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SEC ENFORCEMENT

SEC Enforcement Landscape Post-*Gabelli*



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On January 13, 2017, the Supreme Court granted cert on a question with substantial implications for market participants around the country: whether disgorgement falls under the five-year statute of limitations period set forth in 28 U.S.C. § 2462, which governs most claims brought by the Securities and Exchange Commission (''SEC'' or the ''Commission''). This decision promises to resolve the uncertainty left in the wake of the Court's landmark ruling in *Gabelli v. Securities and Exchange Commission*, in which the Court held that the statute of limitations for government enforcement actions seeking civil penalties begins to run from the date the fraudulent activity actually occurred, as opposed to when it was or reasonably could have been discovered. Although *Gabelli* ostensibly saved the federal catch-all statute of limitations from evisceration, its focus on civil penalties left open the possibility that other tools in the government's vast arsenal – such as disgorgement and injunctive relief – could be used to bring enforcement actions based on recently discovered conduct without regard to how much time had passed since the events at issue.

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Indeed, in the four years since the decision was rendered, attorneys on both sides of the aisle have had (some) reason to celebrate as courts have offered conflicting guidance on *Gabelli*'s impact. For example, in *SEC v. Graham*, the Eleventh Circuit applied the rationale articulated in *Gabelli* to preclude the SEC from seeking claims for disgorgement and declaratory relief beyond the five year statutory period in Section 2462. [823 F.3d 1357 (11th Cir. 2016).] Yet just three months later, in *SEC v. Kokesh*, the Tenth Circuit held that disgorgement claims are not subject to Section 2462's statute of limitations. [834 F.3d 1158 (10th Cir. 2016)] The Supreme Court's resolution of this circuit split will provide much needed clarity regarding the reach of the government's enforcement arm. Until then, other than in the Eleventh Circuit, disgorgement remains a vehicle through which the SEC may sidestep the statute of limitations.

I. THE *GABELLI* DECISION

SEC enforcement actions are subject to the statute of limitations period in 28 U.S.C. § 2462, which provides that ''an action, suit or proceedings 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[.]'' The issue in *Gabelli* concerned the point at which this federal catch-all statute of limitations period

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begins to run – at the time that an alleged violation occurs, as argued by the petitioners, or at the time that an alleged violation is or should have been discovered, as argued by the SEC. In a unanimous decision authored by Chief Justice Roberts, the Court sided with the petitioners and held that an action by the government seeking a civil monetary penalty must be commenced within five years of the alleged violation.

Gabelli arose out of an enforcement action for fraud that the SEC filed in April 2008 in the Southern District of New York against a mutual fund portfolio manager and the Chief Operating Officer of the fund's investment adviser. The SEC alleged that, from 1999 until 2002, the defendants permitted one of the mutual fund's investors to engage in market timing in exchange for an investment in a separate hedge fund that was managed by the same investment adviser. Neither the quid pro quo agreement nor the market timing was disclosed, and the defendants banned other investors from engaging in market timing and made statements indicating that the practice would not be tolerated. The SEC alleged that the defendants aided and abetted violations of the anti-fraud provisions of the Investment Adviser's Act of 1940, 15 U.S.C. § 80b et seq., and sought civil penalties and injunctive relief.

The defendants moved to dismiss, arguing in part that the claim for civil penalties was untimely under Section 2462 because the complaint alleged market timing up until August 2002 but was not filed until April 2008 – more than five years after the alleged fraudulent activity ended. In response, the SEC relied on the so-called ''discovery rule'' exception to the statute of limitations, which provides that the clock only begins to run on a cause of action for fraud when the violation was discovered, or could have been discovered with reasonable diligence. The district court rejected the government's argument and dismissed the cause of action for civil penalties as time-barred. The court also rejected the government's alternative argument that the statute of limitations was tolled through the doctrine of fraudulent concealment – which is triggered when a defendant takes actions beyond the challenged conduct to frustrate discovery of the fraud – finding that the complaint failed to allege any such concealment. The Second Circuit reversed the district court, reinstating the SEC's action for civil penalties on the grounds that the discovery rule applies where, as here, a case sounds in fraud, notwithstanding that no reference to the discovery rule appears in the plain language of Section 2462. In doing so, the Second Circuit created a circuit split with four of its sister courts.

