The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990

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INTRODUCTION

Since Roman times, legal systems have imposed time restrictions on the ability of plaintiffs to sue.[1] Traditional justifications for these statutes of limitations include providing a release for defendants from old liabilities, encouraging plaintiffs to bring cases while the evidence is still obtainable and the witnesses' memories fresh, and giving property owners security in their rights.[2] Despite these benefits, the common law courts have long exempted government-initiated suits from time restrictions in the absence of specific legislative authorization for imposing such time bars.[3] This exemption for the government developed in England to protect the prerogative of the sovereign.[4] The practice took root in the United States, despite the absence of a sovereign, because of a desire to preserve the government's right to revenues and to ensure the enforcement of public policy.[5] In order for this exemption to apply, however, the state must sue in its governmental capacity, meaning that it is primarily acting to protect the public's rights rather than its own interests.[6]

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1. *See* Note, *Developments in the Law: Statutes of Limitations,* 63 HARV. L. REV. 1177, 1177 (1950).

2. *See* Toussie v. United States, 397 U.S. 112, 114-15 (1970); S. REP. No. 1328, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503-04; *Developments in the Law: Statutes of Limitations, supra* note 1, at 1185-86.

3. This principle is embodied in the maxim *nullum tempis occurrit regi* — time does not run against the king. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938); United States v. Thompson, 98 U.S. 486, 489 (1879); Dole v. Local 427, Intl. Union of Elec., Radio & Mach. Workers, 894 F.2d 607, 610 (3d Cir. 1990); Glenn Elec. Co. v. Donovan, 755 F.2d 1028, 1033 (3d Cir. 1985); United States v. Central Soya, Inc., 697 F.2d 165, 166 (7th Cir. 1982); SEC v. Lorin, 869 F. Supp. 1117, 1127 (S.D.N.Y. 1994); SEC v. Toomey, 866 F. Supp. 719, 724 (S.D.N.Y. 1992).

4. *See* ROBERT DORSEY WATKINS, THE STATE AS A PARTY LITIGANT 33 (1927); Note, *State's Immunity to the Statute of Limitations,* 38 ILL. L. REV. 418, 419 (1944).

5. *See* Block v. North Dakota, 461 U.S. 273, 290 (1983); *Guaranty Trust Co.,* 304 U.S. at 132; *Dole,* 894 F.2d at 610 & n.6.

6. *See* E.I. DuPont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924); *Dole,* 894 F.2d at 611-12; WATKINS, *supra* note 4, at 63. To illustrate the distinction, the state acts in its governmental capacity when it prosecutes violators of statutes because such suits benefit the general public. Suits by the government to enforce a contract with one of its suppliers, on the other hand, would not receive immunity from statutes of limitations because such actions only directly affect the rights of the state as a contractual party. In such suits, the government resembles a private litigant.

Because the government's immunity from statutes of limitations conflicts with the policy behind having such provisions, Congress has created time bars that explicitly override the exemption. Many federal regulatory schemes include their own statutes of limitations applicable to certain actions brought under their authority.[7] Additionally, three general statutes of limitations found in title 28 of the United States Code restrict civil suits by the government. One such time bar, section 2462, governs suits to impose any civil fines, penalties, or forfeitures that are authorized by federal statute.[8] Another, section 2415, controls federal government actions for damages based in contract or tort law.[9] In 1990, Congress added a third general statute of limitations to title 28 applicable to all civil suits based on federal laws enacted after December 1, 1990.[10]

Despite the existence of the general statutes of limitations in title 28, many government suits remain unrestricted by any time

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Dole demonstrates the difference between private and public litigants. In *Dole,* the government sought an injunction to force a union to allow one of its members to examine collective bargaining agreements made with various employers. Although the employee would benefit if the government succeeded in obtaining the injunction, the court rejected the assertion that the Secretary of Labor was suing to serve private interests rather than the public. 894 F.2d at 611-12. "[T]he touchstone remains the fact that public policies are served and the public interest is advanced by the litigation, and the fact that the litigation has private beneficiaries as well does not detract from the public nature of the suit." 894 F.2d at 612.

The public-private distinction is important because *private* litigants generally borrow a limitations period from state law when the federal statute creating the cause of action does not contain such a restriction. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991). When suing on behalf of *public* rights, the government is exempt from this borrowing requirement. *See* 501 U.S. at 355-56; Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977); United States v. Summerlin, 310 U.S. 414, 416 (1940); *Dole,* 894 F.2d at 610.

7. For example, § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1988), contains a six-month limitations period, and the Internal Revenue Code (IRC) contains its own statutes of limitations, such as that found at 26 U.S.C. §§ 6501-03 (1988).

8. *See* Judicial Improvements Act of 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 974 (codified at 28 U.S.C. § 2462 (1988)).

9. *See* Act of July 18, 1966, Pub. L. No. 89-505, § 1, 80 Stat. 304 (1966) (codified as amended at 28 U.S.C. § 2415 (1988)). Section 2415 applies to a variety of suits brought by the government in addition to suits based in tort and contract law, such as actions for conversion of U.S. property.

This Note does not devote further attention to § 2415 because it does not control prosecutions by the Securities and Exchange Commission (SEC). Section 2415 only applies to suits by the federal government seeking money damages. In the securities laws, only private plaintiffs can request damages. *See* 15 U.S.C. § 78r (1988). The only case addressing the applicability of § 2415 to SEC suits based its dismissal of the statutes of limitations defense on grounds that the SEC did not request damages as a remedy. *See* SEC v. Rind, 991 F.2d 1486, 1492-93 (9th Cir.), *cert. denied,* 114 S. Ct. 439 (1993).

10. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5114 (codified as amended at 28 U.S.C. § 1658 (Supp. II 1990)). Section 1658 states: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [Dec. 1, 1990] . . . may not be commenced later than four years after the cause of action accrues." 28 U.S.C. § 1658 (Supp. II 1990). Because the relevant sections of the securities laws were all passed prior to December 1, 1990, this section does not affect SEC enforcement actions, thus placing analysis of § 1658 outside the scope of this Note.

bar.[11] Notably, courts have never dismissed an action by the Securities and Exchange Commission (SEC) for violating a statute of limitations[12] not contained within the securities laws themselves.[13] Courts have decided not to apply either section 2462 or section 2415 of title 28 because the equitable forms of relief traditionally available to the SEC in enforcement suits[14] places these suits outside the reach of these statutes.[15] To bolster their decisions

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11. *See, e.g.,* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (holding that no time bar controls government suits under Title VII of the Civil Rights Act of 1964); Capozzi v. United States, 980 F.2d 872 (2d Cir. 1992) (holding the same in the context of ex parte Internal Revenue Service (IRS) proceedings); Mullikin v. United States, 952 F.2d 920 (6th Cir. 1991) (same); Dole v. Local 427, Intl. Union of Elec., Radio & Mach. Workers, 894 F.2d 607 (1990) (holding the same in a case under §§ 104 and 210 of the Labor-Management Reporting and Disclosure Act); *see also Rind,* 991 F.2d at 1490 (listing other cases in which the courts found no statute of limitations applicable to the federal government).

