STATUTES OF LIMITATIONS FOR EQUITABLE AND REMEDIAL RELIEF IN SEC ENFORCEMENT ACTIONS

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ABSTRACT

The sanctions that can be imposed by the Securities and Exchange Commission (SEC) in civil enforcement actions can be severe. Where the SEC prevails, the agency can impose significant civil monetary penalties on an individual. The SEC may also seek the disgorgement of ill-gotten gains or enjoin an individual from future violations of securities laws. Perhaps most significantly, the SEC can bar someone from associating with a registered investment adviser or broker-dealer, or from serving as an officer or director of a public company, which could be tantamount to a complete prohibition from working in the securities industry. Given the severity of the available sanctions and the SEC's increasingly aggressive enforcement posture, the SEC's enforcement actions frequently resemble criminal prosecutions brought by the Department of Justice. Yet given the civil nature of these claims, defendants in SEC actions frequently lack certain procedural and other protections afforded to criminal defendants.

This article aims to address one procedural protection that may not be available to defendants in civil enforcement actions: defenses based on statutes of limitations. I review the relevant case law and find that, although courts consider some remedies sought by the SEC to be "punitive," and therefore subject to a five-year statute of limitations prescribed by 28 U.S.C. § 2462, other remedies sought by the SEC are considered either "equitable" or "remedial," and are therefore not subject to any statute of limitations. These equitable remedies include the SEC's ability to bar individuals from working in the securities industry. This article discusses a developing body of law, which holds that where sanctions imposed by the SEC are sufficiently severe, and where they fail to either (a) involve ill-gotten gains by a defendant or (b) address a plausible threat to public safety, they cannot be considered remedial in nature. Accordingly, some limitations period must apply to such offenses. This limitation is especially important when a defendant may be barred from the securities industry, effectively ending his or her career. I argue further that, as the SEC's civil enforcement of securities laws becomes increasingly aggressive and prosecutorial in nature, courts should ensure that the SEC does not impose these quasi-criminal penalties while enjoying a lower burden of proof to establish liability, and should afford defendants certain procedural protections to which they are entitled.

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I. Introduction

Although the Department of Justice (DOJ) is authorized to prosecute cases under federal securities laws when it detects criminal misconduct, the primary role for monitoring and enforcing those laws inevitably falls to the Securities and Exchange Commission (SEC). The proposed budget of the SEC Enforcement Division exceeded $500 million for fiscal year 2014, and it was primarily dedicated to pursuing potential violations of the federal securities laws.[2] The SEC also investigates offenses less egregious than those prosecuted by the DOJ. Therefore, while many targets of SEC investigations do not face substantial criminal exposure, they are nevertheless significantly affected by the possibility of an SEC enforcement action. While an SEC enforcement action may not rise to the level of a prosecution by the DOJ, the consequences of such an action can nonetheless be severe for defendants. In this context, it is crucial to understand the differences between the SEC's and DOJ's investigative processes, and the remedies that each can seek for violations of securities laws.

SEC enforcement actions often resemble a criminal probe by the DOJ, except that these actions are civil in nature, and do not provide targets with certain protections afforded to criminal defendants.[3] For example, a putative defendant can assert his Fifth Amendment right against self-incrimination, but the SEC may be permitted to seek an adverse inference therefrom.[4] Moreover, in a number of ways, the SEC has greater ability to pursue a wider range of alleged misconduct. For example, the SEC is not required to prove "willfulness," but may satisfy lesser showings of *mens rea* such as

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[2] *See* U.S. Securities and Exchange Commission, FY 2014 Budget Request by Program, at 64 (2013), *available at* http://www.sec.gov/about/reports/sec-fy2014-budget-request-by-program.pdf.

[3] *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 864–66 (2d Cir. 1998) (holding that civil penalties and disgorgement remedies sought by the SEC are not criminal in nature for purposes of the double jeopardy clause of the Fifth Amendment).

[4] *See, e.g.*, SEC v. Jasper, 678 F.3d 1116, 1125–26 (9th Cir. 2012); SEC v. Whittemore, 659 F.3d 1, 4 (D.C. Cir. 2011); SEC v. Colello, 139 F.3d 674, 677–78 (9th Cir. 1998).

recklessness or negligence.[5] Similarly, should a case reach trial, the SEC must prove the elements of each violation by only a preponderance of the evidence, rather than by the "reasonable doubt" standard employed in criminal cases brought by the DOJ.[6]

This distinction between the protections afforded to defendants in criminal and civil investigations may make sense: a criminal conviction can result in imprisonment and other collateral consequences that do not result from SEC enforcement actions.[7] However, investigations by the SEC have a distinctively prosecutorial flavor. Similar to the DOJ, the SEC possesses broad subpoena powers,[8] and although a custodial sentence may not be available to the SEC, the collateral consequences of an SEC enforcement action can be severe for both companies and individuals alike. Companies may face significant fines and increased scrutiny from regulators. Under certain circumstances, issuers, hedge funds, and broker-dealers, among other entities, may be forced to cease operations. Individuals might see their careers disappear as a result of the acute reputational harm of an investigation. Indeed, these threats are augmented by the SEC's ability to institute administrative proceedings and impose sanctions without the same level of oversight provided by Article III courts[9]—a course of action unavailable to the DOJ. Thus, although claims brought by the SEC are civil in nature, they often have the trappings of a criminal prosecution.[10]

The quasi-penal nature of SEC enforcement has naturally raised concerns regarding the appropriate procedures that should apply to the SEC's suits. One issue that has recently occupied courts (and which will serve as the subject of the remainder of this article) is the extent to which SEC enforcement actions can be dismissed as untimely under the applicable statute of limitations. For example, in *Gabelli v. SEC*, decided by the Supreme Court on February 27, 2013, the Court heard an appeal from the Second

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[5] *See, e.g.*, SEC v. Smart, 678 F.3d 850, 857 (10th Cir. 2012) (holding that recklessness or negligence can support SEC claims brought under certain provisions of the securities laws); SEC v. DiBella, 587 F.3d 553, 568–69 (2d Cir. 2009) (holding that the SEC can pursue negligent conduct that violates the Investment Advisers Act).

[6] *See, e.g.*, SEC v. Savoy Indus., 587 F.2d 1149, 1169 (D.C. Cir. 1978) (applying preponderance of the evidence standard to claims for injunctive relief); Steadman v. SEC, 450 U.S. 91, 96–103 (1981) (applying preponderance of the evidence standard to disciplinary sanctions imposed by SEC).

[7] *Compare* 15 U.S.C. § 78u (2012) (including, among other penalties, injunction proceedings; money penalties in civil actions; prohibition of persons from serving as officers and directors; and other equitable remedies) *with* 15 U.S.C. § 78ff (2012) (including, among other sanctions, imprisonment for up to twenty years).

[8] 15 U.S.C. § 78u(b)–(c) (2012).

[9] Decisions are ultimately reviewed by the D.C. Circuit or the United States Court of Appeals for the circuit in which the defendant resides or has his principal place of business. However, these decisions are only reviewed for abuse of discretion. 15 U.S.C. § 78y(a)–(b) (2012).

[10] The SEC often receives many of the benefits that accompany criminal investigations by the DOJ: issuers adopt cooperative postures, employees may voluntarily submit to interviews, privilege waivers are obtained, and tolling agreements are executed to avoid antagonizing what is viewed as the "prosecutorial" arm of the agency.

Circuit relating to this issue.[11] In *Gabelli*, the defendants argued that the SEC should not be able to benefit from certain types of equitable tolling when it seeks civil penalties, if such tolling would not be permitted in the criminal context.[12] The Court ultimately agreed and limited the ability of the SEC to extend the statute of limitations indefinitely on civil enforcement claims.[13]

The Court in *Gabelli* considered how the general five-year statute of limitations that applies to government penalty actions should apply to civil penalties imposed by the SEC. The Court also considered the conditions under which this limitations period for government penalty actions should be tolled to allow the SEC to file claims more than five years after the alleged violations. However, the Court in *Gabelli* did not specifically address circumstances under which other courts have held that no statute of limitations applies at all—specifically, when the SEC is imposing "remedial" sanctions that are not considered "penalties" under the statute of limitations.[14] In this situation, courts have effectively held that the SEC can at any time bring an action based on conduct that occurred in the distant past.[15] This article will seek to determine the contours of such "unlimited" sanctions based on existing precedent, and will ultimately propose that courts scrutinize so-called "remedial" sanctions imposed by the SEC to ensure that defendants do not suffer quasi-criminal penalties based on stale evidence, absent witnesses, and the cold record that might be presented by the SEC many years after the alleged misconduct.

As a point of contrast, and in order to introduce the statute of limitations that applies to SEC actions that impose "penalties," I begin with a brief summary of the law as it relates to sanctions that are universally acknowledged as punitive in nature. I then describe the circumstances under which courts have or have not found that other remedies sought by the SEC—including employment bars, injunctions, and disgorgement—fall within the category of punitive remedies that are subject to the limitations period. I will contrast these cases with instances in which such sanctions have been considered "remedial," and have therefore not been subject to any statute of limitations. I conclude by identifying some of the failings of the approaches taken by courts in this field, and by suggesting ways in which a review of proposed SEC sanctions might be improved.