The Supreme Court subsequently granted certiorari. On appeal, the SEC did not pursue any issues related to other forms of relief or to equitable tolling doctrines, so the sole question before the Court was whether the five year limitations period for civil penalties set forth in Section 2462 was subject to the discovery rule. The Court reversed the Second Circuit and concluded that the SEC's claim for civil penalties was time-barred under Section 2462 because it commenced on the date the fraud occurred, more than six years before the SEC filed its complaint.

As a preliminary matter – consistent with the ''basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's potential opportunity for recovery and a defendant's potential liabilities'' – the Court noted that a natural reading of Section 2462 establishes a fixed date by which exposure to government actions must end. Then, observing that it had never applied the discovery rule in a government enforcement action for civil penalties, the Court listed several ''good reasons'' to explain why the discovery rule is not appropriate in this context. First, in contrast to typical private plaintiffs who must rely on an apparent injury to learn of a wrong, the ''central mission'' of the SEC and other federal agencies is to investigate potential violations and they have ample tools at their disposal to do so, including subpoena power, whistleblower award programs, and cooperation agreements. As such, ''the SEC as enforcer is a far cry from the defrauded victim the discovery rule evolved to protect'' – namely, a victim who does not know he is injured and who reasonably does not inquire as to any injury. Second, also in contrast to private plaintiffs, the government may seek relief for the purpose of punishing wrongdoers rather than solely to extract compensation and restore the status quo. Because ''[t]he discovery rule helps to ensure that the injured receive recompense,'' it is inconsistent with the punitive nature of government actions for civil penalties.

Third, in order to apply the discovery rule in the government context, a court would have to engage in a fact-intensive and often speculative inquiry about what a government agency knew, ''when it knew it, and when it should have known it.'' [*Gabelli* at 1223.] The court would be required to make a number of judgments, such as identifying the relevant actor for purposes of imputing knowledge in an organization with hundreds of employees, dozens of offices, and layers of leadership or evaluating whether a government agency should have managed resource constraints differently to detect statutory violations. Moreover, a court's formidable task in applying the discovery rule would be further complicated by the government's likely assertion of various privileges, such as law-enforcement, attorney-client, work-product, or deliberative process. The nature of these challenges would frustrate the basic policy goal of repose underlying the statute of limitations in Section 2462, leaving ''defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future.''

Given the broad sweep of Section 2462, *Gabelli* had immediate consequences for cases involving a large number of federal agencies beyond the SEC. These include the Department of Justice, Environmental Protection Agency, Federal Trade Commission, and Federal Election Commission. Indeed, during oral argument, counsel for the petitioners estimated that there were approximately 80 to 100 similar statutes authorizing federal agencies to bring civil penalty actions that would be impacted by the Court's construction of Section 2462. Against this backdrop, the questions that *Gabelli* left unanswered were in some ways just as critical as its holding.

II. THE REACH OF SECTION 2462

One key question that *Gabelli* left unanswered relates to Section 2462's application to other remedies beyond civil monetary penalties. The wording of Section 2462 is broad, and applies to claims ''for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.'' Included in the SEC's vast arsenal of sanctions

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for civil actions are civil injunctions, disgorgement, and bars to service as an officer or director; available sanctions for administrative proceedings include cease and desist orders, revocations or industry bars, as well as disgorgement. Such sanctions have the potential to be just as debilitating financially or professionally as the imposition of civil penalties. Censures, suspensions, and bars may have life-altering career and reputational consequences. Injunctions and cease and desist orders entail future exposure to potential additional enforcement action and all such attendant consequences. And disgorgement may result in substantial pecuniary loss. Given the potentially serious and injurious impact of these equitable remedies, the possibility that the SEC could seek such relief beyond the five year statute of limitations period left concerned commentators suggesting that *Gabelli* represented only an illusory victory to enforcement targets.

This fear was at least partly based on the possibility that courts would determine that various equitable remedies do not meet the criteria for a ''penalty'' and thus fall outside the purview of Section 2462. *Gabelli* suggested that any relief ''which go[es] beyond compensation, [is] intended to punish, and label[s] defendants wrongdoers'' would constitute a penalty for purposes of the five year statute of limitations period. The extent to which the Court's rationale might extend beyond civil monetary penalties to certain equitable penalties is thus primarily based on whether a court concludes that the relief at issue is primarily punitive, or remedial, in nature.