12. *See Rind,* 991 F.2d 1486; SEC v. Lorin, 869 F. Supp. 1117 (S.D.N.Y. 1994); SEC v. Toomey, 866 F. Supp. 719 (S.D.N.Y. 1992); SEC v. Egan, 821 F. Supp. 1274 (N.D. Ill. 1992); SEC v. O'Hagan, 793 F. Supp. 218 (D. Minn. 1992); SEC v. Keating, 1992 Fed. Sec. L. Rep. (CCH) ¶ 96,906 (C.D. Cal. July 23, 1992); SEC v. Willis, 777 F. Supp. 1165 (S.D.N.Y. 1991); SEC v. Hayes, 1991 Fed. Sec. L. Rep. (CCH) ¶ 96,236 (N.D. Tex. July 25, 1991); SEC v. Washington County Util. Dist., 1982 Fed. Sec. L. Rep. (CCH) ¶ 99,112 (E.D. Tenn. Dec. 2, 1982); SEC v. Glick, 1980 Fed. Sec. L. Rep. (CCH) ¶ 97,535 (D. Nev. June 12, 1980); SEC v. Continental Advisers, 1978 Fed. Sec. L. Rep. ¶ 96,489 (D.D.C. June 29, 1978); SEC v. Penn Cent. Co., 425 F. Supp. 593 (E.D. Pa. 1976).

13. Six federal acts passed between 1933 and 1940 constitute the *securities laws. See* Securities Act of 1933, ch. 38, tit. 1, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77mm (1988)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. (1988)); Public Utility Holding Company Act of 1935, ch. 687, tit. 1, 49 Stat. 803 (codified as amended at 15 U.S.C. § 79 to 79z-6 (1988)); Trust Indenture Act of 1939, ch. 411, 53 Stat. 1149 (codified as amended at 15 U.S.C. § 77aaa-77bbbb (1988)); Investment Company Act of 1940, ch. 686, tit. 1, 54 Stat. 789 (codified as amended at 15 U.S.C. § 80a-1 to 80a-64 (1988)); Investment Advisers Act of 1940, ch. 686, tit. 2, 54 Stat. 847 (codified as amended at 15 U.S.C. § 80b-1 to 80b-21 (1988)).

Sections of the securities laws containing explicit statutes of limitations include § 13 of the Securities Act, 15 U.S.C. § 77m (1988) (mandating that suits be brought within one year after discovery of the violation and no more than three years after the security was offered for sale); §§ 21 and 20A of the Securities Exchange Act as amended by §§ 3(a)(2) and 5(b)(4) of the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. §§ 78u-1(d)(5), 78t-1(b)(4) (1988) (providing five-year statutes of limitations that begin to run after the sale or purchase of a security on inside information); § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e) (1988) (stating that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation"); § 18(c) of the Securities Exchange Act, 15 U.S.C. § 78r(c) (1988) (containing the same limitations as those found in § 9(e)); § 29 of the Securities Exchange Act, 15 U.S.C. § 78cc(b) (1988) (same); § 16(b) of the Securities Exchange Act, 15 U.S.C. § 78p(b) (1988) (giving a two-year period beginning from the time of obtaining illegal profits in which to bring an action); and § 15 of the Securities Exchange Act, 15 U.S.C. § 78o(b)(1) (1988) (limiting the SEC to various periods of time for bringing actions against brokers and dealers).

14. This Note uses *enforcement suits* to mean civil prosecutions by the SEC of alleged violators of the securities laws.

15. *See, e.g., Rind,* 991 F.2d at 1492-93 (holding 28 U.S.C. § 2415 inapplicable because the Commission was asking for disgorgement, an equitable remedy, rather than money damages as § 2415 requires); *Lorin,* 869 F. Supp. at 1117 (finding that an action seeking disgorgement does not fall within 28 U.S.C. § 2462); *Glick,* 1980 Fed. Sec. L. Rep. (CCH) ¶ 97,535 (finding 28 U.S.C. § 2462 inapplicable because the plaintiff sought injunctive rather than monetary relief).

against applying the limitations provisions of title 28, courts often cite the important policy objectives served by the securities laws with which the imposition of time bars could interfere.[16] Although courts have held that securities enforcement suits brought by the government are not subject to *any* time bar contained in title 28,[17] this position must be reassessed in light of the passage of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act),[18] which gives the SEC the authority to request the type of relief — civil fines and penalties — that brings enforcement suits within the scope of section 2462.[19]

This Note argues that section 2462's limitations period reaches all SEC civil suits for monetary fines but not those SEC actions seeking equitable relief. Part I interprets section 2462 and, in the process, demonstrates that the statute controls SEC enforcement suits for civil penalties. Part II argues that SEC actions requesting injunctions or disgorgement of profits, unlike those seeking monetary fines, are not subject to the time bar. Finally, Part III asserts that SEC administrative enforcement proceedings should not be immune from the statute of limitations found in section 2462 of title 28 because exempting administrative proceedings would be tantamount to making the limitations period optional given the SEC's control over the forum in which its enforcement actions are litigated.

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16. After the stock market crash of 1929-1932, Congress enacted the securities laws to hinder the ability of dishonest companies to raise money in the American capital markets. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963). Congress intended to grant broad authority to the SEC to enforce the securities laws. *See Rind,* 991 F.2d at 1492; *In re* Johnson, 56 S.E.C. 302 (1994). Section 2 of the Securities Exchange Act of 1934 states that "[t]ransactions in securities . . . are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions." 15 U.S.C. § 78b (1988). This passage from the Exchange Act demonstrates that SEC enforcement actions serve a public purpose and thus are entitled to the presumption against time bars. *See supra* note 6 and accompanying text; *see also Rind,* 991 F.2d at 1492 ("Imposing a state or any other statute of limitations on Commission civil enforcement actions would also conflict with the underlying policies of the securities laws; this conclusion strongly negates any inference that Congress intended a limitations period to apply.").

17. *See, e.g., Rind,* 991 F.2d at 1492 ("[N]o statute of limitations should apply to Commission civil enforcement actions."). The Commission does not, however, dispute the applicability of the statute of limitations found at 18 U.S.C. § 3282 to its criminal prosecutions. *See, e.g.,* United States v. Sloan, 389 F. Supp. 526, 528 (S.D.N.Y. 1975).

18. Pub. L. No. 101-429, 104 Stat. 931 (codified in scattered sections of 15 U.S.C.).

19. Because 28 U.S.C. § 2462 contains a five-year statute of limitations and because the Remedies Act was passed in *1990,* no court has yet faced this issue.

I. The Ambiguities Within Section 2462 and the Securities Laws

With the passage of the Remedies Act in 1990, the SEC received an expanded arsenal of civil and administrative sanctions.[20] The SEC now can impose monetary fines for violations of the Securities Act,[21] the Securities Exchange Act,[22] the Investment Company Act,[23] and the Investment Advisers Act.[24] The SEC can also now obtain civil penalties, disgorgement, and cease-and-desist orders in administrative proceedings.[25]

Because the Remedies Act authorizes the SEC to obtain civil fines, suits requesting such relief fall within the ambit of section 2462 which governs suits for "civil fines, penalties, and forfeitures." While section 2462's applicability may on the surface seem quite clear, no court has explicitly addressed this issue, and the ambiguities in the language of section 2462 as well as in the securities laws could lead future courts to apply the presumption that statutes of limitations do not run against the government in the absence of

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20. *See* Richard W. Jennings et al., Securities Regulation: Cases and Materials 1467-72 (7th ed. 1992). The House Report announced the reason for the passage of the Remedies Act:

> The principal purpose of H.R. 975, the Securities Law Enforcement Remedies Act of 1990, is to provide the Securities and Exchange Commission (Commission) with new remedial authority that will enable the agency to operate its enforcement program in a more flexible manner. The legislation is intended to permit the Commission to achieve the appropriate level of deterrence in each case and thereby maximize the remedial effects of its enforcement actions.