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[11] Gabelli v. SEC, 568 U.S. 133, No. 11-1274 (Feb. 27, 2013).

[12] *See* Brief for Respondent at 12–21, Gabelli v. SEC, 568 U.S. 133, No. 11-1274 (Feb. 27, 2013).

[13] *Gabelli*, 568 U.S. 133, No. 11-1274, slip op. at 4–5.

[14] *See e.g.*, Johnson v. SEC, 87 F.3d 484, 491 (D.C. Cir. 1996) ("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, § 2462 will not apply.")

[15] *Id.*

II. The SEC Enforcement Structure

Pursuant to section 21 of the Securities Exchange Act of 1934 (1934 Act), the SEC has broad authority to investigate alleged violations of the federal securities laws under the 1934 Act itself, as well as the Securities Act of 1933, the Investment Advisers Act of 1940, and a range of subsequent statutes.[16] In connection with such investigations, the SEC has the authority to impose a broad range of sanctions against defendants, either through administrative procedures overseen by the SEC itself and administrative law judges, or through suits brought in federal district court.[17]

Sanctions available to the SEC include civil penalties that are clearly designed to punish violators of the federal securities laws.[18] However, given the SEC's regulatory and preventive functions, the sanctions that it can seek against potential defendants extend beyond these purely punitive enforcement actions. Specifically, the SEC is permitted to seek what are commonly termed "equitable" remedies against defendants who have violated the securities laws. These remedies include injunctive relief; prohibitions on service as an officer or director of public companies in the future; and general equitable relief, which includes disgorgement of any ill-gotten gains resulting from an offense.[19]

While all of these remedies are available to the SEC, each remedy serves different purposes, and may be subject to different elements of proof. While civil penalties are clearly intended as punishment—and incorporate the retributive and deterrent functions of punitive sanctions accordingly—the equitable remedies referenced above are generally considered "remedial" in nature. They are not designed to punish the defendant for misconduct, but rather to restore the position of both the defendants and their victims to their pre-offense status, or to prevent future harm to the public. This distinction is important, because the quasi-criminal punishments imposed through civil penalties, which go beyond the damage actually caused by a defendant's misconduct, are subject to more stringent restrictions than a civil action intended simply to redress investor losses or gains by the alleged

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[16] 15 U.S.C. § 78u (2012); *see also* SEC v. Dresser Indus., 628 F.2d 1368, 1376–77 (D.C. Cir. 1980) (describing general framework of SEC investigations).

[17] *See, e.g.*, 15 U.S.C. § 78u(d)(2) (2012) (granting the SEC the authority to bar individuals from serving as officers or directors of public companies through a civil enforcement action in federal court); 15 U.S.C. § 78o(b)(4) (2012) (granting the SEC the authority to bar individuals from participating in certain industries on an administrative basis); 15 U.S.C. § 78u(d)(1) (2012) (granting the SEC the authority to seek injunctive relief in federal court).

[18] 15 U.S.C. § 78u(d)(3) (2012) (describing the different measures of civil penalty that can be sought by the SEC, ranging from a $5,000 fine for the least egregious violations to a $500,000 fine for violations involving fraud or deceit that "resulted in" or "created a significant risk of" substantial losses to investors).

[19] *See* 15 U.S.C. § 78u(d)(1)–(6) (2012) (providing various remedies to the SEC, including injunctive relief; bars on holding senior positions within publicly traded companies; civil penalties; other equitable relief; and prohibitions against participating in penny-stock offerings).

violator.[20] As a result, the rules that apply to the SEC when it seeks penalties are different from the rules that apply when it seeks equitable relief. In the context of a defense based on the relevant statute of limitations in which a defendant claims that the SEC's claims are untimely, this procedural difference is expressed by the general limitations statute for penalty actions.[21]

III. Limitations on SEC Penalty Actions

A. Civil Monetary Penalties

Courts have uniformly agreed that under certain conditions, SEC claims are subject to the five-year statute of limitations set forth in section 2462.[22] *Gabelli*, and other cases in which the SEC seeks the imposition of civil monetary penalties, are illustrative: in relevant part, the statute provides that "[e]xcept 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."[23]

Courts interpreting the statute have held that when the SEC seeks to extract from defendants monetary penalties that are entirely disconnected from the injuries suffered by victims, it must file its claims within the five-year limitations period prescribed by section 2462.[24] Furthermore, in describing the purpose of the limitations period generally, courts have drawn

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[20] *See, e.g.*, Gabelli v. SEC, 568 U.S. 133, No. 11-1274, slip op. at 7–8 (Feb. 27, 2013) (contrasting cases in which "the injured receive recompense" with those that "go beyond compensation, are intended to punish, and label defendants wrongdoers," and noting the importance of time limitations on such penalty actions) (citing Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 423 (1915); Tull v. United States, 481 U.S. 412, 422 (1987); Adams v. Wood, 6 U.S. (2 Cranch) 336, 342 (1805)).

[21] 28 U.S.C. § 2462 (2006).

[22] *Id.*

[23] This provision constitutes a catch-all statute of limitations that applies to civil enforcement actions in the absence of a specific statute governing the limitations period. Thus, there are many instances in which it is applied or analyzed in government enforcement actions that do not involve federal securities laws. *See, e.g.*, Coghlan v. NTSB, 470 F.3d 1300, 1304–06 (11th Cir. 2006) (analyzing the limitations period as applied to the revocation of a pilot's license by the FAA); FEC v. Williams, 104 F.3d 237, 238–41 (9th Cir. 1996) (applying the statute to sanctions sought for alleged violations of federal election law); United States v. Banks, 115 F.3d 916, 918–19 (11th Cir. 1997) (applying the statute to an enforcement action brought by the United States under the Clean Water Act); Gilbert v. Bangs, 813 F. Supp. 2d 669, 674–75 (D. Md. 2011) (analyzing the statute as applied to a denial of a sales license by the Bureau of Alcohol, Tobacco, Firearms and Explosives). Conversely, other limitations statutes can apply to federal securities laws when private plaintiffs seek to redress their injuries. *See, e.g.*, Merck & Co. v. Reynolds, 559 U.S. 633, 648–53 (2010) (applying the two-year statute of limitations under 28 U.S.C. § 1658 to private securities fraud claims brought under § 10(b) of the Securities Exchange Act of 1934).

[24] *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009) ("Under 28 U.S.C. §2462, agencies may not impose civil penalties in an enforcement action initiated more than five years after the offender committed the illegal act.") (citing 3M Co. v. Browner, 17 F.3d 1453, 1456–58 (D.C. Cir. 1994)).

strong parallels between the punitive nature of the penalties described in section 2462 and criminal causes of action.[25] In limiting the ways in which government agencies can avoid the strict time limitations imposed by section 2462, courts have cited early Supreme Court precedent regarding the limitations placed on criminal prosecutions: "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."[26]

In limiting the ability of government agencies to impose civil penalties on defendants, courts have recognized that enforcement actions by executive agencies can be similar, if not tantamount, to criminal prosecution in terms of the consequences that they impose on defendants.[27] Accordingly, if defendants in the criminal context should be protected from prosecution based on stale allegations where "evidence has been lost, memories have faded, and witnesses have disappeared," it stands to reason that the same evidentiary protections should be extended to defendants against whom an agency seeks to impose analogous quasi-criminal penalties.[28] Similarly, courts have understood that for the criminal justice system to operate, potential defendants should not constantly fear prosecution by the government, but should instead be able to rely on the government's inaction for comfort.[29] Again, these concerns are equally applicable to penalties imposed in civil enforcement actions as they are to those imposed in criminal cases.[30]

This conclusion is not controversial, and thus the arguments in cases such as *Gabelli* did not revolve around the question of whether section 2462 would pertain to actions for civil penalties, but rather the exact way in which it would be applied under the facts of the case. Indeed, the SEC has agreed with the underlying principle that, as a general rule, civil penalties should be subject to the five-year limitations period provided by the statute.[31]

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[25] *See, e.g., Gabelli*, 568 U.S. 133, No. 11-1274, slip op. at 7 (stating that the type of penalties contemplated by 28 U.S.C. § 2462 "go beyond compensation, [and] are intended to punish") (citing cases).

[26] 3M Co. v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting Adams, 6 U.S. (2 Cranch) at 341). *See also* Proffitt v. FDIC, 200 F.3d 855 (D.C. Cir. 2000) (same); FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 18 (D.D.C. 1995) ("[I]t is inappropriate for a government regulator to wield the threat of an open-ended penalty."); United States v. Mayo, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813).

[27] *3M*, 17 F.3d at 1456–58 (analogizing criminal prosecutions, civil enforcement actions, and the imposition of administrative sanctions by government agencies).

[28] *Id.* at 1457 (quoting Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)).

[29] *Gabelli*, 568 U.S. 133, No. 11-1274, slip op. at 9.