Some courts engage in a fact-intensive inquiry to determine whether a requested equitable sanction is effectively a penalty in disguise, consistent with the D.C. Circuit's instruction in *Johnson v. SEC* that a court must objectively consider ''the degree and extent of the consequences to the subject of the sanction . . . as a relevant factor'' in the Section 2462 analysis. [87 F.3d 484, 489 (D.C. Cir. 1996) (holding that censure and a six-month suspension constitute a penalty under Section 2462 given, among other things, the long-lasting repercussions to the defendant's ability to pursue her vocation and the lack of any finding justifying the sanctions based on the defendant's current behavior or future risk to the public); *see also United States v. U.S. Steel Corp.*, 966 D. Supp. 2d 801, 811 (N.D. Ind. 2013) (''Section 2462's limitations period does not apply to injunctive relief if the injunction is actually remedial—i.e., if it seeks to undo prior damage or protect the public from future harm. On the other hand, Section 2462 does bar injunctive relief if it is really just a facade for a penalty or a forfeiture—i.e., where the injunctive relief sought is punitive in nature.'') (internal quotation marks and citations omitted). *See generally SEC v. Quinlan*, 373 Fed. Appx. 581, 587 (6th Cir. 2010) (collecting cases for both the categorical and fact-specific approaches).] For example, following this approach, the Fifth Circuit concluded in *SEC v. Bartek* that permanent injunctions and officer/director bars constituted penalties for purposes of Section 2462 because the remedies (i) would have significant collateral consequences to the defendants, including long-term stigmatization; (ii) would not address past harm caused by the defendants; and (iii) are unlikely to prevent future harm due to the low likelihood that the defendants would engage in similar harmful behavior in the future. [484 Fed. Appx. 949, 956 (5th Cir. 2012); *see also U.S. v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998) (''Our focus in defining a penalty for § 2462 is whether the sanction seeks compensation unrelated to, or in excess, of the damages caused by the defendant[.]'').]

In contrast, other courts have categorically held that certain forms of equitable relief are, by definition, outside the scope of Section 2462. [*SEC v. Pentagon Capital Management*, 725 F.3d 279, 287-88 (2d Cir. 2013) (vacating the district court's imposition of a civil penalty because the statute of limitations period in Section 2462 had expired, but upholding its award of disgorgement); *SEC v. Straub*, No. 11 Civ. 9645, 2016 WL 5793398, at *15 (S.D.N.Y. Sept. 30, 2016) (''[T]he weight of the authority in this jurisdiction holds that disgorgement, being a traditional equitable remedy, is not covered by Section 2462.''); *SEC v. Berry*, 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008) (applying the rationale articulated by the Ninth Circuit in *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993) – in which the court ''held that there is no statute of limitations governing SEC enforcement actions seeking equitable relief'' because ''a statute of limitations would frustrate the SEC's duty to vindicate a public right or interest and to safeguard the public interest by enjoining securities violations'' – in a Section 2462 context and concluding that equitable relief is not punitive in light of such policy considerations).] In particular, many courts agreed that disgorgement does not fall within the statute of limitations of Section 2462 because disgorgement is intended to prevent unjust enrichment, rather than serve as a penalty. [*See, e.g.*, *SEC v. Wyly*, 56 F. Supp. 3d 394, 402 (S.D.N.Y. 2014), new trial denied, 117 F. Supp. 3d 381 (S.D.N.Y. 2015), appeal docketed, *U.S. Securities and Exchange Commission v. Wyly*, No. 15-2821 (2d Cir. Sept. 4, 2015) (''While the Second Circuit has not addressed the issue of whether disgorgement constitutes a civil forfeiture, it has specifically held that, due to its remedial nature, disgorgement does not constitute a penalty.'')(emphasis in original); *SEC v. Druffner*, 802 F. Supp. 2d 293 (D. Mass. 2011) (''Disgorgement is an equitable remedy that 'does not serve to punish or fine the wrongdoer, but simply serves to prevent the unjust enrichment.' '' (internal quotation marks and citations omitted)); *SEC v. Ahmed*, No. 3:15CV675 (JBA), 2016 WL 7197359, at *5 (D. Conn. Dec. 8, 2016) (noting that ''[s]ignificantly, Section 2462 has been interpreted as applying only to punishments,'' and that ''because Section 2462's statute of limitations covers only fines, penalties or forfeitures, all of which are punitive, the Court concludes that its statute of limitations does not apply to claims for disgorgement, which is not punitive but remedial.'').] The Second Circuit's explanation of disgorgement actions is representative of such reasoning:

> In a securities enforcement action, as in other contexts, ''disgorgement'' is not available primarily to compensate victims. Instead, disgorgement has been used by the SEC and courts to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud. A district court order of disgorgement forces a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court, even if it exceeds actual damage to victims.

[*SEC v. Cavanaugh*, 445 F.3d 105, 117 (2d Cir. 2006); *see also Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009) (holding that disgorgement that is causally related to the wrongdoing at issue is not a penalty be-

cause it is intended to deprive wrongdoers of the profits obtained from their violations).]

However, although many courts and the SEC itself have assumed that disgorgement is an inherently equitable remedy not subject to Section 2462, it has occasionally been called into question. Specifically, some courts have suggested that disgorgement, while perhaps not a ''penalty'' under Section 2462, may nonetheless be subject to the limitations period as a form of ''forfeiture.'' [*See, e.g.*, *Riordan v. SEC*, 627 F.3d 1230, 1234, n.1 (D.C. Cir. 2010) (relying on an earlier D.C. Circuit holding in noting that ''disgorgement orders are not penalties,'' and are not covered by Section 2462's statute of limitations, but commenting that ''[i]t could be argued that disgorgement is a kind of forfeiture covered by § 2462.'').] Conceptually, this makes sense in that disgorgement ordered in SEC cases does not need to be returned to harmed parties, and in many cases, for example, insider trading or market manipulation matters, is routinely retained by the government. It serves effectively as another form of punishment to a party in that it forces the party to turn over any allegedly wrongful profits – even via joint and several punishments, profits that the party did not retain in the first place.

III. *SEC V. GRAHAM*

The viability of disgorgement as a tool to reach beyond Section 2462's five year statute of limitations was curtailed on May 26, 2016 by the first federal appellate decision to explicitly consider the issue after *Gabelli*. There, the Eleventh Circuit Court of Appeals definitively endorsed the theory that disgorgement was a form of forfeiture to the extent that Section 2462's statute of limitations would apply. *SEC v. Graham* arose from a civil enforcement action that the SEC filed in January 2013 in the Southern District of Florida. The complaint alleged that the defendants had run a $300 million Ponzi scheme between November 2004 and July 2008 and, among other things, sought relief in the form of disgorgement. The district court held that the disgorgement of ill-gotten gains realized from the alleged securities law violations could ''truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise),'' and thus fell within the ambit of Section 2462. [*SEC v. Graham*, 21 F. Supp. 3d 1300, 1310 (S.D. Fla. 2014) (''Penalties, 'pecuniary or otherwise,' are at the heart of all forms of relief sought by the SEC in this case.'').] The Eleventh Circuit agreed, looking to the ordinary, dictionary meaning of forfeiture to conclude that there was ''no meaningful difference'' between the terms and that ''for the purposes of § 2462 forfeiture and disgorgement are effectively synonyms.'' [*SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).]

Given the absence of a statutory definition of ''forfeiture'' in Section 2462, the Eleventh Circuit began its analysis by considering the ordinary meaning of the word. Referring to the definitions proffered in various dictionaries, the court observed that the ''definitions illustrate that forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing.'' The court then looked to the definitions of the term ''disgorgement,'' which were virtually identical – ''[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion'' and ''[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'' Indeed, the court observed that even the Supreme Court had used the terms interchangeably. [*Graham* at 1363, citing *United States v. Ursery*, 518 U.S. 267, 284 (1996) (' 'Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.' ').] After finding such substantive overlap in the definitions and use of the terms ''disgorgement'' and ''forfeiture,'' the court concluded that the reference to forfeiture in Section 2462 applied with equal force to disgorgement. [In doing so, the court rejected the SEC's argument that the terms refer to fundamentally different things – i.e., in the case of disgorgement, direct gains from wrongdoing, or in the case of forfeiture, both such ill-gotten gains and any additional profit earned on such gains. The court observed that, even under the SEC's reading of the terms, ''disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture,'' thereby still bringing it within the ambit of Section 2462. *Id*. at 1364.]