H.R. Rep. No. 429, 101st Cong., 1st Sess. 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1380. *See generally* Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties,* 58 Alb. L. Rev. 5 (1994). Laby and Callcott note that the length of SEC investigations has increased since the passage of the Remedies Act. *Id.* at 50-52. They believe that the increased stakes resulting from the heightened penalties have provided a disincentive for defendants to settle the litigation. This increase in time makes the need for a statute of limitations to protect defendants even more pressing.

21. Section 20 states:

> Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission . . . other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title [which details the penalties for insider trading], the Commission may bring an action in a United States district court to seek, and the court shall have the jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such a violation.

15 U.S.C. § 77t(d)(1) (1994).

22. Section 21(d) of the Securities Exchange Act of 1934 contains language similar to that found in § 20 of the Securities Act of 1933, thereby authorizing civil penalties for violations of its provisions. *See* 15 U.S.C. § 78u(d) (1994).

23. Section 42(e) embodies this authorization. *See* 15 U.S.C. § 80a-41(e) (1994).

24. See § 209(e) of the Act codified at 15 U.S.C. § 80b-9(e) (1994).

25. *See* Jennings et al., *supra* note 20, at 1406. A cease-and-desist order resembles an injunction except that it is granted by administrative judges, it does not have the collateral consequences of an injunction, and it can be obtained more quickly. *Id.* at 1469 (quoting S. Rep. No. 337, 101st Cong., 2d Sess. 20-21 (1990)).

clear congressional intent that they do so.[26] This Part concludes that Congress wished section 2462's limitations period to apply to SEC proceedings seeking civil fines. Section I.A utilizes the legislative and judicial history of the statute to interpret the ambiguous term *enforcement* as encompassing actions to impose penalties, as well as attempts to collect fines owed by the defendant from earlier proceedings. Section I.B argues that the inclusion of statutes of limitations in some sections of the securities laws does not indicate that Congress intended no limitations to apply to other sections.

A. *The Interpretation of* Enforcement

The meaning of the term *enforcement* is left somewhat ambiguous by the current language in section 2462: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the *enforcement* of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."[27] The statute's stated application to actions for the *enforcement* of civil fines could lead to the conclusion that it only governs proceedings to col-

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26. *See supra* notes 3-6 and accompanying text; *see also* Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386 (1984) (holding that statutes of limitation should receive strict construction so that any ambiguity is resolved in favor of the government); E.I. DuPont de Nemours & Co. v. Davis, 264 U.S. 456 (1924) (same).

In 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), the court rebutted a citation of the Supreme Court presumption in favor of freeing the government from time bars:

> [T]here is another Supreme Court maxim, older still, a maxim specifically relating to actions for penalties and one pointing in quite the opposite direction: "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."

17 F.3d at 1457 (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805)).

Commentators have split as to whether the presumption frees the SEC from statutes of limitations. *Compare* Christopher R. Dollase, Comment, *The Appeal of* Rind: *Limitations of Actions in Securities and Exchange Commission Civil Enforcement Actions,* 49 Bus. Law. 1793, 1813-17 (1994) (claiming that the Supreme Court presumption frees the SEC from statutes of limitations) *with* Edward Brodsky, *Statute of Limitations and Civil Enforcement,* N.Y.L.J., Sept. 21, 1993, at 3 *and* Edward Brodsky & Scott A. Eggers, *The Statute of Limitations in SEC Civil Enforcement Actions,* 23 Sec. Reg. L.J. 123 (1995) *and* Thomas L. Riesenberg, *Application of Statutes of Limitations to SEC Disgorgement Actions*, Insights, Feb. 1994, *available in* LEXIS, News Library, INSITE File (maintaining that the presumption should *not* free the SEC).

Note that the government is also not subject to the equitable doctrine of laches. *See* United States v. Summerlin, 310 U.S. 414, 416 (1940) (stating that laches does not bar government suits); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938) (same); SEC v. Williams, 884 F. Supp. 28, 29 (D. Mass. 1995); SEC v. Willis, 777 F. Supp. 1165, 1175 (S.D.N.Y. 1991). Note further that even in the absence of a statute of limitations or laches, courts may still take into account both the length of time it took the SEC to bring suit and factors relating to the burden of the requested remedy on the defendant in deciding whether to grant equitable relief. *See* SEC v. Rind, 991 F.2d 1486, 1492 (9th Cir.), *cert. denied,* 114 S. Ct. 439 (1993); *Williams,* 884 F. Supp. at 31; *Willis,* 777 F. Supp. at 1174. Balancing such factors mitigates the potentially harsh result reached in this Note that enforcement suits requesting equitable relief are currently free from time bars. *See infra* Part II.

27. 28 U.S.C. § 2462 (1988) (emphasis added).

lect penalties levied in earlier actions from defendants. Such an interpretation would free most SEC civil prosecutions from section 2462's restriction because these suits *impose* penalties, rather than merely collect fines already owed.

The circuit courts have not decided upon a uniform interpretation of *enforcement.* Most courts assume without debate that section 2462 applies to suits seeking to *impose* penalties or forfeitures.[28] In *Capozzi v. United States,*[29] however, the Second Circuit maintained that *enforcement* "is the collection of amounts owed, not the assessment of them."[30] The District of Columbia Circuit in *3M Co. v. Browner* subsequently rejected the *Capozzi* definition of *enforcement.*[31] In *3M Co.,* the Environmental Protection Agency (EPA) argued that *enforcement* "connotes an action to collect a penalty already imposed."[32] 3M countered with the argument that *enforce* equals *impose* and, as further support, pointed out that no statute of limitations would apply to the EPA in this situation if the court adopted the EPA's interpretation.

The court sided with 3M because the history of section 2462 demonstrates that Congress intended the section to cover suits that *impose* penalties as well as collection actions.[33] From 1799 through its initial codification in title 28 in 1940 as section 791, the language of the general statute of limitations, now found in section 2462, remained essentially unchanged. The earlier version of the statute stated that "[n]o suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United

28. *See, e.g.,* Rex Trailer Co. v. United States, 350 U.S. 148 (1956); Action for Children's Television v. FCC, 59 F.3d 1249, 1254 (D.C. Cir. 1995); United States v. Walsh, 8 F.3d 659, 662 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1830 (1994); United States v. 2 Burditt Street, 924 F.2d 383, 385 (1st Cir. 1991); Public Interest Research Group v. Powell Duffryn Terminals Inc., 913 F.2d 64, 74 (3d Cir. 1990), *cert. denied,* 498 U.S. 1109 (1991); United States v. Core Lab., Inc., 759 F.2d 480 (5th Cir. 1985).