[30] *Gabelli* provides a recent and forceful opinion on this point. Writing for a unanimous Court, Chief Justice Roberts held that applying attenuated limitations requirements on the SEC in civil enforcement actions "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.*

[31] *See* Brief for Respondent at 3, Gabelli v. SEC, 568 U.S. 133, No. 11-1274 (Feb. 27, 2013) ("The timeliness of [actions seeking monetary penalties] is therefore governed by 28 U.S.C. 2462."); *see also* SEC v. Brown, 740 F.Supp. 2d 148, 157–58 (D.D.C. 2010) ("The

B. Other SEC Sanctions

While the SEC concedes that the five-year statute of limitations imposed by section 2462 should apply to the imposition of civil penalties, this concession does not provide a comprehensive answer to questions regarding the effective limitations period for SEC sanctions. In addition to straightforward civil penalties, the SEC has access to a number of what are commonly termed "equitable" remedies at its disposal, including employment bars, injunctions and disgorgement.[32] There is less consensus regarding the time available to the SEC for seeking these other remedies, or indeed whether there should be any time limitations at all. This topic will occupy us for the remainder of this article.

To determine whether the limitations period of section 2462 should apply to other forms of relief sought by the SEC, courts have generally analyzed whether a particular remedy qualifies as a "penalty" under the text of the relevant statute.[33] In general, courts have held that if a remedy qualifies as a penalty, it should be subject to section 2462.[34] Consequently, the SEC must bring the action within five years of the alleged misconduct.[35] However, to the extent a sanction is "remedial" and seeks to redress harms to investors, to disgorge windfall benefits for violators, or merely to restore the *status quo ante* that existed prior to the alleged misconduct, courts have held that such sanctions are not governed by section 2462.[36] No statute of limitations applies to SEC enforcement actions under these circumstances.

IV. Time Limitations on Equitable Remedies

A. Government Enforcement of Remedial Claims are Not Subject to Limitations

In contrast to the general rule that criminal and quasi-criminal claims against a defendant should be subject to time constraints,[37] courts addressing government claims seeking other forms of relief have frequently relied upon a general proposition that no limitations period applies to actions seeking

parties do not dispute that the SEC's claim for civil penalties . . . is subject to the five-year statute of limitations in § 2462.").

[32] *See* 15 U.S.C. § 78u(d)(1)–(6) (2012).

[33] Johnson v. SEC, 87 F.3d 484, 487–88 (D.C. Cir. 1996) (citing Huntington v. Attrill, 146 U.S. 657 (1892); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397 (1906)).

[34] *Id.*

[35] 28 U.S.C. § 2462 (2006).

[36] *Johnson*, 87 F.3d at 488 ("In many other situations the courts have reaffirmed that a sanction which only remedies the damage caused by the defendant does not trigger the protections of § 2462") (citing cases).

[37] *See* 18 U.S.C. § 3282 (2012) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for *any* offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.") (emphasis added).

"equitable" remedies.[38] Thus, for example, the Supreme Court in *Holmberg v. Armbrecht* noted that "[t]raditionally, and for good reasons, statutes of limitation are not controlling measures of equitable relief."[39] The Court went on to note that the remedial functions of a court sitting in equity required that it exercise its judgment and discretion to determine whether a plaintiff had a valid cause of action: "[e]quity eschews mechanical rules; it depends on flexibility."[40] In the context of SEC enforcement actions seeking injunctive relief, disgorgement, or other remedial sanctions against defendants, many courts have concluded, based on *Holmberg* and its progeny, that equitable claims by the SEC are not constrained by any formal limitations period.[41]

However, other courts have held not only that the government should be permitted to seek equitable remedies without conforming to a rigid statute of limitations, but also that this ability to seek equitable relief should not be constrained, even in the event that the claims are considered untimely in the reasoned judgment of the court.[42] Rather than focusing on the formal distinction between law and equity, these courts have held that, in the absence of an explicit statute of limitations prescribed by Congress, courts should not inject themselves into the legislative process by creating such defenses by judicial fiat.[43] While the Court in *Holmberg* relied upon the equitable nature of the relief being sought to justify flexibility and discretion on the part of the reviewing court, other courts have held that unless Congress provides otherwise, "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitations, in the absence of congressional enactment clearly imposing it."[44] In these cases, contrary to *Holmberg*, a court reviewing the timeliness of equitable claims brought by the government would have no discretion to dismiss such claims in the absence of any limitation imposed by Congress. Specifically regarding the statutes of limitations

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[38] *See, e.g., Johnson*, 87 F.3d at 488; Peerless Casualty Co. v. United States, 344 F.2d 495, 496 (D.C. Cir. 1964); United States v. Perry, 431 F.2d 1020, 1025 (9th Cir. 1970).

[39] Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

[40] *Id.*

[41] *See, e.g.*, SEC v. Kelly, 663 F. Supp. 2d 276, 286–87 (S.D.N.Y. 2009) ("[T]he great weight of the case law in this jurisdiction supports the SEC's contention that equitable remedies are exempted from § 2462's limitations period."); SEC v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995) ("The controlling factor is the distinction between actions at law and actions in equity, not the potential harm that the remedy may cause the defendant."); *see also* SEC v. McCaskey, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999); SEC v. Schiffer, No. 97 Civ. 5853, 1998 WL 226101, at *2 n.6 (S.D.N.Y. May 5, 1998); SEC v. Tandem Mgmt. Inc., No. 95 civ. 8411, 2001 WL 1488218, at *6 (S.D.N.Y. Nov. 21, 2001) (citing cases).

[42] *See, e.g.*, United States v. Telluride Co., 146 F.3d 1241, 1246 (10th Cir. 1998) ("We interpret time limitations against the government narrowly to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interests, unless Congress clearly allows those claims to be barred.")

[43] *See, e.g.*, *Id.* at 1244 (holding that a court does not have the authority to impose a statute of limitations for an action in the absence of a congressional enactment creating such a limitations period).

[44] *Id.* (quoting E.I. DuPont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)); *see also* United States v. Banks, 115 F.3d 916, 918–19 (11th Cir. 1997).

in enforcement proceedings conducted by government agencies, the Supreme Court has held that they "must receive a strict construction in favor of the government."[45] Thus, under this line of cases, statutes of limitations would be the responsibility of the legislative branch, and would not be subject to significant judicial interpretation.

The differences between these parallel justifications may appear slight, but as we shall see in greater detail below, they can account for some of the eccentricities in the case law as it relates to this issue. For example, at first glance, *Holmberg* appears to demand a flexible, holistic approach from lower courts in determining whether an action sounding in equity is timely—and therefore whether the claim can be maintained by plaintiffs. The Court in *Holmberg* noted that, although a judge should not apply any rigid statute of limitations to cases involving equitable relief, he or she should nonetheless determine whether "the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair."[46] The Court went on to note that "[a] federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs' lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence."[47] Therefore, *Holmberg* contemplates instances in which equitable claims would be time-barred not because of any formal statute of limitations, but simply because of the discretionary judgment of the courts. Certainly, given its focus on the formal distinction between law and equity,[48] *Holmberg* rejects any notion that the five-year limitations period of section 2462 might apply to equitable claims in the same way that it applies to legal claims.[49] However, as noted above, this conclusion does not result in a holding that such claims can never be time-barred. A court may dismiss such equitable claims as untimely, but only on the basis of its own reasoned judgment, not through reliance on a congressional statute.

Conversely, the cases providing that government enforcement actions are subject to "no time limitation, in the absence of congressional enactment clearly imposing it"[50] appear at first glance to offer a sweeping grant of deference to government agencies in matters concerning the timeliness of claims, contrary to the court-reviewed flexibility that *Holmberg* proposes. Yet, in the context of SEC enforcement actions, this broad rule proves more pliable than expected. Specifically, the rule leaves room for dispute over exactly which claims are covered by explicit congressional enactments, and

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[45] E.I. DuPont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924); *see also* SEC v. Lorin, 869 F. Supp. 1117, 1127 (S.D.N.Y. 1994) (citing cases).

[46] *Holmberg*, 327 U.S. at 396.

[47] *Id.* (quotation marks and citations omitted).

[48] *Id.* ("[S]tatutes of limitation are not controlling measures of equitable relief . . . [a]nd so, a suit in equity may lie though a comparable cause of action at law would be barred.")

[49] *Id.*

[50] United States v. Telluride Co., 146 F.3d 1241, 1244 (10th Cir. 1998).

how the facts of a particular case might fall under a statute of limitations provided by Congress.

