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Multilateral Development Banks to Cross-Bar in Effort to Combat Corruption

The World Bank and four regional development banks[1] recently agreed to "cross-bar" companies and individuals found to have engaged in corruption, fraud, coercive practices, or collusion. In doing so, these institutions have significantly raised the potential consequences of corrupt or fraudulent practices for companies involved in the development sector. The agreement follows efforts among multilateral development banks ("MDBs") to develop a consistent approach to addressing issues of corruption and fraud. World Bank President Robert B. Zoellick described the cross-debarment agreement as sending this message: "Steal and cheat from one, get punished by all." Previously, companies and individuals debarred by one MDB could continue to obtain contracts on projects financed by other MDBs.

Longtime Concerns About Corruption

Corruption was placed firmly on the agenda of MDBs in 1996, when James D. Wolfensohn, then the President of the World Bank, described corruption as a "cancer" that "diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors."[2] Since that time, MDBs have developed a range of mechanisms to address corruption.

Existing Anti-Corruption Efforts

One example of the anti-corruption programs the MDBs instituted is the World Bank's Integrity Vice-Presidency, which investigates allegations of fraudulent, corrupt, collusive, coercive, or obstructive practices in projects the World Bank finances or supports. If an investigation determines that such wrongdoing occurred, the World Bank's Sanctions Board may impose sanctions on a company or an individual. The sanctions are publicly disclosed. The World Bank's Sanctions Board

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1 The African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group.

2 *President James D. Wolfensohn on Strategic Issues of the World Bank Group*, Transition, Vol. 7, Nos. 9-10 (Sept.-Oct. 1996), http://www.worldbank.org/html/prddr/trans/so96/art3.htm.

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Michael M. Ostrove

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IBA Criminal Law Section
Paris
Conference Brochure:
http://www.int-bar.org/conferences/conf328/binary/Paris%20Transnational%20Crime%20programme.pdf

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is empowered to impose the following penalties:

- debarment of a company or individual from World Bank projects, either indefinitely or for a stated period;
- conditional non-debarment (i.e. no debarment if the company or individual complies with certain remedial, preventive, or other measures);
- debarment with conditional release, whereby the company or individual's period of debarment will be reduced or terminated if certain conditions are complied with, such as the implementation of compliance programs;
- restitution; and
- reprimands.

Currently, over 160 companies or individuals are barred from World Bank contracts. In 2006, the World Bank also introduced a Voluntary Disclosure Program ("VDP") intended to encourage companies or individuals to disclose past fraudulent and corrupt conduct on World Bank projects. In exchange for voluntarily disclosing misconduct, participants in the VDP will not be debarred. The VDP is a confidential process, and the fact of participation is not publicly disclosed. Participation in the VDP involves conducting an internal investigation, disclosing the results of that investigation to the World Bank, and adopting a compliance program monitored for three years by a compliance monitor.

In recent years, other MDBs have adopted their own initiatives to address corruption and fraud, including initiatives similar to those of the World Bank.

Coordination Among MDBs

In 2006, the World Bank, International Monetary Fund, European Investment Bank Group, and the four regional development banks formed an Anti-Corruption Task Force and agreed to work toward a "consistent and harmonized approach to combat corruption" and to better coordinate their efforts.

The new cross-debarment agreement builds on the Anti-Corruption Task Force's September 2006 Uniform Framework for Preventing and Combating Fraud and Corruption ("Uniform Framework"). Key elements of the harmonized approach include standardized definitions of sanctionable practices and an agreement to share information in connection with investigations of such conduct. The Uniform Framework also includes a commitment to "explore further how compliance and enforcement actions taken by one institution can be supported by the others."

Cross-Debarment Agreement

Nearly four years later, the World Bank and the four regional development banks each agreed in April 2010 to enforce the debarment decisions of another participating MDB where, among other criteria, the term of debarment exceeds one

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C5
London
Conference Brochure:
http://www.c5-online.com/AntiCorruptionLON/workshop.htm

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Third China Summit on Anti-Corruption
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C5/ACI
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http://www.c5-online.com/AntiCorruptionChina.htm

June 24, 2010
Karolos Seeger

European Healthcare Compliance Programme
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Seton Hall University School of Law and SciencesPo.
Paris
Conference Brochure:
http://law.shu.edu/ProgramsCenters/HealthTechIP/HealthCenter/HCCP/international/index.cfm

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year and the underlying debarment decision is made public. The cross-debarment agreement applies only to future and not past debarments.