29. 980 F.2d 872 (2d Cir. 1992). The *Capozzi* defendant was challenging the IRS's assessment of penalties under 26 U.S.C. § 6700 (1988).

30. 980 F.2d at 875.

31. 17 F.3d 1453, 1459 (D.C. Cir. 1994).

32. 17 F.3d at 1457.

33. 17 F.3d at 1458-59. Furthermore, the nature of IRS proceedings at issue in *Capozzi* distinguishes that case from enforcement suits in other areas. If the IRS believes a taxpayer owes more taxes than she paid, it conducts an ex parte proceeding to determine the amount of money owed, including penalties. Any suit brought in federal court attempts to collect this money. The Second Circuit relied on the uniqueness of IRS procedure as an additional justification for not applying § 2462 to the proceeding establishing the money the defendant owes. *See Capozzi,* 980 F.2d at 874. The broader relevance of *Capozzi* is thus arguably limited because many agencies, including the SEC, do not conduct ex parte proceedings to assess penalties.

A federal district court within the Second Circuit discussed the relationship between *Capozzi* and *3M Co.* in a case addressing the applicability of § 2462 to SEC enforcement suits. The court, however, declined to determine whether *Capozzi* should be limited to the unique circumstances of the IRS. *See* SEC v. Lorin, 869 F. Supp. 1117, 1122 n.6 (S.D.N.Y. 1994).

States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."[34] When Congress modified the rules governing the federal judiciary in 1948, it added the word *enforcement* to the description of the actions to which the statute applies and removed the term *prosecution.*[35] In the legislative history accompanying the 1948 revisions to the judicial code, Congress referred to these adjustments as mere changes to "phraseology,"[36] thereby indicating that it did not intend to revise the substance of the statute. Furthermore, traditional notions of statutory construction hold that such modifications to language do not alter the meaning of the statute.[37]

Interpretations of section 2462's predecessors thus apply with equal force to section 2462. Because the prior versions of section 2462 unambiguously provided a statute of limitations for any suit seeking to impose a fine, penalty, or forfeiture, the addition of the word *enforcement* to section 2462 should not limit the statute's relevance to suits collecting fines assessed in earlier proceedings.[38] This demonstration of congressional intent is sufficient to override the presumption that statutes of limitation do not run against the government.

B. *The Effect of the Doctrine of* Expressio Unius et Exclusio Alterius Est

The SEC has used the doctrine of *expressio unius et exclusio alterius est* to challenge the applicability of statutes of limitations to its suits. This statutory-construction doctrine holds that the express inclusion of one thing means the exclusion of all others.[39] Because the securities laws contain statutes of limitations governing private causes of action, the SEC reasons that the absence of time bars from most of the statutory provisions granting it the authority to

34. 28 U.S.C. § 791 (1940). In the years immediately preceding 1940, this time bar could be found in Rev. Stat. § 1047. The first version of the statute appeared in the Act of Mar. 2, 1799, § 89, 1 Stat. 627, 695-96. Subsequent versions of the statute of limitations are found in the following acts: Act of Mar. 26, 1804, § 3, 2 Stat. 290, 290-91; Act of Apr. 20, 1818, § 6, 3 Stat. 450, 452; Act of Feb. 28, 1839, § 4, 5 Stat. 321, 322; Act of Mar. 3, 1863, § 14, 12 Stat. 737, 741-42; and Act of July 25, 1868, § 1, 15 Stat. 183, 183.

35. To compare the language of the two versions of the statute, compare the text accompanying note 27 with the text accompanying note 34.

36. *See* H.R. Rep. No. 3214, 80th Cong., 2d Sess. A191 (1948), *reprinted in* 1 Legislative History of Title 28, United States Code "Judiciary and Judicial Procedure" (Roy M. Mersky & J. Myron Jacobstein eds., 1971).

37. *See* Keene Corp. v. United States, 113 S. Ct. 2035, 2041 (1993); Finley v. United States, 490 U.S. 545, 554 (1989); 3M Co. v. Browner, 17 F.3d 1453, 1458 (D.C. Cir. 1994).

38. *See* 17 F.3d at 1458-59.

39. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992); *see also* United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1850 n.9 (1995); Freightliner Corp. v. Myrick, 115 S. Ct. 1483, 1488 (1995).

sue must indicate a congressional intention not to restrict the SEC.[40]

Two considerations reduce the impact of the doctrine in the context of the securities laws. First, evidence of contrary legislative intent overrides the doctrine.[41] As discussed in section I.A, legislative history indicates that Congress wished to limit the window of opportunity for bringing suits, such as SEC enforcement actions, to five years.

Second, the court in *United States v. Incorporated Village of Island Park*[42] rejected the use of the *expressio unius* doctrine in interpreting the Fair Housing Act to prevent the use of section 2462. Like the securities laws, the Fair Housing Act has time bars governing suits based on certain of its sections, while none controls those invoking other sections of the Act. The court declined to interpret the absence of a statute of limitations as conclusive evidence of congressional intent to free government suits brought under these sections from any time restriction and found section 2462 applicable.[43]

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40. *See* SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir.) ("Congress clearly devoted its time and attention to limitations issues. The fact that it did not enact an express statute of limitations for lawsuits instituted by the Commission, therefore, must be interpreted as deliberate."), *cert. denied*, 114 S. Ct. 439 (1993); Brief of the Securities and Exchange Commission, *Rind*, 991 F.2d 1486 (9th Cir.) (No. 91-55972), *cert. denied*, 114 S. Ct. 439 (1993).

41. *See* 2A SINGER, *supra* note 39, § 47.23.

42. 791 F. Supp. 354 (E.D.N.Y. 1992). The Second Circuit also has rejected reliance on the *expressio unius* doctrine to determine the impact of § 2462 but did so in the context of holding § 2462 inapplicable to suits under a section of the IRC. *See* Capozzi v. United States, 980 F.2d 872, 875 (2d Cir. 1992). As discussed *supra* in note 33, the outcome of *Capozzi* can be limited to the uniqueness of IRS procedure.

43. *See* 791 F. Supp. at 367 ("Indeed, it may well be that Congress enacted present Section 3614 both with an eye toward the rule that the United States is not subject to statutes of limitations unless otherwise provided *and* with an eye toward Section 2462.").

The *expressio unius* doctrine, when applied to title 28, could argue against applying § 2462 to the federal government. Unlike § 2462, other areas of title 28 specifically name the government when their provisions apply to it, *see, e.g.*, 28 U.S.C. § 2415 (1988), thereby implying that § 2462 does not impact suits by the United States. This argument must fail because evidence of legislative intent to have § 2462 restrict government suits exists to overcome the doctrine. Furthermore, in a case addressing the applicability of the version of the statute contained in the Act of February 28, 1839, § 4, 5 Stat. 322, to the United States government, the court held that the general understanding of the terminology used in the Act indicates an intention to include the United States within its scope. *See* United States v. Maillard, 26 F. Cas. 1140, 1142 (S.D.N.Y. 1871) (No. 15,709). The court rejected the government's contention that because § 4 fails to declare that government-initiated suits are controlled by its strictures, the congressional purpose to apply the statute of limitations is not clear enough to override the presumption against restricting the government with time bars. Section 2462, as a direct descendent of § 4, also should control government suits seeking civil penalties, even though it too does not explicitly proclaim its applicability to the government.