This second line of cases ostensibly places the primary responsibility for determining statutes of limitations on Congress, and suggests that unless Congress has provided otherwise, enforcement agencies do not face any time limitations. Superficially, this formulation appears to offer the SEC and other government enforcement agencies considerably more discretion for determining the timeliness of equitable claims than the holding in *Holmberg*—but only if one assumes that Section 2462 only applies to actions at law, and not those in equity. However, as we saw above, the statute of limitations that applies to government penalty actions does not explicitly draw the distinction between legal and equitable claims, but instead applies to any enforcement action imposing a "civil fine, penalty, or forfeiture, pecuniary or otherwise."[51] This distinction can be construed as different from the line between law and equity as drawn in *Holmberg* and its progeny. Although some courts have referenced "equitable" remedies when holding that no limitations period applies to certain claims brought by government enforcement agencies,[52] it is more accurate to describe these claims as "remedial," because they are contrasted with the "penalties" that are subject to section 2462.[53] As will be discussed in Part IV below, many courts have found that supposedly "equitable" claims can be sufficiently punitive to fall within the scope of section 2462.

However, before examining these differences, it is necessary to describe briefly a discrete body of conflicting case law that deviates from these general rules, exemplified by the decision of the Ninth Circuit in *FEC v. Williams*.[54]

B. Contrary Authority: FEC v. Williams

FEC v. Williams is the leading Ninth Circuit case holding that the statute of limitations set forth in section 2462 should apply to both equitable and penal sanctions imposed by government agencies, contrary to the authority cited above.[55] In particular, the *Williams* court supported what is known as

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[51] 28 U.S.C. § 2462 (2006).

[52] *See, e.g.*, *Banks*, 115 F.3d at 919 ("Because Congress did not expressly indicate otherwise in the statutory language of § 2462, its provisions apply only to civil penalties; the government's *equitable* claims against [defendant] are not barred.") (emphasis added); SEC v. Bartek, 484 Fed. Appx. 949, 956 (5th Cir. 2012) ("Equitable remedies would not be subject to § 2462's time limitations.").

[53] *See, e.g.*, SEC v. Lorin, 869 F. Supp. 1117, 1121–22 (S.D.N.Y. 1994) ("[T]he label placed on a monetary liability—whether, for example, 'fine,' 'penalty,' 'sanction,' or 'disgorgement'—is not dispositive; instead, the determining consideration concerns whether the amount so labelled serves a remedial or punitive function."). *But see* SEC v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995) ("The controlling factor is the distinction between actions at law and actions in equity, not the potential harm that the remedy may cause the defendant.").

[54] FEC v. Williams, 104 F.3d 237 (9th Cir. 1996).

[55] *Id.*

the "concurrent remedy rule," which applies when legal and equitable remedies are connected to one another by a common set of facts.[56] The *Williams* court cited the Supreme Court decision in *Cope v. Anderson* in determining that equitable remedies that were predicated on non-equitable claims should be subject to the same limitations period as the non-legal claims.[57] Although *Williams* addressed federal election law, the application of the Court's holding to SEC enforcement actions is relatively straightforward. Apparently, the *Williams* court would have applied the "concurrent remedy rule" to all of the remedies available to the SEC under 15 U.S.C. § 78u, including not only civil penalties, but also injunctive relief, director and officer and industry bars, and disgorgement,[58] which are customarily considered equitable remedies not subject to statutes of limitations. The court provided no additional analysis beyond its citation to *Cope*, evidently concluding that because the injunctive relief sought by the FEC accompanied a claim for civil penalties, the five-year limitations period should apply to both claims.[59]

The Ninth Circuit has rarely found converts to its opinion in *Williams*, as reflected in the numerous decisions supporting the proposition that government enforcement of equitable claims is not subject to a limitations period unless specifically prescribed by Congress.[60] The Ninth Circuit's reliance on *Cope* in this context appears particularly misplaced. *Cope* did not address a government enforcement action in which equitable remedies were paired with civil penalties.[61] Instead, it involved a suit between private litigants, in which a receiver for an insolvent bank sought an assessment against certain shareholders of a holding company that had owned shares in the bank.[62] Thus, the government was not a party to the case.[63] Furthermore, the Supreme Court in *Cope* applied Ohio and Pennsylvania statutes of limitations to assess the timeliness of the plaintiffs' claims, rather than one of the federal statutes at issue in the majority of government enforcement actions.[64]

Given these underlying facts, it is perhaps understandable that the Ninth Circuit's holding on this point in *Williams*, which was based almost entirely on the authority of a single citation to *Cope*, has been criticized as inapposite to government enforcement actions.[65] For example, the Eleventh Circuit in *United States v. Banks*, ruling on an enforcement action brought by the government under the Clean Water Act, criticized *Williams* for failing to take

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[56] *Id.* at 240.

[57] Cope v. Anderson, 331 U.S. 461, 464 (1947) ("[E]quity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.")

[58] *Williams*, 104 F.3d at 240.

[59] *Id.* ("[B]ecause the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both").

[60] *See, e.g.*, United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997); United States v. Telluride Co., 146 F.3d 1241, 1248 (10th Cir. 1998).

[61] *See Cope*, 331 U.S. at 463.

[62] *Id.*

[63] *See id.*

[64] *Id.* at 463–64.

[65] *See Banks*, 115 F.3d at 919 (citing United States v. Beebe, 127 U.S. 338, 347 (1888)).

into consideration the deference afforded to the government in enforcement actions, as opposed to the private actions at issue in *Cope*.[66] The Eleventh Circuit abrogated a district court case that had followed *Williams* and held that the Ninth Circuit rule was limited to private actions in which the government was acting for the benefit of private parties.[67]

As illustrated above, the weight of authority decidedly agrees that the government faces no statute of limitations when seeking remedial sanctions against defendants in SEC enforcement actions. However, this conclusion does not definitively settle the question of whether a defendant has a potential statute-of-limitations defense when faced with an SEC action seeking injunctive relief, an officer and director bar, an industry bar, or disgorgement.[68] As I shall explain, courts have disagreed over the definition of "remedial" sanctions that escape the limitations period imposed by section 2462. Following a brief discussion in Part V of the distinctions drawn by courts between equitable and remedial remedies, in Part VI I will address each of the three broad categories of remedy that the SEC has sought, and how these distinction apply to each one.

V. Equitable Sanctions v. Remedial Sanctions

As described above, courts have largely accepted that the SEC and other enforcement agencies whose actions are subject to section 2462 may defeat a limitations defense when the sanctions that they seek to impose are remedial in nature. However, the exact conditions under which courts have determined that remedial sanctions escape from the limitations period under section 2462 have varied. While civil penalties are universally agreed to constitute penalties under the statute, at various times injunctive relief, officer and director and industry bars, and even disgorgement, have been found to be penalties as well, subjecting them to the statutory limitations period.[69] Certain courts have taken a more categorical approach in denying defendants any limitations defenses under these circumstances, while others have been more sympathetic to the arguments of defendants that the SEC is seeking to impose penalties through traditionally "remedial" means.[70]

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[66] *Id.*

[67] *See id.* ("The statute [of limitations] is enforced against the government only when the government is acting to vindicate *private* interests, not a sovereign or public interest.").

[68] *See infra* Part IV.

[69] *See, e.g.*, SEC v. Bartek, 484 Fed. App'x. 949, 957 (5th Cir. 2012) (denying SEC's request for an officer and director bar); SEC v. Jones, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) (denying SEC's requests for an officer and director bar and for injunctive relief); SEC v. Brown, 740 F. Supp. 2d 148, 156–57 (D.C. Cir. 2010).

[70] *Compare* SEC v. Kelly, 663 F. Supp. 2d 276 (S.D.N.Y. 2009) *with Bartek*, 484 Fed. App'x at 957.

A. Johnson v. SEC

One critical case in the evolution of the arguments surrounding limitations defenses in SEC enforcement actions has been *Johnson v. SEC*, a case heard by the United States Court of Appeals for the District of Columbia Circuit, which frequently hears appeals from SEC administrative proceedings given its role in the administrative appellate process.[71] Although the court in *Johnson* was not the first to undertake a detailed analysis of the application of section 2462 to "equitable" remedies,[72] it has generated a line of cases that has largely abandoned the distinction between sanctions that sound in law and those that sound in equity, and has instead focused attention on whether the sanction in question is penal or remedial in nature.[73]

The court in *Johnson* reviewed a decision of an SEC administrative law judge (ALJ) that imposed a six-month disciplinary suspension on a branch manager of a securities firm.[74] The ALJ imposed the sentence based on a finding that the manager had negligently supervised an employee who stole money from clients, but not on any findings the manager was complicit in the fraud itself.[75] The SEC asserted that the suspension did not constitute a civil penalty, framing it as a "remedial action" intended "to protect the public from future harm,"[76] thereby rejecting arguments made by the supervisor that the SEC's action was barred under section 2462.[77] In reviewing the case, the court largely ignored whether the relief sought by the SEC was legal or equitable in nature, and instead focused on the text of section 2462, conducting a detailed analysis of whether the suspension would constitute a "penalty" that would be subject to the statute.[78] The court went on to hold that where an SEC sanction compensated victims for their losses or deprived defendants of ill-gotten gains, such a sanction cannot be considered a penalty under the statute, but when the relief sought goes "beyond remedying the damage caused to the harmed parties by the defendant's action," the action would be subject to the five-year limitations period of section 2462.[79]

Evaluating the six-month suspension imposed on the petitioner, the *Johnson* court held that although a defendant in an SEC enforcement action could not prevail simply because he or she was negatively impacted by the sanction in question, "the degree and extent of the consequences to the sub-

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[71] *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 388–89 (2006) (citing E. BARRETT PRETTYMAN, JR., HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR 79–80 (1977)).