The initial debarment decision must be based on conduct falling within the harmonized definitions of sanctionable practices in the Uniform Framework. The four categories of prohibited conduct are corrupt, fraudulent, coercive, and collusive practices. A corrupt practice is defined as "the offering giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party"—a definition that includes private actors. This contrasts with the United States Foreign Corrupt Practices Act, which prohibits bribes only to foreign "officials" (although the new United Kingdom Bribery Act also applies in the private context).

The cross-debarment agreement contains a significant carve-out: An MDB party to the agreement "may decide not to enforce a debarment by [another MDB] where such enforcement would be inconsistent with its legal or other institutional considerations." Thus, the institutions have significant discretion to opt out of enforcing particular debarments. The carve-out provides that in such instances, the non-enforcing institution will notify the other institutions of its decision. However, the carve-out does not appear to require the non-enforcing institution to explain how its decision was reached.

Conclusion

The cross-debarment agreement significantly increases the stakes for companies involved in the development sector, particularly those that work with more than one MDB. While companies accused of corruption can find themselves subject to investigation in various jurisdictions and can potentially be debarred from government contracts in different jurisdictions, each of these jurisdictions conducts it own investigation and has its own legal process. What is noteworthy about the cross-debarment agreement is that a company with an entirely "clean" record with respect to its activities with one MDB presumptively will be debarred by that institution if it has been debarred by another MDB (unless the carve-out applies). No further investigation is required. Consequently, the cross-debarment agreement provides yet another reason for companies involved in the development sector to maintain strong compliance programs, and specifically to address the sanctionable practices under the Uniform Framework. ■

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Navigating Statutes of Limitations in the Enforcement Context

The limitations period applicable to FCPA violations and other enforcement actions is of critical importance to private parties subject to the statute and related laws. Proper analysis of the limitations period and the impact of the related doctrine of laches has an important impact on matters ranging from whether a company has a compliance event that may trigger reporting obligations to if the company has a document retention policy sufficient to enable it to defend itself against FCPA allegations. In this article, we examine the applicable statutes in their criminal and civil enforcement contexts. We also discuss tolling agreements, the equitable doctrine of laches, the Supreme Court's recent clarification of the statute of limitations in securities fraud cases in *Merck & Co., Inc. v. Reynolds*,[1] and the ramifications it might have for future FCPA enforcement actions.

Despite the limits imposed by statutes of limitations and the doctrine of laches, government agencies have found ways to investigate and bring claims relating to bribery allegations many years after they occurred. Among the tools the government has to overcome these limits are charging conspiracy in criminal cases, tolling agreements, and equitable claims. The *Merck* decision, which states that the statute of limitations in private party cases brought under the '34 Act begins to run only when the plaintiff has discovered all of the facts, including those facts showing the defendant's scienter, may also extend the time the government has to bring suit in FCPA cases should a court choose to use the *Merck* holding by analogy.

The FCPA itself does not have a statute of limitations provision. Instead, the governing limits are those found in the "catch-all" five-year statutory period set forth in 18 U.S.C. § 3282 on the criminal side and 28 U.S.C. § 2462 on the civil side.

Criminal Context

In criminal cases, the statute of limitations begins running when the crime is "complete."[2] The statute of limitations set forth in 18 U.S.C. § 3282 constrains the government such that it can no longer prosecute five years after the completion of a crime. In the context of an FCPA bribery violation, the crime is complete when the bribe scheme ends. The government has taken the view that ongoing revenue streams derived from a bribe are part of the crime for purposes of calculating the statute of limitations, so it is possible that the criminal conduct would not be considered "complete" even after the payment or offer of the payment of a bribe.