More recent case law likewise supports holding the government subject to the § 2462 limitation for civil prosecutions. *See, e.g.*, United States v. Walsh, 8 F.3d 659 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1830 (1994); Iran Air v. Kugelman, 996 F.2d 1253 (D.C. Cir. 1993); United States v. Meyer, 808 F.2d 912 (1st Cir. 1987); United States v. N.O.C., Inc., No. CIV.A. 87-3539, 1988 WL 109727 (D.N.J. Oct. 14, 1988); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985). The United States has even on occasion

Despite the strong arguments in favor of applying section 2462 to SEC enforcement suits, it is admittedly troubling that Congress created a five-year time bar, the same length as section 2462, for SEC suits seeking civil fines for insider trading.[44] Although the legislative histories for the insider trading acts do not specifically address this issue, they suggest that Congress felt a need to hold the SEC to a time bar in no uncertain terms given the long judicial history against limiting the period for bringing enforcement suits.[45] Because these insider trading acts were the first time the SEC was able to seek civil penalties, and thus no prior enforcement suits were of the type to which section 2462 applied, the long-held judicial stance against restricting enforcement suits by time bars made

acknowledged that § 2462 affects its litigation. *See, e.g., N.O.C., Inc.*, 1988 WL 109727, at *5; United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63, 65 (N.D. Cal. 1962). In fact, several plaintiffs have challenged the applicability of § 2462 to suits brought by a non-state actor because of the understanding that § 2462 imposes a statute of limitations on actions initiated by the United States. *See, e.g.*, Public Interest Research Group v. Powell Duffryn Terminals Inc., 913 F.2d 64, 74 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (subjecting private litigants to § 2462 because they were "acting as an adjunct to government enforcement actions"); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1520 (9th Cir. 1987); Bodne v. Geo A. Rheman Co., 811 F. Supp. 218, 221 (D.S.C. 1993); Connecticut Fund for Envt. v. Job Plating Co., 623 F. Supp. 207, 211 (D. Conn. 1985).

44. The Insider Trading Sanctions Act of 1984 first authorized the SEC to impose civil fines in enforcement suits and also restricted the SEC with a statute of limitations. The sanctioning mechanism for insider trading was redesigned by the Insider Trading and Securities Fraud Enforcement Act of 1988 which placed the time bar in 15 U.S.C. § 78u-1(d)(5) (1994).

45. The legislative history for the Insider Trading Sanctions Act of 1984 comments on the Act's five-year statute of limitations:

> The legislation provides that an action to seek the new civil penalty may not be brought more than five years after the date of the purchase or sale that constitutes the violation. The limitation is applicable solely to actions brought under this legislation. The limitation does not bar or limit any other actions by the Commission or the Attorney General, nor does it bar actions to recover penalties which were imposed in actions brought within the five-year period.

INSIDER TRADING SANCTIONS ACT OF 1984, H.R. REP. No. 355, 98th Cong., 1st Sess. 12 (1983), *reprinted in* BERNARD D. REAMS, JR., INSIDER TRADING AND THE LAW: A LEGISLATIVE HISTORY OF THE INSIDER TRADING SANCTIONS ACT OF 1984, PUB. LAW NO. 98-376, at 12 (1989). Note that as originally drafted, the legislation did not include a statute of limitations. *See Insider Trading Sanctions and SEC Enforcement Legislation: Hearings on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection, & Finance of the House Comm. on Energy & Commerce*, 98th Cong., 1st Sess. 4-6 (1983), *reprinted in* REAMS, *supra*, at 4-6.

In hearings on the proposed legislation, the Honorable John S. R. Shad, Chairman of the SEC, and other members of the SEC staff suggested that the legislative subcommittee clarify a variety of issues left unresolved by the initial draft of the bill, including the issue of statutes of limitations. *Id.* at 15. In a memorandum, Shad stated that a time bar should perhaps be imposed because of the large sums of money involved and suggested a five-year period because "[a]nything less would result in the anomalous result that the Attorney General could bring a criminal action until five years after the violation and the Commission could bring an injunctive action, but could not seek the civil penalty during all of that period." *Id.* at 46.

The legislative history of the Insider Trading and Securities Fraud Enforcement Act of 1988 did not address the issue, merely stating that the legislation "dictates that no action pursuant to this section may be brought more than 5 years after the date of the last transaction that formed the basis of the violation." H.R. REP. No. 910, 100th Cong., 2d Sess. 39 (1988).

the need to provide explicitly for a statute of limitations more pressing.

II. The Differences Among SEC Remedies

Section 2462 only governs suits for "civil fines, penalties, and forfeitures." As Part I demonstrated, SEC enforcement suits requesting civil penalties fall within the scope of section 2462. Classifying the SEC's equitable remedies as penalties or forfeitures, however, presents a closer question. This Part argues that section 2462 does not impose a time bar on those SEC-initiated suits requesting equitable relief, such as injunctions and disgorgement, because the nature of such relief is not the type included within section 2462.

The SEC's remedies throughout most of its history have been limited to equitable, injunctive-type relief,[46] except for the civil penalties it could obtain for insider trading[47] and a few other specified offenses.[48] The SEC seeks this equitable relief in federal court or in administrative proceedings. Federal courts will grant the SEC's request for an injunction, which often consists of ordering the defendant to stop engaging in the illegal activities at issue, buying or selling stock or destroying records,[49] if it appears likely that the defendant will violate the securities laws again.[50] The SEC prefers injunctions to administrative remedies because of their collateral effects[51] and the threat of contempt if defendants disobey the

46. *See* Jennings et al., *supra* note 20, at 1404.

47. The Insider Trading and Securities Fraud Enforcement Act of 1988 gave the SEC the authority to obtain civil penalties from defendants convicted of insider trading. *See* 15 U.S.C. § 78u-1(a)(1) (1988). The Act contains its own five-year time bar that begins to run on the date of the alleged unlawful activity. *See* 15 U.S.C. § 78u-1(d)(5) (1988).

48. The legislative history of the Remedies Act describes these other offenses. First, the Foreign Corrupt Practices Act of 1988 gives the SEC the authority to impose penalties "not to exceed $10,000 against an issuer, or certain persons acting on behalf of an issuer, who violates Section 30(a) of the Exchange Act." H.R. Rep. No. 429, 101st Cong., 1st Sess. 16 n.4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1380, 1385. Additionally, issuers face fines of up to $100 per day for failure to file certain information in compliance with § 32(b) of the Exchange Act. 1990 U.S.C.C.A.N. at 1385. Congress states that, as of 1990, only one case had imposed the fine authorized by § 32(b). *Id.*

49. *See* Jennings et al., *supra* note 20, at 1405.

50. *See* SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994). In deciding whether a risk of future infractions of the securities laws exists, courts weigh " 'whether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future.' " 29 F.3d at 695 (quoting SEC v. First City Fin. Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989)).