[72] *See, e.g.*, SEC v. Lorin, 869 F. Supp. 1117, 1121–30 (S.D.N.Y. 1994); SEC v. Glick, No. Civ. LV-78-11, 1980 WL 1414, at *1–2 (D. Nev. June 12, 1980).

[73] *See e.g.*, *Bartek*, 484 Fed. App'x 949; *Jones*, 476 F. Supp. 2d 374;

[74] Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996).

[75] *Id.* at 486.

[76] *Id.*

[77] *Id.* at 491.

[78] *Id.* at 487–88.

[79] *Id.* at 488.

ject of the sanction must be considered as a relevant factor in determining whether the sanction is a penalty."[80] The court concluded that, under this analysis, the six-month suspension "clearly" constituted a punishment that would be barred by the limitations defense raised by the petitioner.[81] The court noted that even a suspension could cripple the career of professionals in the securities industry, given the self-reporting requirements that frequently accompany such sanctions.[82] As such, the court found that the severe collateral consequences accompanying the SEC's decision suggested that the agency's actions were more punitive than remedial.[83]

Furthermore, the court noted that, notwithstanding the ALJ's statements to the contrary, the petitioner did not appear to present a danger to the public, and indeed that both the SEC's evidence and the ALJ's opinion focused on her past misconduct, rather than presenting any evidence that she would continue to be a threat to the public if she were permitted to continue to work in the securities industry.[84] The court found that this lack of evidence of future danger to the public demonstrated that the sanctions were imposed "solely in view of [petitioner's] past misconduct, [belying] the SEC's assertion in this litigation that the sanctions were imposed not as punishment for past dereliction, but primarily because of [her] present danger to the public."[85] The court also commented in a footnote that the SEC waited over five years to bring suit against the petitioner, further indicating that the agency was not terribly concerned about the threat that she posed to public order.[86] In light of all of these considerations, the court found that the sanction constituted a penalty, and was therefore barred by the applicable statute of limitations.[87]

B. Courts Adopt the Johnson Precedent

Two aspects of the United States Court of Appeals for the District of Columbia Circuit's decision in *Johnson* are particularly notable in light of subsequent developments in the interpretation of section 2462. First, the "misconduct" that the SEC sought to punish in *Johnson* was hardly egregious. The petitioner was allegedly negligent in her supervision of an employee who had stolen client funds, notwithstanding the fact that once she discovered the fraud, the supervisor fired the employee in question, informed the SEC of the conduct, and initiated an internal audit of the com-

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[80] *Id.*
[81] *Id.* at 488–89.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 490.
[85] *Id.* at 489–90.
[86] *Id.* at 490 n.9 ("If the SEC really viewed Johnson as a clear and present danger to the public, it is inexplicable why it waited *more than five years* to begin the proceedings to suspend her.")
[87] *Id.*

pany's procedures.[88] Thus, the alleged misconduct at issue in *Johnson* certainly did not involve any active malice on the part of the sanctioned individual. As such, it would not have been surprising for courts to find that its holding was simply not applicable to cases that involved more serious misconduct.

Second, and perhaps more importantly, the language used by the court in *Johnson* virtually set forth a roadmap by which the SEC and ALJs might avoid such a reversal in the future. The court in *Johnson* essentially rested its holding on the ALJ's insufficient attention to the ways in which the suspension would protect the public in the future, instead focusing solely on the petitioner's past misconduct. It is not difficult to imagine an ALJ crafting an opinion, even with similar facts, that would satisfy the court, by discussing the importance of well-functioning capital markets, risks of recidivism, and so forth, thereby presenting a case for the future threat posed by individuals found liable for securities law violations, rather than their past conduct.

For these reasons, one would have expected *Johnson*, which dealt with relief that was entirely disproportionate to the conduct, to be *sui generis*, and therefore unlikely to be followed. But the opposite has proven true. To be sure, there are cases in which courts have upheld equitable sanctions imposed by government agencies notwithstanding the holding in *Johnson*, basing their decisions on findings that the sanctions sought by the SEC or a similar government agency were remedial in nature, and that the defendant presented a future risk to the public.[89] Indeed, several cases have maintained the distinction between legal and equitable remedies that preceded *Johnson*, holding—typically with little discussion—that equitable remedies are not subject to the statute of limitations imposed by section 2462.[90] Generally,

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[88] *Id.* at 485–86.

[89] *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471–72 (D.C. Cir. 2009) (holding that an award of disgorgement was not punitive) (citing cases); Meadows v. SEC, 119 F.3d 1219, 1228 n.20 (5th Cir. 1997) ("*Johnson* emphasized that the imposition of a six-month suspension is less penal in nature where the reason for the sanction is the degree of risk petitioner poses to the public and is based upon findings demonstrating petitioner's unfitness to serve the investing public. In the instant action, the ALJ made such findings." (citation omitted)); *see also* United States v. Telluride Co., 146 F.3d 1241, 1246–47 (10th Cir. 1998) ("Consistent with our definition, the restorative injunction in this case is not a penalty because it seeks to restore only the wetlands damaged by [defendant's] acts to the status quo . . . ."); SEC v. Quinlan, 373 Fed. App'x. 581, 587–88 (6th Cir. 2009); Coghlan v. NTSB, 470 F.3d 1300, 1306 (11th Cir. 2006) ("Here, the ALJ specifically found that [petitioner] made false statements . . . and that '*safety in air commerce, or in air transportation and the public interest* does require affirmation of the [FAA's] Order to Revocation . . . .") (alteration in original).

[90] *See, e.g.*, SEC v. Kelly, 663 F. Supp. 2d 276, 286–87 (S.D.N.Y. 2009) ("[T]he great weight of the case law in this jurisdiction supports the SEC's contention that equitable remedies are exempted from § 2462's limitations period.") (citing cases); SEC v. McCaskey, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999) ("No statute of limitations applies to the SEC's claims for equitable remedies . . . .") (citing cases)); *see also* SEC v. Williams, 884 F. Supp. at 30 ("The controlling factor is the distinction between actions at law and actions in equity, not the potential harm that the remedy may cause the defendant."); FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 20–21 (D.D.C. 1995) (citing Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)).

however, courts have conducted the analysis prescribed in *Johnson*,[91] or at least acknowledged the debate.[92] Furthermore, many other courts have conducted the analysis set forth in *Johnson* and found that equitable sanctions constituted "penalties" under section 2462, despite the fact that the conduct of the defendants in those cases was much more serious than that of the petitioner in *Johnson* itself.[93] One of the clearest expressions of the rule occurred in *SEC v. Jones*:

> In light of the relevant case law, the ordinary meaning of "penalty," and the clear language of § 2462, the Court holds that the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm.[94]

With the widespread adoption of this analytical framework in cases brought by the SEC, questions have been raised regarding the scope of the inquiry conducted by courts, and the relevant criteria for determining whether a given sanction constitutes a "punishment" or not. The remainder of this article will briefly examine a number of these questions. Specifically, I consider what kinds of "equitable" remedies have normally been viewed as penalties under the statute, and which have not. As we shall see, although it is possible for courts to determine that officer and director bars, injunctions, and disgorgement awards can each constitute a penalty subject to the time limitations of section 2462 under certain circumstances, defendants have understandably had greater success in arguing that some of these remedies are punitive in nature than others.[95]

VI. Equitable Penalties

A. Officer and Director Bars

The SEC has the authority to seek to bar an individual from serving as an officer or director of any public company when that individual has vio-

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[91] *See, e.g.*, *supra* note 69; *see also* SEC v. Brown, 740 F. Supp. 2d 148, 156–57 (D.C. Cir. 2010); Gilbert v. Bangs, 813 F. Supp. 2d 669, 675 (D. Md. 2011).

[92] *See, e.g.*, SEC v. Tandem Mgmt. Inc., No. 95 civ. 8411, 2001 WL 1488218, at *6 (S.D.N.Y. Nov. 21, 2001); SEC v. Alexander, 248 F.R.D. 108, 115–16 (E.D.N.Y. 2007).

[93] *See, e.g.*, SEC v. Bartek, 484 Fed. App'x. 949, 957 (5th Cir. 2012) ("Based on the severity and permanent nature of the sought-after remedies, the district court did not error [sic] in denying the SEC's request on grounds that the remedies are punitive . . . ."); Proffitt v. FDIC, 200 F.3d 855, 861 (D.C. Cir. 2000) ("Although the FDIC's expulsion of Proffitt from the banking industry had the dual effect of protecting the public from a dishonest banker and punishing Proffitt for his misconduct, its punitive purpose plainly goes 'beyond compensation of the wronged party.'")

[94] SEC v. Jones, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007).