One way in which the government can overcome the five-year limit is to charge individuals or companies with conspiracy to violate the FCPA under 18 U.S.C. § 371. Conspiracy is a continuing offense that is triggered by an "overt act." In conspiracy cases, the government needs to demonstrate only that one "overt act" occurred during the limitations period.[3] The statute of limitations begins running on the date of the last "overt act,"[4] thus, the government may prosecute criminal behavior that is more than five years old if the conspiracy ended within the past five years. The last "overt act" may not necessarily be the bribe offer or the making of a payment; steps taken after the offer or payment may also qualify. For example, in *U.S. v. Bigelow*, mailing an original copy of a corrupt purchase agreement following the payment of a commission to a foreign official was deemed an overt act.[5]

It was by bringing conspiracy charges that the government in 2008 was able to press charges against three subsidiaries of Siemens AG, the German engineering conglomerate, for activities that took place well beyond five years prior.[6] The government charged Siemens S.A. Argentina with conspiracy related to payments the company allegedly made

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1 *Merck & Co., Inc. v. Reynolds*, 559 U.S. __ (2010), www.supremecourt.gov/opinions/09pdf/08-905.pdf.

2 *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

3 *United States v. Milstein*, 401 F.3d 53, 71 (2d Cir. 2005).

4 *Fishwick v. United States*, 329 U.S. 211 (1946).

5 *United States v. Bigelow*, Crim. No.: 09-cr-346-RJL (D.D.C. 2009).

6 DOJ Press Rel. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines; Coordinated Enforcement Actions by DOJ, SEC, and German Authorities Result in Penalties of $1.6 Billion, (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

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between 1998 and 2007 to Argentine officials in exchange for favorable business treatment in connection with a $1 billion national identity card project. In addition, from the date Siemens AG was first listed on the New York Stock Exchange on March 12, 2001 through January 2007, Siemens Argentina purportedly made $31,263,000 in corrupt payments to Argentine officials. Again, conspiracy was the charged offense.[7] Siemens Venezuela faced conspiracy charges for payments it made between November 2001 and May 2007 of at least $18,782,965 to Venezuelan officials in return for preferential status on two major metropolitan mass transit projects.[8] Siemens Bangladesh, pleading guilty to conspiracy, admitted that from May 2001 to August 2006, it paid bribes of about $5,319,839 to Bangladeshi officials to gain advantages in the bidding process on a mobile telephone project.[9] Thus, through conspiracy charges, the various Siemens subsidiaries were held accountable for acts that had occurred ten years or more prior to the guilty pleas.

More recently, the government used the same tactic of charging conspiracy to violate the FCPA with Daimler AG,[10] a German corporation, and three of its subsidiaries. Daimler allegedly engaged in a decade-long scheme of making corrupt payments to foreign officials in at least 22 countries that garnered $50 million in profits for the company. Daimler entered into a deferred prosecution agreement and agreed to the filing of a criminal information charging one count of conspiracy to violate the books and records provisions of the FCPA and one count of violating those provisions.[11] The company's Chinese subsidiary, DaimlerChrysler China Ltd. ("DCCL"), which is now known as Daimler North East Asia Ltd., admitted that it made improper payments in the form of commissions, travel, and gifts to Chinese government officials in connection with sales of commercial vehicles and Unimogs to various Chinese government customers. DCCL entered into a deferred prosecution agreement and agreed to the filing of a criminal information charging it with one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions.[12] Daimler's Russian subsidiary DaimlerChrysler Automotive Russia SAO ("DCAR"), now known as Mercedes-Benz Russia SAO, confessed to making improper payments to Russian government officials to secure contracts to sell vehicles by over-invoicing the customer and paying the excess amount back to the officials or other designated third parties that provided no legitimate services to DCAR or Daimler AG. DCAR pleaded guilty to a criminal information charging one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions.[13] DCAR's German subsidiary, Export and Trade Finance GmbH ("ETF"), admitted to making corrupt payments to Croatian government officials and to third parties, including two U.S.-based corporate entities, with the understanding that the payments would be passed on to Croatian government officials to help push through the sale of 210 fire trucks. ETF pleaded guilty to a criminal information charging one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions.[14] In total, Daimler and its subsidiaries will pay $93.6 million in criminal fines and penalties.[15]

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7 *Id.*

8 *Id.*

9 *Id.*

10 For more details on the Daimler case, see *FCPA Update* Vol. 1, No. 7 (Feb. 2010), http://www.debevoise.com/files/Publication/9ea573d9-b41c-477b-9861-01f17cee6c9c/Presentation/PublicationAttachment/887c2335-d8c4-4978-a824-23131f02b335/FCPAUpdateFebruary2010.pdf, and Vol. 1, No. 9 (Apr. 2010), http://www.debevoise.com/files/Publication/0ba57376-052a-48e3-aa86-107980556ca5/Presentation/PublicationAttachment/6e879908-8795-4076-8720-253c7d86d07b/FCPAUpdateApril2010.pdf.

