

**Alert | White Collar Defense & Special Investigations**



August 2018

## **Caution: When Time Runs Out in the U.S. on White Collar Criminal Conduct, It May Not Be the End of the Story**

The UK is copying the United States in a variety of respects regarding the development of its investigation and disposal of white collar and corporate crimes, for example the introduction of the Bribery Act, lower evidential burden, deferred prosecution agreements, etc. Where matters touch upon both the United States and the UK, however, it is critical to understand the similarities and differences (which are sometimes stark) between the two systems.

One area where the U.S.-UK difference is plain relates to time bars – an area that the Securities and Exchange Commission (SEC) itself has acknowledged creates difficulties.

In the UK, the position is simple: there is no statute of limitations in the UK on historic criminal conduct.

In stark contrast, the United States *does* apply a statute of limitations to the SEC and Department of Justice's prosecution of criminal conduct.

### **The SEC**

U.S. courts, including the Supreme Court, have **held** that SEC actions seeking to disgorge ill-gotten gains are subject to a five-year statute of limitations on civil fines, penalties, or forfeitures under 28 U.S.C. § 2462, as the imposition of disgorgement constitutes a penalty. The applicable statute of limitations 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 Supreme Court finding that disgorgement is a ‘penalty’ within 2462 is broadly based on the following: 1) Disgorgement is a “consequence for violating...public laws”; 2) The SEC uses disgorgement as a punitive measure and “to deter violations of the securities laws by depriving violators of their ill-gotten gains”; and 3) In many cases, SEC disgorgement is not compensatory, as while disgorged payments are sometimes used to compensate victims, at other times they are remitted to the Department of the Treasury.

Importantly, the statute of limitations runs from when a defendant engages in the alleged misconduct, not when they receive compensation in connection with that misconduct.

Steven R. Peikin, co-director of the SEC’s Enforcement Division, [acknowledged in a speech](#) the challenge that this time bar creates. In light of the 2017 Supreme Court decision in *Kokesh v. SEC*, he noted the following:

Finally, no discussion about the future of FCPA enforcement would be complete if I did not address one of the other principal challenges we face; namely, the interplay between the length of time it takes to conduct an FCPA investigation and the statute of limitations.

In many instances, by the time a foreign corruption matter hits our radar, the relevant conduct may already be aged. And because of their complexity and the need to collect evidence from abroad, FCPA investigations are often the cases that take the longest to develop. In contrast to the Department of Justice, the statute of limitations is not tolled for us while our foreign evidence requests are outstanding.

These limitations issues have only grown in the wake of the U.S. Supreme Court’s recent decision in *Kokesh v. SEC*, in which the Court held that Commission claims for disgorgement are subject to the general five-year statute of limitations. *Kokesh* is a very significant decision that has already had an impact across many parts of our enforcement program. I expect it will have particular significance for our FCPA matters, where disgorgement is among the remedies typically sought.

While the ultimate impact of *Kokesh* on SEC enforcement as a whole – and FCPA enforcement specifically – remains to be seen, we have no choice but to respond by redoubling our efforts to bring cases as quickly as possible. Even irrespective of *Kokesh*, this approach makes sense because our cases have the highest impact, and our litigation efforts are most effective, when we bring our cases close in time to the alleged wrongful conduct.

## **DOJ**

The position of the DOJ is slightly different than that of the SEC. Under 18 U.S.C. § 3292, the statute of limitations can be tolled for the DOJ while DOJ foreign evidence requests are outstanding.

18 U.S.C. § 3292 permits federal prosecutors to apply, *ex parte*, to the district court before which a grand jury is impaneled for suspension of the statute of limitations for up to three years while awaiting evidence

that reasonably appears to be located in foreign country. This suspension is allowed while the official request of the relevant foreign government for such evidence is pending.

### Overcoming Time Bars

To overcome time bar issues, the SEC and DOJ often use so-called ‘tolling agreements’ where the parties agree to toll the statute of limitations applicable to specified matters that are the subject of investigation.

For tolling agreements to be effective, they must be in place at the relevant time and drafted sufficiently broadly to capture the relevant claim.

### Conclusion

The stark difference between U.S. and UK time bar law (and potentially other non-U.S. jurisdictions) underscores the importance of taking a global view of such matters. The international nature of investigations, the different law enforcement agencies in different countries that may have jurisdiction, and the numerous collateral consequences flowing from misconduct mean that a U.S. statute of limitations time bar may well not be the end of the story.

## Authors

This GT Alert was prepared by **Barry Vitou** and **A. John Pappalardo**. Questions about this information can be directed to:

- **Barry Vitou** | +44 (0) 203.349.8700 | [vitoub@gtlaw.com](mailto:vitoub@gtlaw.com)
- **A. John Pappalardo** | +1 617.310.6072 | [pappalardoj@gtlaw.com](mailto:pappalardoj@gtlaw.com)
- Or your **Greenberg Traurig attorney**

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. <sup>~</sup>Houston. Las Vegas. London. <sup>\*</sup>Los Angeles. Mexico City. <sup>+</sup>Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. <sup>∞</sup>Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. <sup>^</sup>Tokyo. <sup>²</sup>Warsaw. <sup>-</sup>Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Any legal advice depends on the specific circumstances of a matter and consultation with legal counsel is required. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. <sup>~</sup>Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>\*</sup>Operates as a separate UK registered legal entity. <sup>+</sup>Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>∞</sup>Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. <sup>^</sup>Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. <sup>²</sup>Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>-</sup>Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2018 Greenberg Traurig, LLP. All rights reserved.*