 2013). In *Straub*, the SEC brought a civil enforcement action against three senior executives of a Hungarian telecommunications company, Magyar Telekom. The defendants allegedly paid bribes to government and political party officials in Macedonia and Montenegro in 2005 and 2006 in order to win business and shut out competition in the telecommunications industry. The SEC alleges that these executives used sham "consultancy" and "marketing" contracts to pay millions of dollars of bribes to these foreign officials, and then caused the bribes to be falsely recorded in Magyar's books and records. Additionally, they allegedly made false certifications to Magyar's auditors, who, in turn, provided unqualified audit opinions that accompanied the filing with the SEC of Magyar's annual reports. (Magyar is publicly traded through ADRs on the New York Stock Exchange).

The executive defendants moved to dismiss on three grounds: 1) personal jurisdiction; 2) statute of limitations; and 3) failure to state a claim. Judge Sullivan denied the motions to dismiss in their entirety. While the ruling has deservedly received much attention for its holding regarding personal jurisdiction over foreign defendants, commentators have paid insufficient attention to the court's holding regarding the statute of limitations issue, even though *Straub* is the first case in the modern era to interpret the tolling provision of § 2462. In *Straub*, there was no dispute that the SEC conceded the alleged FCPA violations had occurred more than five years prior to the commencement of the action; that the defendants all resided outside the United States; and that the SEC did not attempt to serve them outside of the United States within five years of the violations despite the fact that Hungary is a signatory to the Hague Service Convention. Rather, it was not until Dec. 21, 2011, more than five years after the claims accrued — and, indeed, more than five years after Magyar voluntarily disclosed the violations to the SEC — that the agency filed its complaint.

That complaint was ultimately served on the defendants in March and April 2013, by mail, through the Hague Service Convention. Nonetheless, Judge Sullivan ruled that § 2462 did not even begin to run because the defendants were never present in the United States. *Id*. At *12. The court found that statute unambiguous and determined that modern-day service practices "do[] not change the fact that Congress has maintained the statutory carve-out for defendants not found within the United States." *Id*. Thus, even if the purpose of the carve-out "may no longer be as compelling as it might have once been," the court did not want to "second-guess Congress and amend the statute on its own." *Id*.

Supreme Court Decision Casts Doubt

A mere 19 days after *Straub*, on Feb. 27, 2013, the Supreme Court issued an opinion in *Gabelli v. SEC* that, while not addressing the precise tolling provision at issue in *Straub*, analyzes § 2462 as applied to SEC enforcement actions in a manner that casts a long shadow over the court's decision in that case. In *Gabelli*, the Supreme Court unanimously rejected the SEC's attempt to argue that the "discovery rule" delays the running of § 2462's five-year limitations period until the fraud is discovered or could have been discovered with reasonable diligence. In reversing the Second Circuit, the Supreme Court set a "fixed date when exposure to specified Government enforcement efforts ends," thereby advancing the fundamental purposes of statutes of limitations, namely "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id*. at 1221.

Of particular importance to the Supreme Court's ruling was the fact that the plaintiff in the case was not an individual, who might not know that a fraud had been perpetrated upon her, but rather the SEC, whose "central mission … is to investigate potential violations of the federal securities laws." *Id*. at 1222 (quotations and alterations omitted). Thus, engrafting a discovery rule onto § 2462 "would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id*. at 1223. That, however, "would be utterly repugnant to the genius of our laws" (*id*. at 1223), because, as the Court emphasized, "even wrongdoers are entitled to assume that their sins may be forgotten." *Id*. at 1221.

Conclusion

Foreign wrongdoers deserve no less protection than that afforded by the Supreme Court to the defendants in *Gabelli*. "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." *Adams v. Wood*, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.). While Judge Sullivan's ruling in *Straub* purports to adhere to the plain meaning of § 2462, the statute is ambiguous, in that the tolling provision arguably does not apply unless "the defendant is outside of the United States, precluding service of process." *S.E.C. v. Bartek*, 484 Fed. App'x 949, 953, 2012 WL 3205446, at *3 (5th Cir. 2012). Even without any such ambiguity, it would be proper to interpret the statute in light of the unambiguous statement of purpose in the statute itself ("in order that proper service may be made thereon.").

Allowing foreign defendants to be subject to federal enforcement actions indefinitely is exactly the result against which the Supreme Court cautioned in *Gabelli*. And the *Straub* rule is particularly troublesome in the FCPA context, where authorities increasingly are targeting non-U.S. companies and foreign executives. *See* Leslie Wayne, "Foreign Firms Most Affected by a U.S. Law Barring Bribes," *New York Times*, Sept. 3, 2012.

Take, for example, potential violations by a foreign company that has no U.S. subsidiary, does not otherwise operate in the United States, and is alleged to have paid bribes in a distant country. Should the SEC be permitted to bring an action against the company or its foreign executives decades later, after evidence has been lost, memories faded, and witnesses have long become unavailable or died? The Second Circuit may soon get an opportunity to answer that question, and to interpret § 2462 in light of the Supreme Court's *Gabelli* ruling, now that the *Straub* defendants have sought leave to appeal.

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