11 DOJ Press Rel. 10-360, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties; Combined Criminal and Civil Penalties of $185 Million to be Paid (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

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Civil Context

The 1996 D.C. Circuit case of *Johnson v. Securities and Exchange Commission*[16] ("SEC") was a watershed in SEC enforcement practice, which had previously assumed that the Commission could reach as far back as necessary to seek punishment for alleged violations. In *Johnson*, the U.S. Court of Appeals for the D.C. Circuit held that 28 U.S.C. § 2462, which provides that "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," applied to any SEC administrative proceeding in which the SEC had sought a civil penalty.[17] The court defined "penalty" as "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action."[18] The court further stated that where equitable relief was punitive in nature or there was insufficient proof that the relief the SEC requested had a remedial purpose, the five-year limitations of § 2462 applied.[19]

Section 2462 does not, however, apply to SEC enforcement actions that are purely remedial, including "where the effect of the SEC's action is to restore the status quo ante, such as through a proceeding for restitution or disgorgement of ill-gotten profits…."[20] It also generally does not apply to cases in which injunctive or other equitable relief is sought.[21]

One challenge courts face in applying § 2462 is determining the factors necessary to toll the five-year limitations period. Two cases that demonstrate the contrasting ways in which courts have addressed this issue are *SEC v. Koenig*,[22] a Seventh Circuit decision, and *SEC v. Jones*,[23] which was heard in the Southern District of New York.

In *Koenig*, the Seventh Circuit held that the limitations period began when the SEC reasonably discovered the alleged fraud.[24] The court declined to determine when a claim accrues for the purposes of § 2462 generally because of a "special rule for fraud, a concealed wrong."[25] The court explained that it was "unimportant" whether a court took the view that a claim for fraud accrued only on its discovery or when a person exercising reasonable diligence could have discovered it, or the opposing position that the claim accrues with the wrong. Either way, a victim of fraud has the time from the date the wrong came to light or would have come to light had diligence been applied by the plaintiff.[26] Koenig was the CFO of Waste Management, Inc. He devised several accounting strategies a jury found fraudulent from which he was able to obtain large bonuses. Although all of Koenig's misconduct occurred before January 1997, when he stepped down as CFO, the SEC did not file its complaint until March 26, 2002. The SEC did not discover the fraud until October 1997, when a press release Waste Management issued put the SEC on notice of the need for an inquiry.[27] Under the special rule for fraud, the SEC's action fell within the statute of limitations.

In *Jones*, the court held that the SEC's claim for civil penalties was time-barred because equitable tolling was not warranted under the fraudulent concealment doctrine.[28] The SEC alleged that the defendants, who were the Chief Executive Officer and the North American Head of Fund Administration of Citigroup Asset Management ("CAM"), a

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16 *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996).

17 *Id.* at 488-89

18 *Id.* at 488.

19 *Id.* at 490.

20 *Id.* at 484, 491.

21 *SEC v. Kelly*, 663 F. Supp.2d 276, 287 (S.D.N.Y. 2009).

22 *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2008).

23 *SEC v. Jones*, 476 F. Supp. 2d 374 (S.D.N.Y. 2007).

24 *See Koenig*, note 22, *supra* at 739.

25 *Id.*

26 *Id.* The court went on to note that the United States is entitled the same benefit as a victim of fraud even when it sues to enforce laws that protect its citizens from fraud, but is not itself a victim (citing *Exploration Co. v. United States*, 247 U.S. 435, (1918)).

27 *See Koenig*, note 22, *supra* at 738-39.

28 *See Jones*, note 23, *supra* at 381-3.