[95] *Compare e.g.*, *Jones*, 476 F. Supp. 2d at 381 (denying officer and director bar) *with Zacharias*, 569 F.3d at 471–72 (permitting disgorgement).

lated the anti-fraud provisions of the Exchange Act.[96] Such a bar can only be imposed in a proceeding in federal court, but in administrative proceedings the SEC has the authority to suspend or bar individuals from working in the securities industry, impose civil monetary penalties, and seek the disgorgement of ill-gotten gains.[97] Courts have typically been most skeptical of claims that relief consisting of an officer and director bar or an industry ban is "remedial," and it was precisely this issue that resulted in the holding in *Johnson*.[98]

The *Johnson* court noted a number of characteristics of the suspension at issue that suggested the suspension constituted a penalty.[99] These considerations would apply to an even greater extent for an officer and director bar or an industry ban.[100] The Court in *Johnson* noted that, although the suspension would only apply for a limited period of time, the "collateral consequences" of such a suspension could last for the petitioner's entire career.[101] For example, it noted that investment professionals who had been suspended were required to report the fact they had been sanctioned by the SEC on their professional record, such as the Form ADV required for the registration of investment advisors.[102] Other courts have made similar observations regarding the deleterious effects of an officer and director bar. For instance, in *SEC v. Bartek*, the United States Court of Appeals for the Fifth Circuit upheld a decision by the district court that officer and director bars were penalties under the facts of the case.[103] Notwithstanding the fact that, unlike in *Johnson*, the defendants in *Bartek* had been accused of fraud rather than negligence, the Fifth Circuit held that while remedies such as officer and director bars were "traditionally remedial," the "stigmatizing effect and long-lasting repercussions" of the lifetime bar sought by the SEC suggested that the sanction was punitive in nature.[104] The district court had noted that the SEC was seeking a lifetime bar against the defendants, and that such reputational harm would essentially end their careers in the investment community.[105]

The Fifth Circuit in *Bartek* identified a critical aspect of director and officer bars that may result in the skepticism with which they are sometimes greeted by courts. In a footnote, the court commented that where a court

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[96] 15 U.S.C. § 78d(2) (2012).

[97] 15 U.S.C. § 78o(b)(4) (2012); 15 U.S.C. § 80a-9(b) (2012); 15 U.S.C. § 80a-9 (d) (2012); 15 U.S.C. § 80b-3(f) (2012).

[98] Johnson v. SEC, 87 F.3d 484, 491 (D.C. Cir. 1996).

[99] *Id.*

[100] *Id.* at 488–89.

[101] *Id.* at 489.

[102] *Id.*

[103] SEC v. Bartek, 484 Fed. App'x. 949, 957 (5th Cir. 2012).

[104] *Id.*

[105] SEC v. Microtune, Inc., 783 F. Supp. 2d 867, 883–84 (N.D. Tex. 2011) ("In the investment community, the collateral consequences 'are quite serious,' effectively 'stigmatiz[ing]' the defendant for the rest of his life.") (alteration in original), *aff'd sub nom.* SEC v. Bartek, 484 F. App'x 949 (5th Cir. 2012).

places limitations on the career choices available to a defendant, or "exclude[s] a person from their chosen profession," a significant interest of that defendant is compromised.[106] Except where the government has compelling proof to suggest that such limitations are necessary for the safety of the public, courts will be wary of imposing these limitations.[107] Obviously, in some instances such a ban is necessary, as the district court in *SEC v. Microtune, Inc.* recognized, in comparing the *Bartek* defendants' conduct with that of the defendants in *SEC v. Quinlan*.[108] The defendants in *Quinlan* were found guilty in both state and federal court of especially egregious conduct, including occupying leadership positions in a six-year-long fraudulent scheme to steal money from investors.[109] Under these circumstances, I suspect that few courts would hesitate to find that the defendants should be barred from leadership positions in public companies. On the other hand, in an options backdating case, such as the one at issue in *Bartek*, or for similar, less egregious conduct, the SEC must prove more than the mere fact that violations occurred in the past. In accordance with the holding in *Johnson*, the SEC will be required to show that there is some risk of violations occurring in the future as well.

Indeed, this point raises an additional factor considered by both the courts in *Johnson* and *Bartek*. A defendant is able to present a limitations defense under section 2462 only if the SEC has not brought suit within five years of the alleged violation.[110] The very fact that the SEC has waited so long to bring suit suggests (but does not prove) that imposing sanctions on the defendant is not a top priority for the SEC, calling into question whether the defendant actually poses a threat to society. As the court in *Johnson* noted, "[i]f the SEC really viewed Johnson as a clear and present danger to the public, it is inexplicable why it waited more than five years to begin the proceedings to suspend her."[111]

Furthermore, in cases where the defendant has not committed any further misconduct in the five years since committing the alleged violations, the passage of time itself indicates that the defendant is unlikely to pose the threat posited by the SEC. Courts have held that the defendant's past conduct is by itself insufficient to prove the likelihood of future violations.[112] However, where defendants were "repeat offenders" or had violated injunctions

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[106] *Bartek*, 484 F. App'x at 957 n.10.

[107] *Id.* at 956–57.

[108] *Microtune*, 783 F. Supp. 2d at 886 n.30.

[109] SEC v. Quinlan, 373 F. App'x. 581, 582–83 (6th Cir. 2009).

[110] 28 U.S.C. § 2462 (2006).

[111] Johnson v. SEC, 87 F.3d 484, 489 n.9 (D.C. Cir. 1996). Similarly, the Fifth Circuit in *Bartek* overturned the officer and director bar in that case based in part upon the "minimal likelihood of similar conduct in the future." 484 F. App'x at 957; *see also Microtune*, 783 F. Supp. 2d at 884 ("There is no evidence—nor any allegation—that Bartek has engaged in any misconduct since he left Microtune in 2003, and nothing demonstrates that he is likely to do so in the future.").

[112] *See* SEC v. Patel, 61 F.3d 137, 141 (2d Cir. 1995); Proffitt v. FDIC, 200 F.3d 855, 861–62 (D.C. Cir. 2000).

issued against them, such evidence could suffice to impose these harsh remedies such as industry bars.[113] But where no such allegations have been made, as one district court has held, the fact that "several years have passed since Defendants' alleged misconduct apparently without incident" should limit the ability of the government to impose further limitations on the conduct of defendants within the securities industry.[114]

This relatively high standard makes a great deal of sense. On the one hand, it might be instinctively appealing to impose professional bars indiscriminately on individuals who have been found guilty of securities laws violations. Yet this perspective fails to account for the inherently suspect nature of cases falling outside the limitations period of section 2462. These may be cases that the SEC has viewed as not sufficiently important to litigate for a number of years. When one considers the misconduct often at issue in these cases—such as negligent supervision in *Johnson* or options backdating in *Bartek*—it does not seem reasonable to presume that a defendant's career should effectively end because the SEC eventually decides to bring suit. Where applicable, the absence of any evidence that a defendant has committed further misconduct since engaging in the act at issue in the underlying SEC investigation should provide relatively solid support for leniency.[115]

To the extent that an officer and director bar, or an industry bar, is intended to punish a defendant by limiting his or her ability to advance in his or her field, it is likely that the defendant has already suffered significantly if an SEC investigation has become public. The career of a defendant involved in a securities fraud case could be adversely affected by the mere existence of an SEC investigation, even in the absence of publicity, since an individual under investigation may be required to disclose the investigation to current or prospective employers. In the highly regulated securities industry, firms would be wary of employing the target of an SEC investigation, even if no professional bar has been obtained by the government. Such a hiring could be viewed as reckless or unreasonable in the event that fraud occurs in the future. Thus, the imposition of a formal bar seems unnecessary in this situation. Instead, the SEC could rely on the informal policing mechanisms of the industry itself, which are generally sufficient, except for the most egregious of violations.

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[113] *Compare Proffitt*, 200 F.3d at 861–62 ("While a serious offense, even long past, may indicate Proffitt's current risk to the public, that offense cannot alone determine his fitness almost a decade later.") (citing cases) *with* SEC v. Drexel Burnham Lambert, Inc., 837 F. Supp. 587, 611 (S.D.N.Y. 1993) (imposing injunctive relief on defendants based on the finding that they were "repeat offenders" and that "there is every reason to believe that, absent further injunctive and ancillary relief, [defendants] will continue to abuse their positions as officers and directors of public companies to engage in future violations.").

[114] SEC v. Jones, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007).

[115] *See Patel*, 61 F.3d at 141 (holding that isolated incidents of misconduct "can in no way justify the prediction that future misconduct will occur" for purposes of an officer and director bar).

B. Injunctive Relief

The officer and director prohibitions of 15 U.S.C. § 78u(d)(2) and the industry prohibitions of § 78o(b)(4) are formally distinct from the injunctive relief available to the SEC under 15 U.S.C. § 78u(d)(1) to prohibit defendants from future violations of the securities laws. Nonetheless, the two provisions are closely related, to the extent that they both aim to limit the ability of defendants to cause further harm to the public by engaging in securities fraud.[116] Thus, the standard by which courts have typically reviewed the imposition of injunctive relief mirrors the standard for an officer and director bar or industry bar, although the latter type of remedy is much broader: An officer and director bar or industry bar prohibits a defendant from having any leadership position at a public company or associating with a broker-dealer or investment advisor, while injunctive relief typically only enjoins the defendant from actually violating the securities laws, without necessarily preventing him or her from being employed in the securities industry.[117] Ultimately, both tests revolve around the danger the defendant poses to the public.