IV. *SEC V. KOKESH*

Graham's ruling was contradicted by the Tenth Circuit's recent holding in *SEC v. Kokesh*, which arose from an SEC enforcement action alleging that an individual defendant misappropriated $34.9 million in violation of various securities laws. [834 F.3d 1158, 1164 (10th Cir. 2016).] Following a jury trial, the defendant was found guilty and ordered to disgorge the full amount of the misappropriated fees (plus pre-judgment interest). Relying on *Gabelli* and *Graham*, the defendant appealed on the grounds that, among other things, the disgorgement constituted a forfeiture under Section 2462 and was therefore time-barred because the SEC's claims accrued more than five years prior to the filing of the complaint. The Tenth Circuit rejected the defendant's argument, holding that the ''nonpunitive remedy of disgorgement does not fit'' within ''the meaning of forfeiture'' intended by the statute. [*Id*. at 1166.]

In doing so, the Tenth Circuit explained that it ''see[s] things a bit differently'' than the Eleventh Circuit. [*Id*. at 1165.] While acknowledging the similarities between the terms ''forfeit'' and ''disgorge'' as used in common parlance and legal dictionaries, the Court concluded that the relevant analysis for the purpose of Section 2462 must focus on the historical meaning of the term ''forfeiture.'' Specifically, the Court noted that ''the term forfeiture is linked in [Section] 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*,'' thus making it clear that Congress was contemplating the traditional meaning of forfeiture as a government action against property used in criminal activity. [*Id*. at 1166. (emphasis in original)] From this perspective – and mindful that a court should ''construe [Section] 2462 in the government's favor to avoid a limitations bar'' – the Tenth Circuit declined to credit Graham's reliance on the ordinary meaning of the term forfeiture and concluded that its use in the statute did not encompass the ''nonpunitive remedy of disgorgement.''

V. THE NEED FOR SUPREME COURT REVIEW

In light of the conflicting holdings of the Tenth and Eleventh Circuits, Kokesh filed a petition for a writ of certiorari in October 2016. Response and reply briefs

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followed in short order, and the petition was granted on January 13, 2017. The petition highlights the pressing need to resolve the circuit split, noting that ''[s]ince the start of 2015 alone, ten cases have addressed the question of whether § 2462 applies to disgorgement'' and accusing the SEC of ''exploit[ing]'' the uncertainty in the wake of Gabelli by extracting a disproportionate number of disgorgement payments. [Petition for Writ of Certiorari at 19, *Kokesh v. SEC*, 2016 WL 6124409 (U.S.) (No. 16-529). Moreover, Kokesh's petition is likely to directly affect at least two actions pending before the Second and Eighth Circuits. *See SEC v. Wyly*, 56 F. Supp. 3d 394 (S.D.N.Y. 2014), *new trial denied*, 117 F. Supp. 3d 381 (S.D.N.Y. 2015), *appeal docketed, U.S. Securities and Exchange v. Wyly*, No. 15-2821 (2d Cir. Sept. 4, 2015); *SEC v. Collyard*, 154 F. Supp. 3d 781 (D. Minn. 2015), *appeal docketed*, *U.S. Securities and Exchange v. Paul D. Crawford, et al*, No. 16-1405 (8th Cir. Feb. 17, 2016). Specifically, Kokesh observed that ''[i]n 2015 alone, the SEC extracted $3 billion in disgorgement payments,'' compared to $1.2 billion in monetary penalties. Petition for Writ of Certiorari at 3, *Kokesh v. SEC*, 2016 WL 6124409 (U.S.) (No. 16-529).] In turn, the SEC agreed that the case is an appropriate vehicle for Supreme Court review, that the question presented is deserving of resolution, and that the petition for a writ of certiorari should be granted.