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business unit of Citigroup, Inc., had failed to disclose to the boards of mutual funds the benefits CAM would receive from a transfer agent arrangement with an outside vendor.[29] The purported wrongdoing occurred in early summer 1999 and the SEC brought its claim in August 2005.[30] The court explained that, given the six-year interval that elapsed, the SEC had to demonstrate that it was entitled to tolling the limitations period. In order to do so, the SEC had to show (1) defendants concealed the existence of the cause of action, (2) the SEC did not discover the alleged wrongdoing until some point within five years of commencing the action, and (3) the SEC's continuing ignorance was not attributable to a lack of diligence on its part.[31] The court held that the concealment element is satisfied where the SEC can prove either that the defendants took affirmative steps to prevent the discovery of the fraud or that the wrong was self-concealing in nature.[32] Here, the SEC asserted the latter. The court explained, however, that standing alone, allegations of fraud are insufficient to prove that a particular act is self-concealing.[33] For a fraud to be self-concealing, the defendant must have perpetrated "some misleading, deceptive, or otherwise contrived action or scheme, in the course of committing the wrong, that [was] designed to mask the cause of action… Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[34] The court held that the SEC had not met its burden to show that the defendants' act was unknowable and thus self-concealing. The SEC learned of the alleged fraud in 2003 through a whistleblower. Nonetheless, even though the purported misconduct had not been affirmatively disclosed to the SEC earlier, the record did not support a finding that the nature of the misconduct was incapable of being known.[35]

Tolling agreements

The government often asks the entities or individuals involved in investigations to sign agreements that toll the statute of limitations as part of their cooperation with the government. The government also makes tolling agreements part of deferred prosecution agreements, which allow the government to prosecute should the individual or company violate the deferred prosecution agreement after the original statute of limitations period has expired. Although commonplace in many FCPA investigations, both the DOJ and the SEC have indicated in recent months that there will be greater internal administrative scrutiny of whether to enter into tolling agreements; the result may be to accelerate the handling of many FCPA matters, although the ultimate effects of the government's new policies on tolling remain to be seen.[36]

Another manner in which the government may toll the statute of limitations is through filing mutual legal assistance ("MLA") requests with foreign governments under 18 U.S.C. § 3292, which suspends the limitations period to permit the U.S. to find foreign evidence. The DOJ frequently makes MLA requests in FCPA cases, and the tolling lasts until the foreign government has fully cooperated with the requests or for three years, whichever period is shorter. In a rare FCPA judicial decision, the Second Circuit ruled in 2008 that the government must apply to the district court for a suspension of the running of the statute of limitations based on an MLA request before the limitations period expires.[37]

Laches and no likely recurrence

Laches is an equitable doctrine that principally concerns the fairness of permitting a claim to be enforced.[38] For a defendant to establish a defense of laches,

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29 *Id.* at 376-9.

30 *Id.* at 381.

31 *Id.* at 382 (citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988)).

32 *Id.* at 382.

33 *Id.*

34 *See Jones*, note 23, *supra* (citing *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984)).

35 *Id.* at 383.

36 *See FCPA Update*, Vol. 1, No. 3 (Oct. 2010) (commenting on new rules).

37 *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008).

38 *Holmberg v. Ambrecht*, 327 U.S. 392, 396 (1946).

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a court must find that the plaintiff unreasonably and inexcusably delayed in commencing the action and, as a result, the defendant suffered prejudice.[39]

The SEC has proven to be virtually immune to laches arguments. Courts have consistently held that the doctrine is inapplicable to governmental agencies seeking to vindicate public rights or interests.[40] SEC enforcement actions "serve the public interest in accomplishing voluntary compliance with securities laws."[41]

The passage of time can work in defendants' favor, however, in that on rare occasions, defendants have been able to defeat SEC requests for relief in particular cases by asserting that there is no need to grant the SEC injunctive relief because the violation has not recurred. In *Jones*, the court found that the SEC's request for a permanent injunction was punitive in nature and therefore barred under § 2462 because the SEC had presented no evidence other than past wrongdoings to show the likelihood of a recurrence of violations of securities laws and the "potential collateral consequences of a permanent injunction [were] quite serious."[42] The Southern District of Florida similarly refused to impose a permanent injunction on the chief executive officer of a corporation found to have provided insider information because he had not previously leaked insider information and did not personally trade in the stock of the target corporations, which precluded the conclusion that he would engage in further violations.[43]