51. If defendants are found guilty of infractions in an SEC enforcement suit, they risk private litigants invoking the doctrine of collateral estoppel to obtain damages based on the prior SEC judgment against the defendants. *See* Jennings et al., *supra* note 20, at 1405. Collateral estoppel prevents relitigation of legal and factual issues decided in an earlier proceeding. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

order.[52] Since 1971, as part of their injunction decrees, the courts also have ordered defendants to turn over any of the illegal profits they obtained; this remedy is known as "disgorgement."[53]

The SEC also brings enforcement actions administratively. Administrative judges were historically limited to authorizing the SEC to issue a stop order to prevent the release of a misleading registration statement;[54] to censure broker-dealers[55] and potentially even bar them from all future participation in the securities industry;[56] to suspend the trading of securities of a corporation not in compliance with the laws;[57] and to order individuals to comply with certain disclosure requirements.[58]

Injunctions and disgorgement are not covered by section 2462 because they are remedial rather than punitive, a distinction the Supreme Court has relied upon in interpreting the ancestor of sec-

Additionally, federal and state statutes often prevent a person subject to an injunction from involvement in the securities industry. *See* JENNINGS ET AL., *supra* note 20, at 1424. *See generally* Thomas J. André, Jr., *The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard?*, 1981 U. ILL. L. REV. 625.

52. *See* JENNINGS ET AL., *supra* note 20, at 1425.

53. *See* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971) (authorizing the remedy of disgorgement for the first time); *see also* SEC v. Penn Cent. Co., 425 F. Supp. 593, 598 (E.D. Pa. 1976) (holding that courts can award disgorgement under the provisions of the securities laws granting the Commission the power to seek injunctions).

54. *See* Securities Act of 1933, ch. 38, § 8(d)-(e), 48 Stat. 881 (codified as amended at 15 U.S.C. § 77h(d)-(e) (1994)).

55. *See* Securities Exchange Act of 1934, ch. 404, § 15, 48 Stat. 895 (codified as amended at 15 U.S.C. §§ 78o(b)(4), (6) (1994)).

56. *See* Securities Exchange Act of 1934, ch. 404, § 19, 48 Stat. 898 (codified as amended at 15 U.S.C. § 78s(h) (1994)).

57. *See* Securities Exchange Act of 1934, ch. 404, §§ 12, 15, 48 Stat. 892 (codified as amended at 15 U.S.C. §§ 78*l*(k), 78o(c)(5) (1994)).

58. *See* Securities Exchange Act of 1934, ch. 404, § 15, 48 Stat. 895 (codified as amended at 15 U.S.C. § 78o(c)(4) (1994)). In addition, the SEC can prevent attorneys and accountants that violate the standards contained in Rule 2(e) from practicing before it. *See* JENNINGS ET AL., *supra* note 20, at 1406.

tion 2462,[59] according to a view long-held by courts.[60] One court that discussed the application of section 2462 to SEC enforcement proceedings dismissed the defense on the grounds that the SEC was asking for an injunction, a type of relief which "is not intended to punish or penalize."[61]

As with injunctions, courts have rejected defendants' attempts to assert section 2462 of title 28 as a defense to SEC suits requesting disgorgement of profits based on the well-established principle that the remedy is not punitive.[62] Disgorgement, by returning parties to

59. *See* Meeker v. Lehigh Valley R.R., 236 U.S. 412, 423 (1915) (refusing to apply § 1047 of the Revised Statutes, a predecessor to § 2462, because "the liability sought to be enforced was not punitive but strictly remedial"); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (holding that the statute of limitations in § 1047 of the Revised Statutes does not apply to a suit for treble damages because it is not a suit for a penalty or forfeiture); Brady v. Daly, 175 U.S. 148 (1899) (deciding that an action for damages is not one for a penalty or forfeiture).

A recent Court decision defined punishment for purposes of the Double Jeopardy Clause. The Court stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." United States v. Halper, 490 U.S. 435, 448 (1989). The Court limited its holding to those cases "where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. This limitation clarifies that the *Halper* definition does not control determinations of whether SEC injunctive relief is a *penalty* because the actual form of the injunction is not set by statute and is not disproportionate to the harm caused by the defendant.

60. *See, e.g.*, SEC v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995); SEC v. Penn Cent. Co., 425 F. Supp. 593, 599 (E.D. Pa. 1976); *see also* JENNINGS ET AL., *supra* note 20, at 1405. The SEC is so confident of the rule that its suits seeking injunctions are not subject to any time bars that it sought Rule 11 sanctions against a defendant who raised a statute of limitations defense to an enforcement proceeding seeking an injunction. *See* SEC v. Keating, [1992] Fed. Sec. L. Rep. (CCH) ¶ 96,906 (C.D. Cal. July 23, 1992). *But see* Edwin Martenet, *Statutes of Limitations on SEC Enforcement Proceedings*, 41 VA. L. REV. 59, 67-72 (1955) (arguing that the injunctive relief available to the SEC is a penalty within the meaning of § 2462); Gary P. Naftalis & Mark J. Headley, *SEC Actions Seeking to Bar Securities Professionals*, N.Y.L.J., June 12, 1995, at 1 (asserting that injunctions which revoke the licenses of securities professionals are penalties).

61. SEC v. Glick, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,535 (D. Nev. June 12, 1980).

62. *See* SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (holding that disgorgement is not punishment for purposes of the Double Jeopardy Clause; "[d]isgorgement is no less remedial in nature merely because victims other than the government have been injured by Bilzerian's violations of the securities laws"); SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-31 (D.C. Cir. 1989) (characterizing disgorgement as an equitable remedy that serves the goals of depriving wrongdoers of their profits as well as deterrent, but not punitive, purposes); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) (asserting that disgorgement is not punitive because it is only based on the amount the defendant gained from her harmful actions; any amount granted above this would be a penalty); *Williams*, 884 F. Supp. at 31; SEC v. Lorin, 869 F. Supp. 1117, 1123 (S.D.N.Y. 1994) ("[D]isgorgement is similar to the redressing of a private injury in that both serve to return affected parties to the status quo before the unlawful activity at issue had taken place. That goal appears, by definition, to be remedial."); SEC v. Egan, 821 F. Supp. 1274, 1275 (N.D. Ill. 1993) ("[D]isgorgement is an inherently equitable remedy."); *Penn Cent. Co.*, 425 F. Supp. at 599 ("We reject the contention that the SEC seeks disgorgement for punitive reasons. The relief sought is remedial, depriving defendants of the rewards they obtained by violating the securities laws. Such action serves to protect the investing public by providing an effective deterrent to future violations."). Professors Louis Loss and Joel Seligman stated, during congressional testimony, that "judicial decisions have emphatically rejected the argument that disgorgement is

the status quo before the illegal activities, acts to remedy the injustice caused by violations of the securities laws.[63] It escapes characterization as punitive because it only mandates that defendants turn over the illegal profits; the amount disgorged is calculated by subtracting the costs incurred in generating the profits from the amount obtained in violation of the securities laws.[64]

Because disgorgement is neither a statutory fine nor a penal sanction, it is not a *forfeiture* as the term is used in section 2462. Commentators, however, have argued for classifying disgorgement as a *forfeiture.*[65] The confusion arises, in part, because courts have referred to disgorgement as a *forfeiture* in the past,[66] although never in the context of section 2462. In cases where defendants asserted a section 2462 defense, courts have often used *forfeiture* interchangeably with statutory fines or penalties.[67] For example, in the most recent case to address this issue, the District of Columbia

punitive or penal in nature." Declaration of Louis Loss and Joel Seligman (April 18, 1994) (on file with author).