In contrast to the officer and director bars examined above, courts have generally accepted claims where the SEC seeks injunctive relief against a defendant. This stance conforms to the general contours of the *Johnson* ruling, in which the court held that "the degree and extent of the consequences to the subject of the sanction" must be compared with the protection afforded to the public by the remedy.[118] The consequences of injunctions against future violations are significantly less severe than the professional bars described above, and therefore courts are less likely to consider them as punishments subject to the time limitations of section 2462. Given that all individuals and entities are prohibited from violating the securities laws, the burden of formally enjoining such violations seems minimal.

One interesting aspect of injunctive relief imposed by the SEC is that the structure of the remedy should, in theory, automatically meet the requirements imposed by *Johnson*—perhaps further accounting for the frequency with which courts have granted these remedies when sought. Under *Johnson*, in order for a particular sanction to be classed as "remedial," the SEC must

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[116] *See* 15 U.S.C. §§ 78u(d)(2); 78o(b)(4) (2012).

[117] In the context of this discussion, the distinction between injunctive relief imposed by the SEC and injunctive relief imposed by other government agencies may be important. While other government agencies may issue injunctions requiring defendants to undertake remedial action, *see, e.g.*, United States v. Telluride Co., 146 F.3d 1241, 1246–48 (10th Cir. 1998) (requiring the restoration of damaged wetlands), or enjoining them from conduct that could result in obvious harms to the public, *see, e.g.*, Coghlan v. NTSB, 470 F.3d 1300, 1305–07 (11th Cir. 2006) (preventing petitioner from obtaining a pilot's license); Gilbert v. Bangs, 813 F. Supp. 2d 669, 675–76 (D. Md. 2011) (preventing petitioner from obtaining a license to sell firearms), the SEC typically enjoins defendants from committing future violations of the securities laws, which imposes legal obligations on them but does not directly control their behavior.

[118] Johnson v. SEC, 87 F.3d 484, 488 (D.C. Cir. 1996).

demonstrate that there would be a likelihood of future harm to the public in the event that the injunction is not granted.[119] However, this requirement mirrors the underlying legal standard that applies to all injunctive relief, which demands that a litigant demonstrate irreparable injury absent the injunction.[120] In the context of government enforcement actions, at least one court has held that although injunctive relief is equitable, and therefore not subject to the limitations period imposed by section 2462, the elements required to receive this relief ensure that the government remain constrained in pursuing injunctions.[121]

As such, in instances where the SEC is unable to demonstrate the likelihood of future harm, its application for an injunction fails. On the one hand, in the absence of a showing of likely future harm, the injunction should be classified as a penalty under *Johnson*, and would be subject to the time bar imposed by section 2462. On the other hand, and perhaps more importantly, in the absence of a showing of likely future harm, the application for an injunction is wholly invalid as a matter of law, because the government has failed to make the requisite showing necessary for an injunction.[122]

Regardless, when courts have evaluated the timeliness of a claim for an injunction under section 2462, they have not typically considered the underlying authority of the SEC to impose that injunction as suggested by *Glick*.[123] Instead, they have focused on the narrower question of whether the injunction in question qualifies as a penalty, which naturally involves the same basic test: has the SEC persuasively demonstrated that the injunction serves to protect the public by neutralizing the danger posed by the defendant in the event that the injunction is not granted?[124] In this context, courts have considered many of the same factors that they consider when determining

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[119] *Id.* at 489–90; *see also Patel*, 61 F.3d at 141–42.

[120] *See* eBay Inc. v. MercExchange, *L.L.C.*, 547 U.S. 388, 393 (2006) (reaffirming that a plaintiff seeking an injunction must demonstrate that they would "suffer irreparable harm if an injunction did not issue" in order to obtain equitable relief).

[121] SEC v. Glick, No. Civ. LV-78-11, 1980 WL 1414, at *2 (D. Nev. June 12, 1980)("The fact that the SEC, when seeking purely injunctive relief, is not bound by any specifically delineated statute of limitations does not mean that it possesses unlimited or perpetual power to obtain injunctive relief for past conduct. Before the SEC can obtain injunctive relief, there must first be a showing that there is a reasonable likelihood or expectation that the defendants will commit further violations of the securities laws.")

[122] Arguably, this holds true for all "equitable" remedies sought by the SEC, given that some courts have held that "[t]o obtain equitable remedies, the government must demonstrate a 'reasonable likelihood of further violation[s] in the future.'" United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1132 (D.C. Cir. 2009). This perspective calls into question the holding of *Johnson* itself, which provided that certain equitable remedies sought by the SEC are punitive: one could argue that to the extent that such remedies are punitive, and are not based on a demonstration of likely future harm, they cease being equitable remedies entirely. *See Johnson*, 87 F.3d at 491. This concern is precisely the reason that the SEC requires the federal statute when seeking such remedies, and therefore must comply with the limitations period associated with the statute. However, this point is primarily terminological and has little bearing on the outcome of such cases.

[123] *See, e.g.*, SEC v. Jones, 476 F. Supp. 2d 374, 383-85 (S.D.N.Y. 2007).

[124] *Id.*

whether an officer and director bar is appropriate. Thus in *SEC v. Jones*, the court denied the government's request for a permanent injunction, citing the factors that are familiar from our discussion of officer and director bars, as well as industry bars discussed above.[125] After citing a string of Second Circuit cases holding that it is insufficient for the SEC to base its suit for a permanent injunction on past misconduct, the court found that the SEC failed to show that the defendants were a future threat to the public, thereby distinguishing the case from others in which repeat offenders were enjoined from violations of the securities laws.[126] The court also noted that the fact that "several years [had] passed since Defendants' alleged misconduct . . . further undercuts the Commission's assertion that Defendants pose a continuing risk to the public."[127]

Jones is especially relevant to these questions because of its discussion of the potential collateral consequences of an injunction. In particular, the *Jones* court discussed the interaction between the looser standards that sometimes govern injunctions, and the more stringent requirements that courts impose when the SEC seeks the professional bars described above.[128] Although the court in *Jones* recognized the reputational damage that would be suffered by defendants in the event that an injunction was issued against them, it also noted that such an injunction could serve as the basis for an industry bar under the relevant provisions of the Investment Advisers Act of 1940.[129] Indeed, one of the defendants in *Jones* asserted that the SEC had indicated that it intended to seek such a bar, which led the court to effectively incorporate the standard of review that applies to actions to impose an industry bar on an individual.[130] As a result of this analysis, the court determined that "[t]he severity of these collateral consequences indicate that the requested injunction would carry with it the sting of punishment."[131]

In their review of SEC suits for injunctive relief, courts have potentially overlooked the fact that an injunction can serve as the basis for a more comprehensive industry bar. For while the SEC must normally file a complaint in federal court in order to seek such a bar, there are also administrative sanctions that the SEC can use to limit a defendant's participation in certain aspects of the securities industry, which do not require a filing in federal court. Yet an injunction from a court can serve as a powerful foundation for such an administrative action, thereby enabling the SEC to leverage the relief readily offered to it in federal court into an administrative employment bar

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[125] *Id.*

[126] *See id.* (citing SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99 (2d Cir. 1978); SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959); SEC v. Patel, 61 F.3d 137, 141–42 (2d Cir. 1995)).

[127] *See Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007).

[128] *Id.*

[129] *Id.* at 385 (citing 15 U.S.C. § 80a-9(a)(2); § 80b-3(e)(3), (f)).

[130] *See id.*

[131] *Id.*

that might otherwise be more difficult to obtain. Certainly, the defendant in such an action could appeal. However, if courts take responsibility for evaluating the collateral consequences of certain sanctions when determining whether those sanctions constitute penalties, the fact that some less serious sanctions can serve as the basis for more serious ones in the future should not be overlooked. Where a defendant can further link the injunction sought by the SEC to other, more serious forms of punishment such as a professional bar, he or she may have a strong argument that the five-year statute of limitations imposed by section 2462 should apply.

C. Disgorgement

In contrast to SEC actions seeking professional bars or injunctive relief, it is difficult to argue that an SEC action seeking disgorgement might qualify as a penalty. After all, disgorgement is frequently contrasted with civil penalties by the very fact that it is remedial rather than punitive, aiming to restore the *status quo ante* by depriving defendants of their ill-gotten gains.[132] Where the United States Court of Appeals for the District of Columbia Circuit questioned whether professional bars and injunctions were penalties in *Johnson*, the court unequivocally held that actions for disgorgement were remedial, and therefore not subject to the statute of limitations in cases such as *SEC v. Bilzerian* and *Zacharias v. SEC*.[133]

Nonetheless, even in cases involving disgorgement there are arguments that such an action could constitute a penalty that would be subject to attack under the five-year limitations period of section 2462. As the United States Court of Appeals for the District of Columbia Circuit grudgingly admitted in

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[132] Zacharias v. SEC, 569 F.3d 458, 471–72 (D.C. Cir. 2009).