While it is true most courts that have considered the issue have ruled, many via a quick assertion that disgorgement sounds in equity, in a manor consistent with the Tenth Circuit's view, there is reason to believe the Eleventh Circuit's view will prevail. [*See, e.g.*, *SEC v. Ahmed*, No. 3:15CV675 (JBA), 2016 WL 7197359, at *8 (D. Conn. Dec. 8, 2016) (''This Court declines to be guided by *Graham*, which has been described as an 'outlier.' ''); *SEC v. Saltsman*, No. 07CV4370NGGRML, 2016 WL 4136829, at *29 (E.D.N.Y. Aug. 2, 2016) (''[T]he court agrees with the courts that have viewed *Graham* as an outlier.'').] By holding that disgorgement is a form of forfeiture, *Graham*'s reasoning arguably does not upset the well-settled precedent that disgorgement does not qualify as a ''penalty'' under Section 2462. Indeed, it even dovetails with the SEC's own approach in previous cases. For example, in a bankruptcy proceeding in 1992, the SEC prevailed on a complaint seeking to establish nondischargeability of a disgorgement debt on the grounds that the disgorgement ''serve[d] a deterrent purpose'' and was thus ''sufficiently penal to characterize the resulting debt as a 'fine, penalty, or forfeiture' '' within the meaning of the relevant bankruptcy statute governing the dischargeability of debts. [*SEC v. Telsey*, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992).] As the D.C. Circuit has noted, the ''SEC's own position on what constitutes a penalty appears to vary with context.'' [*Johnson*, 87 F.3d 484 at 491 n.1.] In addition, courts have alluded to the persuasiveness of Graham's ''logical'' reasoning, even as they have been bound by the precedent in their circuits. [*See, e.g.*, *SEC v. Straub*, No. 11 CIV. 9645 (RJS), 2016 WL 5793398 (S.D.N.Y. Sept. 30, 2016) (declining to depart ''from the weight of authority'' in the Second Circuit to follow *Graham* but acknowledging that ''the *Graham* court's reasoning is logical''). Notably, in assessing whether disgorgement could constitute a form of forfeiture in a case pre-dating *Graham*, the D.C. Circuit acknowledged that ''[i]t could be argued that disgorgement is a kind of forfeiture covered by § 2462, at least where the sanctioned party is disgorging profits not to make the wronged party whole, but to fill the Federal Government's coffers.'' *Riordan v. SEC*, 627 F.3d 1230, 1234 n.1 (D.C. Cir. 2010). This acknowledgement came just one year after the D.C. Circuit held that disgorgement is not subject to Section 2462 because it is not a punitive measure in *Zacharias*. 569 F.3d at 471–72.]

Moreover, *Graham* advances the public policy considerations that the Court stressed in *Gabelli* while invoking Chief Justice Marshall's ''particularly forceful language'' regarding the importance of statute of limitations – namely, that it ''would be utterly repugnant to the genius of our laws'' if certain actions could ''be brought at any distance of time.'' [*Gabelli* at 1223 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).] Finally, *Graham*'s approach also comports with a relatively recent IRS memorandum holding that a disgorgement payment was not tax deductible because it was ''primarily punitive'' and thus more akin to criminal forfeiture than restitution. [IRS Memorandum, No. 201619008 (May 6, 2016), *available at* https://www.irs.gov/pub/irs-wd/201619008.pdf.] The memorandum is particularly noteworthy given both its author – another government agency whose interests are presumably in large part aligned with the SEC's – and its explicit endorsement of the relationship between disgorgement and forfeiture:

> [W]e think that some cases that impose disgorgement as a discretionary equitable remedy can have similarities that impose forfeiture as required by statute. We note that forfeiture is not deductible even when it is used by the government to compensate victims. Forfeiture and restitution to a victim serve different purposes, and a criminal defendant can be required to pay restitution and also forfeit an equal amount.

In any event, regardless of how the Supreme Court ultimately rules on the question of whether disgorgement is subject to Section 2462, there can be no dispute that *Graham* has represented an important victory for securities market participants and a setback for the SEC. At the very least, in the short term, it has likely curtailed claims for disgorgement in enforcement actions pending before the Eleventh Circuit. This number – while far less than certain other jurisdictions – is not insubstantial. For example, of the 137 enforcement actions that the SEC filed in federal court in Fiscal Year 2015 (i.e., October 1, 2014 - October 30, 2015), 26 were filed in the Eleventh Circuit. Moreover, it has forced the Commission to be circumspect about whether and where to bring certain enforcement actions in other jurisdictions to avoid creating additional precedent supportive of *Graham*.