Potential impact of the Supreme Court's Merck decision

Under 28 U.S.C. § 1658(b), a securities fraud action is time-barred if commenced more than five years after the violation occurred, or two years after the discovery of the facts that constitute the violation. On April 27, 2010, in *Merck & Co., Inc. v. Reynolds*,[44] the Supreme Court resolved confusion among the various circuits regarding when the period for filing a securities fraud lawsuit begins to run. The case involved Vioxx, a nonsteroidal anti-inflammatory drug Merck marketed to treat osteoarthritis, acute pain conditions, and dysmenorrhoea (it has since been withdrawn from the market). In November 2003, following a study regarding the dangers of Vioxx, the results of which *The Wall Street Journal* published, investors sued Merck for securities fraud for allegedly concealing the information and thereby misleading investors. Merck moved to dismiss the lawsuit, contending that the plaintiffs should have known the facts constituting the fraud before November 2001 because of a March 2000 study, a September 2001 FDA warning letter to Merck that had been made public, and several product liability actions.[45]

In ruling in favor of the plaintiffs, the Court, in an opinion by Justice Breyer, addressed two major points. First, Merck had argued that facts tending to show a materially false or misleading statement should suffice in showing that statements were made with scienter. The Court held that the two-year period does not begin to run merely because a plaintiff has knowledge of facts showing that the defendant made a materially false or misleading statement. The Court explained that § 1658(b) required discovery of the facts constituting the violation, and under Rule 10(b) of the '34 Act,[46] a misstatement made innocently or only negligently—and thus without scienter—is not a violation.[47] Second, the Court rejected the "inquiry notice" standard the trial court and Third Circuit had applied. Instead, the court posited that the two-year period does not start running when a reasonably diligent plaintiff has enough information to investigate further, but only after the plaintiff actually discovers the fraud violation, or a reasonably diligent plaintiff would have discovered it. The Court concluded that the two-year period begins

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39 *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 655 (2d Cir. 1978).

40 *See United States v. Summerlin*, 310 US 414, 416 (1940); United States v. Re Pass, 688 F.2d 154, 158 (2d Cir. 1982).

41 *SEC v. Toomey*, 866 F.Supp. 719, 724 (S.D.N.Y. 1992).

42 *See Jones*, note 23, *supra* at 381-85 (explaining that granting injunction would stigmatize defendants in investment community and impair their ability to pursue a career).

43 *SEC v. Ginsburg*, 2002 WL 1835810 (S.D.Fla. 2002).

44 *See Merck*, note 1, *supra*.

45 *Id.*

46 15 U.S.C. § 78j(b).

47 *See Merck*, note 1, *supra*.

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to run when all facts have been discovered, including facts demonstrating the defendant's scienter.[48]

Whether the *Merck* decision will affect how courts address the issue of knowledge of scienter as it applies to statutes of limitations in FCPA cases remains to be seen. There are three separate knowledge or scienter standards in the FCPA's anti-bribery provisions: (1) any violation must be perpetrated "corruptly;"[49] (2) for criminal penalties to be imposed, an individual must have also acted "willfully;"[50] and (3) if liability is based on a payment to a third party, the individual making the payment must have made it while "knowing" that the payment or thing of value would be directed entirely or partially to a government official.[51] If the *Merck* holding were applied to FCPA actions, a court could conclude that the statute of limitations would begin to run only when the SEC had discovered all of the facts, including those facts showing the defendant's scienter. Should a court so deploy *Merck*, the SEC would have yet another means through which to extend the time in which it could bring an FCPA suit, and FCPA defendants and potential defendants would have a correspondingly weaker statute of limitations defense.

Takeaways

Despite the five-year statute of limitations in the criminal and civil contexts in which the FCPA operates, the passage of time alone frequently does not stop the government from bringing charges for alleged misconduct. There are numerous ways in which the government can overcome 18 U.S.C. § 3282 and 28 U.S.C. § 2462, including conspiracy charges, tolling agreements, mutual legal assistance requests, and equitable claims. The Supreme Court's decision in *Merck* provides possibly another avenue by which government lawyers could argue for an expanded time in which to bring suit. ■

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48 *Id.*

49 15 U.S.C. § 78dd-1.

50 15 U.S.C. § 78ff(c)(2).

51 15 U.S.C. § 78dd-1, dd-2.