[133] *See id.* ("Our disgorgement cases uniformly hold that an order to disgorge is not a punitive measure; it is intended primarily to prevent unjust enrichment.") (citing SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000); *see also* SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994)); Jones, 476 F. Supp. 2d at 385. One of the more extended discussions of SEC disgorgement actions occurs in SEC v. Lorin. 869 F. Supp. at 1121–30. While Lorin rejected the contention that disgorgement might constitute a penalty for the purposes of section 2462, it also considered at some length the argument that the limitations period for civil actions under section 10(b) should be "borrowed" for purposes of a disgorgement action by the government. *Id.* at 1125–30. The defendants argued that, in light of the fact that disgorgement amounts were frequently distributed by the SEC to "victims" of the fraud (and that the SEC was sometimes ordered to do so by courts), such actions did not represent instances in which the government was acting as a sovereign, but was rather acting on behalf of private litigants. *Id.* at 1127. As such, the deference to the government when it pursues a public right (including the presumption against finding a claim untimely under a statute of limitation) would not apply to such actions. *Id.*; see also United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997) ("The statute is enforced against the government only when the government is acting to vindicate private interests, not a foreign or public interest.") (citation omitted). After discussing this argument at length, the court ultimately rejected it, holding that "[t]he element of SEC actions that I find dispositive in terming them public interest actions is their allowance for the United States to itself obtain a monetary benefit. The fact that SEC actions often benefit private parties does not persuade me that they cannot simultaneously serve the public interest." *Lorin*, 869 F. Supp. at 1130 (citation omitted).

Zacharias, an action for disgorgement must seek funds that are causally related to the alleged misconduct.[134] In theory, where the SEC sought a disgorgement amount that it could not link to an amount of ill-gotten gain received by the defendants, such an action could be classified as a penalty, and challenged as untimely.[135] However, under these circumstances, a broader attack on the disgorgement action would be more fruitful, given that a link between the disgorgement amount and the alleged misconduct is a necessary element of the sanction in the first place. Thus, for example, the court in *Jones* cursorily held that disgorgement remedies were not subject to the time bar imposed by section 2462, but went on to find that the SEC's claims for disgorgement could not be maintained in light of a failure to identify an amount gained by the defendants as a result of their misconduct.[136]

In contrast to some of the nuances inherent in the imposition of professional bars or injunctive relief, the unambiguous position of courts on disgorgement remedies appears both simple and correct. Notably absent are the analyses of collateral consequences that frequently accompany the other types of remedies previously discussed—a disgorgement award neither jeopardizes a defendant's career, nor does it carry significant reputational harm, except to the extent that the defendant is associated with an SEC investigation in the first place. Provided that the government is able to connect a defendant's unlawful conduct to pecuniary gain, there are few credible arguments that a defendant should be permitted to retain his or her ill-gotten gains, regardless of how much time has elapsed since the misconduct in question. Obviously, defendants frequently dispute the *amount* of disgorgement, but few can claim that the disgorgement is itself punitive. Where defendants have made such claims, courts have rightly rebuffed them.

Yet this unambiguous posture towards disgorgement as an equitable remedy only serves to contrast the other remedies discussed above. While disgorgement naturally feels similar to a remedial sanction, injunctive relief and professional bars do not. There are factual circumstances under which these sanctions undoubtedly serve the public interest, but I would hesitate to accept this characterization at face value. The SEC frequently assumes an adversarial stance towards civil defendants that appears closer to a

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[134] *Zacharias*, 569 F.3d at 472.

[135] *Id.* at 471–72 (citing cases); *see also* SEC v. Microtune, Inc., 783 F. Supp. 2d 867, 887–88 (N.D. Tex. 2011) (dismissing claims of disgorgement against one defendant based on the fact that there was no evidence that defendants exercised any backdated stock options, and therefore had no ill-gotten gain to disgorge).

[136] *Jones*, 476 F. Supp. 2d at 385–86. This contrasts with the customary approach taken by courts ruling on the timeliness of claims for injunctive relief. When determining whether an injunction should be granted, courts typically consider whether or not the relief constitutes a "penalty" under the statute, rather than whether the necessary elements required for an injunction have been met by the SEC. *See supra* Part VI-B. This possibly reflects courts' commitment to the idea that disgorgement always represents a remedial sanction, the elements of which may or may not have been proved by the SEC. With respect to injunctive relief, on the other hand, courts are more agnostic, and willing to hold that as a result of a failure of the SEC to prove certain facts, they are not remedial at all.

prosecutorial function than the strictly "remedial" role that many of the forms of relief available to them are intended to fulfill. In this light, courts should be careful about reviewing administrative sanctions and claims for relief brought by the SEC, to ensure that the properly punitive role played by the SEC is cabined within the congressionally mandated statutes of limitations.

VII. Conclusion

While it is easy to become ensnared in the details surrounding the jurisprudence and terminology of SEC enforcement actions, the underlying impetus for this inquiry should not be forgotten. SEC enforcement actions can impose severe costs on defendants, whether through administrative proceedings or in ordinary litigation. Yet defendants in such actions frequently lack access to certain protections afforded to criminal defendants who face similar charges. A defendant in an SEC enforcement action can be deprived of their career many years after the alleged misconduct took place. In the absence of adequate judicial oversight, defendants face quasi-criminal penalties enforced through civil proceedings, with civil burdens of proof brought by a government enforcement agency unconstrained by the limitations protections afforded in criminal prosecutions.

Of course, in many instances the remedies sought by the SEC are entirely appropriate, and reflect the important role that the agency plays in regulating what have proven over the past few years to be highly imperfect capital markets. Where individuals at public companies, broker-dealers, or investment advisers act in ways that jeopardize the integrity of financial markets, the SEC can and should impose both penalties and remedial sanctions on the individuals responsible. But in such cases, I would not expect the SEC to bring claims more than five years after the alleged misconduct. Ideally, the SEC would move to eliminate the most serious types of fraud quickly and efficiently, in order to better safeguard the public interest.

Conversely, where the SEC pursues claims against defendants after the expiration of the applicable statute of limitations, it should be assumed that it is addressing marginal cases that involve less serious conduct than those it addresses in a timely manner. In such instances, correcting past harms and preventing future harms to investors is appropriate, but punishment is not. As I have argued above, under these circumstances courts should be careful to review the nature of the SEC's claims, because as the agency becomes more aggressive in its pursuit of securities fraud and as its posture becomes more prosecutorial, its sanctions should be subject to the statutory limitations period that applies when it seeks to punish, rather than to correct. For example, where the SEC aims to prevent an individual from working in the industry of his or her choice, it should act within the time allotted to it by statute, or should be required to show that the public faces serious harm if the relief that it seeks is not granted. Similar standards should apply to in-

junctive relief, mirroring the standards that typically accompany equitable claims in general.[137] Allowing the limitations period to continue indefinitely not only imposes quasi-criminal sanctions on civil defendants, but also absolves the agency of its duty to conduct efficient and timely investigations.[138]

Increasingly, courts have moved in this direction. Recognizing the fact that some SEC claims that were traditionally viewed as remedial are becoming more punitive in nature, courts have more carefully scrutinized the SEC's assertions that its enforcement program is merely attempting to restore the *status quo ante* when acting outside the limitations period for penalties imposed by Congress. Yet courts must go further in developing clearer standards for determining when the SEC has met its burden of showing that a particular sanction is remedial, and when it has not. Doing so would not only serve to protect the interests of defendants, who would otherwise be obliged to defend themselves against stale claims. It might also encourage the SEC to further rationalize the way in which it brings claims in the first place: ensuring that penalty actions are brought earlier and more aggressively against serious offenders, while milder forms of remedial relief are deployed later against others. The public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions. While investigations can take time, and the issues involved can be complex, it is not unreasonable to expect the SEC to focus its efforts on bringing claims in a timely fashion against those who are guilty of serious and intentional misconduct.

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[137] *See supra* Part II.

[138] The investigative authority of the SEC was stressed by the Supreme Court in *Gabelli*, which held that the agency should not benefit from the "discovery rule" extending the applicable statute of limitations for civil penalty actions, in part because "the SEC's very purpose is to root . . . out [fraud], and it has many legal tools at hand to aid in that pursuit." Gabelli v. SEC, 568 U.S. 133, No. 11-1274, slip op. at 8 (Feb. 27, 2013). This suggests that the Court would hold the SEC to a higher standard of competence than civil plaintiffs, which is in tension with some earlier holdings by courts that agencies acting on behalf of the government should be granted more lenient standards "to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interest . . . ." United States v. Telluride Co., 146 F.3d 1241, 1246 n.7 (10th Cir. 1998) (citing Guaranty Trust Co. v. United States, 304 U.S. 126, 132–33 (1938)).