Decisions outside the securities-law context further support classifying disgorgement as non-punitive. *See, e.g.,* United States v. Moffitt, Zwerling & Kemler, P.C., 875 F. Supp. 1190, 1197 (E.D. Va. 1995) (finding that criminal forfeitures serve remedial purposes); Crowder v. United States, 874 F. Supp. 700, 704 (M.D.N.C. 1994) (finding that forfeitures are not punitive where the defendant "was never entitled to [the] proceeds"). In United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), *cert. denied,* 115 S. Ct. 573 (1994), a decision in which the defendant was forced to turn over the profits he obtained from drug sales, much like disgorgement. The court noted the non-punitive character of this sanction because the defendant was not required to give up anything to which he ever had a legal claim. *But see* Cisneros v. Cost Control Mktg. & Sales Management, 862 F. Supp. 1531, 1534 (W.D. Va. 1994), *affd. sub nom.* United States Dept. of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Management, 1995 U.S. App. LEXIS 25285 (4th Cir. Sept. 8, 1995) (holding that § 523(a)(7) of the Bankruptcy Code which refers to "a fine, penalty, or forfeiture" encompasses a disgorgement).

For arguments that disgorgement is a penalty or forfeiture, thus placing actions seeking that form of remedy within the ambit of § 2462, see Brodsky & Eggers, *supra* note 26, at 135-42; Jonathan Eisenberg & Benjamin Haskin, *Statutes of Limitations Made Applicable to SEC Actions,* INSIGHTS, July 1994, *available in* LEXIS, News Library, INSITE File; Brodsky, *supra* note 26; Richard L. Stone & Aron Jaroslawicz, *Statute of Limitations on Actions Brought by SEC,* N.Y.L.J., Oct. 24, 1994, at 1.

63. *See Lorin,* 869 F. Supp. at 1122.

64. *See Lorin,* 869 F. Supp. at 1124 (citing Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990)); *see also* Herrmann v. Steinberg, 812 F.2d 63, 66 (2d Cir. 1987) (allowing defendants to deduct transaction costs from the amount disgorged); Oliff v. Exchange Intl. Corp., 669 F.2d 1162, 1168 (7th Cir. 1980), *cert. denied,* 450 U.S. 915 (1981) (same); *cf.* SEC v. R.J. Allen & Assoc., 386 F. Supp. 866, 881 (S.D. Fla. 1974) (authorizing disgorgement of *profits* without specifying the method for calculating the disgorgement amount).

65. *See, e.g.,* Brodsky & Eggers, *supra* note 26.

66. *See Cisneros,* 862 F. Supp. at 1534 (classifying disgorgement as a "fine, penalty, or forfeiture" for the purposes of § 523(a)(7) of the Bankruptcy Code); SEC v. Telsey, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992) (same); *see also* Brodsky & Eggers, *supra* note 26, at 138 & n.61 (listing cases).

67. *See, e.g.,* Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959) (equating the statutory fine of $2000 for violations of the False Claims Act, which the court characterized as a *forfeiture,* with the type of forfeitures to which § 2462 refers); *see also* Austin v. United States, 113 S. Ct. 2801, 2808 (1993) (noting that " 'forfeit' is the word Congress used for fine" in early legislation in addition to the relinquishment of property). *Austin* also noted that the

Circuit referred to the monetary fines that the Federal Communications Commission can obtain from broadcasters of indecent material as "forfeiture penalties."[68] Other cases also emphasize the penal nature of *forfeiture* as used in section 2462. These courts apply section 2462 in situations where the defendant's previously existing, valid right to some property is taken away as a penalty for illegal activity,[69] which differs from disgorgement where the defendant has no legal right to the money turned over.

III. Administrative Proceedings

Whether conducted in a traditional court or in an administrative tribunal, SEC enforcement actions serve the purpose of deterring violations of the securities laws and protecting the integrity of the markets. This factor, when combined with the SEC's complete discretion in choosing the forum for an enforcement suit, results in the conclusion that the same statute of limitations applies to administrative enforcement suits as to those in federal court.[70] With the passage of the Remedies Act in 1990, the SEC was authorized for the first time to obtain civil penalties in administrative adjudications[71] and thus potentially subject to section 2462. In addition to fines, the Act authorized disgorgement and cease-and-desist orders;[72] all of these remedies represent a vast expansion of the small

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purpose of all types of forfeitures has always been, in part, to punish. 113 S. Ct. at 2810 & n.12.

68. *See* South Fork Broadcasting Corp. v. FCC, 59 F.3d 1249 (D.C. Cir. 1995). Section 503(b)(1)(D) of title 47 of the U.S.C. authorizes the FCC to obtain a "forfeiture penalty," the amount of which is unrelated to the damage caused by the defendant or profits received, unlike disgorgement. See also *infra* note 69 for a discussion of the definition of *forfeiture.*

69. *See, e.g.,* United States v. 2 Burditt Street, 924 F.2d 383, 385 (1st Cir. 1991) (assuming that § 2462 governed a suit against a defendant convicted under the Controlled Substances Act, who was forced to turn over his real property connected to his offense); H.P. Lambert Co. v. Secretary of Treasury, 354 F.2d 819, 822 (1st Cir. 1965) (finding that § 2462 applied to an action to revoke a customhouse broker's license); United States v. Maillard, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871) (No. 15,709) (interpreting "forfeiture," as used in § 2462's predecessor, to encompass a case in which a defendant was forced to give up goods illegally imported into the United States or their cash equivalent).

Furthermore, Black's Law Dictionary defines *forfeiture* as "a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting *valid right* without compensation." Black's Law Dictionary 650 (6th ed. 1990) (emphasis added).

70. *See* 3M Co. v. Browner, 17 F.3d 1453, 1455-57 (D.C. Cir. 1994) (discussing the continued validity of the policies behind having statutes of limitations in the administrative context); Naftalis & Headley, *supra* note 60, at 1, 4; Stone & Jaroslawicz, *supra* note 62, at 1. *See generally* Teresa A. Holderer, Note, *Enforcement of TSCA and the Federal Five-Year Statute of Limitations for Penalty Actions,* 91 Mich. L. Rev. 1023 (1993) (arguing for the application of § 2462 to administrative actions by the EPA under the Toxic Substances Control Act of 1976).

71. *See* Jennings et al., *supra* note 20, at 1406.

72. *See id.*; *see also supra* note 25.

class of orders available administratively before the Act.[73] The likely increased use of administrative actions in light of the Remedies Act[74] enhances the importance of having a statute of limitations available to protect defendants from stale claims brought administratively. This Part argues that SEC enforcement actions seeking civil fines are subject to the section 2462 statute of limitations whether the proceedings are conducted in a federal court or in an administrative tribunal.[75]

Section 2462 only states that it applies to an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture,"[76] leaving the issue of forum ambiguous. An examination of the history of the statute, however, demonstrates a congressional intent to apply the time bar to administrative proceedings. Earlier versions of section 2462 included *prosecutions* within the list of actions controlled by the time bar.[77] The removal of *prosecutions* from the statute, according to traditional notions of statutory construction, did not change the overall meaning of the statute.[78] Section 2462, therefore, also controls prosecutions, which include administrative proceedings according to the Administrative Procedure Act.[79]

Lower courts have concluded that section 2462 governs administrative actions, both implicitly[80] and explicitly.[81] The SEC adminis-

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73. *See supra* text accompanying notes 54-58.

