

## Statute of limitations on bribery—UK and US perspectives

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**Corporate Crime analysis: In US bribery cases, unlike in the UK, enforcers face a five-year statute of limitations on the disgorgement of ill-gotten gains. Barry Vitou, shareholder and head of Greenberg Traurig LLP's white collar defence and special investigations practice in London, and John Pappalardo, shareholder and co-chair of the firm's global white collar criminal defence practice in Boston, highlight the SEC and DOJ use of tolling agreements and explain why, from a limitation perspective, it's important for practitioners to take a 'global view' when advising on corporate investigations.**

**There is a statute of limitations in the US. Can you explain the effect of this and what the position is regarding limitation in the US versus the UK?**

As is noted, the US does include a statute of limitations which applies to the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ). The position in respect of the SEC and DOJ is slightly different.

Dealing first with the SEC, US 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 US Code (USC) para 2362, as the imposition of disgorgement constitutes a penalty. The relevant statute of limitations applied provides:

'Except as otherwise provided by Act of Congress, any 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 reasons given by the Supreme Court for finding that disgorgement is construed as a 'penalty' within 2362 are broadly:

- first, disgorgement is a 'consequence for violating...public laws'
- second, the SEC uses disgorgement 'to deter violations of the securities laws by depriving violators of their ill gotten gains' and is punitive
- third, that 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 US Treasury

Importantly, the statute of limitations runs from when a defendant allegedly engages in misconduct, not when they receive compensation in connection with that misconduct. This potentially anchors claims at a fixed point in time which may have long since passed when the alleged misconduct is uncovered.

The SEC itself has acknowledged the challenge that this creates. In a speech given by Steven R Peikin, co-director, Enforcement Division, following the Supreme Court decision, Mr Peiken said:

'Finally, no discussion about the future of FCPA [Foreign Corrupt Practices Act] 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 DOJ, 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 US 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.'

It is worth noting that the position is slightly different in DOJ investigations. While these are likewise subject to the general Statute of Limitations in 2362 the statute of limitations can be tolled for the DOJ while DOJ foreign evidence requests are outstanding under 18 USC para 3292. This permits federal prosecutors to apply, *ex parte*, to the district court before which grand jury is impanelled, for suspension of statute of limitations for up to three years while awaiting evidence that reasonably appears to be located in foreign country while official request of relevant foreign government for such evidence is pending.

In practice, to overcome time-barring issues, the SEC and the DOJ often use so-called 'tolling agreements' where the parties agree to toll the statute of limitations applicable to specified matters the subject of investigation—though for these to be effective they will need to be drafted to ensure they are sufficiently broad to capture the relevant claim and in place at the relevant time.

Notwithstanding their many similarities, the US statute of limitations is another example of the difference between the UK and the US systems. There is no statute of limitations in the UK. This means that it will be important to ensure that US and UK counsel work closely together where, as in many cases, the fact pattern touches 'both sides of the pond' to ensure advice is obtained so the complete picture can be understood.

## **Does the statute of limitations apply to companies in the same way as it applies to individuals, and how does this impact corporate investigations/self-reporting/settlement negotiations with regulators in the US?**

Yes, the statute of limitations applies to companies in the same way as it applies to individuals. As Mr Peiken himself has noted, the recent cases mean that the SEC can be expected to redouble its efforts to bring cases quickly. It is expected that corporates will still wish to investigate alleged misconduct, without doing so they will not be in a position to know whether conduct is historic or current and therefor whether or not it might be time-barred in the US.

The factor of whether or not something is time-barred should be a consideration (among many others) when a corporation is determining whether or not to self-report. This is a complex calculus and many unique factors may, or may not, drive a self-report.

## **There is no equivalent in the UK. How do you think the interplay with the two regimes will play out in cross-border investigations and cross-border resolutions?**

While increasingly UK law enforcement is following the US approach, there remain a variety of legal and practical differences between the approach taken in the US and UK. This difference between the regimes could result in further cross-border co-operation among US/UK law enforcement agencies.

For example, where US enforcement authorities consider that they may be time-barred, they may work with UK (or other non-US) enforcement agencies who also have jurisdiction and who may not be subject to time-barring issues, to achieve their desired objective.

## **What considerations should practitioners advising on corporate investigations bear in mind from a limitation perspective?**

This underscores again the importance of a 'global view'. 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 US statute of limitation time bar may well not be the end of the story.

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