74. *See* Jennings et al., *supra* note 20, at 1467; *see also supra* notes 20-25 and accompanying text (discussing how the Remedies Act changed the enforcement tools available to the SEC).

Agencies generally prefer using administrative fora because of the perceived advantage of litigating on one's "home turf" and because such actions are less expensive than judicial proceedings. *See* Jennings et al., *supra* note 20, at 1405. Additionally, the SEC's ability to receive civil fines and cease-and-desist orders in the administrative forum may give the SEC an edge in enforcement suits because of the increasing reluctance of courts to issue injunctions. *Id.* at 1404.

75. For an early dismissal of the claim that SEC administrative actions are free from the § 2462 statute of limitations, see Martenet, *supra* note 60, at 62-67.

76. 28 U.S.C. § 2462 (1988).

77. *Compare supra* text accompanying note 27 *with supra* text accompanying note 34.

78. *See supra* text accompanying notes 35-37.

79. 3M Co. v. Browner, 17 F.3d 1453, 1456 (D.C. Cir. 1994) ("According to the Administrative Procedure Act, agency attorneys who bring administrative complaints, including complaints for civil penalties, are performing 'prosecuting functions.' ").

The use of the term *proceeding* in § 2462 would seem to bring administrative actions under the purview of the statute. *Proceeding* was added to the statute as part of the revisions to the Judicial Code in 1948. Because such revisions do not change the substance of the statue, reliance on the use of *proceeding* to justify applying § 2462 to administrative actions would be misguided. *See In re* Baird & Co., 52 S.E.C. 17, n.3 (1966).

80. *See, e.g.,* United States Dept. of Labor v. Old Ben Coal Co., 676 F.2d 259 (7th Cir. 1982); United States v. McCune, 763 F. Supp. 916 (S.D. Ohio 1989).

81. *See, e.g.,* Wyatt v. Federal Aviation Admin., 28 F.3d 111 (9th Cir. 1994); *3M Co.,* 17 F.3d at 1457 ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but

trative judges, however, have always claimed that their hearings are not subject to the section 2462 statute of limitations.[82] An administrative judge in one of these cases, *In re Baird & Co.*,[83] relied on several bases for declining to apply the statute: title 28 is entitled the Judicial Code, thus giving rise to the presumption that its provisions only apply to federal courts; administrative proceedings are governed by the Administrative Procedure Act, and, if Congress had intended such actions to be subject to a time bar, it would have included a limitation in the Act; the Securities Exchange Act imposes time bars on some civil actions, therefore the absence of statutes of limitations controlling the SEC indicates congressional intention not to restrict the agency; SEC enforcement actions are remedial rather than punitive; and, finally, SEC prosecutions serve the public interest.[84] Whatever merit these arguments may have once held, they cannot stand in the face of consistent judicial application of section 2462 to administrative proceedings and the history of section 2462.[85] No justification exists for treating the SEC differ-

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not when it is brought in an administrative agency."); Capozzi v. United States, 980 F.2d 872, 874 (2d Cir. 1992) (holding that the phrase "action, suit, or proceeding" within § 2462 "implicate[s] some adversarial adjudication, be it administrative or judicial"); United States v. N.O.C., Inc., No. CIV.A. 87-3539, 1988 WL 109727, at *7 (D.N.J. Oct. 14, 1988).

82. *See In re* Johnson, 56 S.E.C. 302 (1994); *In re Baird & Co.*, 52 S.E.C. at 17. In Commission cases where the administrative judges held that no statute of limitations applied to the SEC, injunctive-type relief was at issue, a type of remedy that automatically makes such cases fall outside the control of § 2462. *See supra* Part II. Prior to the enactment of the Remedies Act, the SEC could not obtain civil penalties administratively so it comes as no surprise that cases have not held that § 2462 applies to administrative proceedings. In the one SEC administrative case since the passage of the Remedies Act where § 2462 was raised as a defense, the SEC was not seeking a civil penalty. *See In re Johnson*, 56 S.E.C. at 302.

Administrative judges with the Commodities Future Trading Commission (CFTC) have also declined to hold their agency bound by § 2462. The judges have acknowledged that the type of relief sought by the CFTC in the cases precluded application of this statute of limitations. *See, e.g., In re* Sidel, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,824 (Sept. 3, 1993); *In re* O'Malley, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,820 (Sept. 2, 1993); *In re* Segal, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,162 (Nov. 5, 1991); *In re* Hunt, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,009 (Nov. 6, 1987).

83. 52 S.E.C. 17 (1966).

84. *See* 52 S.E.C. at 17 (construing *In re* Thomson & McKinnon, (File No. 7-12769)).

85. *See supra* notes 77-81 and accompanying text.

The terminology and structure of title 28, at first glance, do lend some support for the exemption of administrative actions from its provisions. For example, certain sections make explicit reference to agencies, *see* 28 U.S.C. §§ 451, 2341 (1988), thereby implying under the *expressio unius* doctrine that the other sections not do not govern administrative actions. Also, the definition of *courts* contained in title 28 does not specifically mention administrative tribunals. The appearance of § 2462 in Part VI of title 28 dealing with fines and forfeitures, entitled "Particular Proceedings," however, leads to the inference that the statute applies to all proceedings of a particular type. Thus, the time bar should apply to all actions, whether conducted in a federal court or agency tribunal, seeking a civil fine, penalty, or forfeiture.

The federal government, in another context, also argued that § 2462 must only apply to suits in federal court because of 28 U.S.C. § 2461 (1988). *See* Holderer, *supra* note 70, at 1040. Section 2461 declares: "Whenever a civil fine, penalty or pecuniary forfeiture is preently from other agencies by exempting its administrative actions from section 2462.

CONCLUSION

The judicial and legislative history of section 2462 of title 28 demonstrates that the time bar protects defendants from stale claims asserted by the SEC. Furthermore, an interest in conducting fair trials also supports applying section 2462 to enforcement suits. As time passes, the ability to find witnesses decreases, and those that can be located are less likely to recall the events with great lucidity. Moreover, stability and predictability are served by having statutes of limitations. These interests are particularly important in economic transactions,[86] a world impacted by the securities laws. If SEC enforcement suits could impose staggering fines on corporate entities at any time, the transaction costs of contracting would increase as parties would have to compensate for this risk of liability. This inefficiency would interfere with the functioning of the free market and can be avoided by the imposition of statutes of limitation.

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scribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action." 28 U.S.C. § 2461 (1988). Because the securities laws do state a "mode of recovery or enforcement," § 2461 does not prevent § 2462 from controlling SEC-initiated suits for civil penalties. *See, e.g.,* 15 U.S.C. § 78u-1 to 78u-2 (1994); *see also* Holderer, *supra* note 70, at 1040 (arguing that § 2461 does not control § 2462's meaning because the Toxic Control Substances Act does indicate which tribunal should hear suits under the Act).

86. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 79-80, 587-88 (4th ed. 1992).