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Stopping the Clock: Tolling Agreements in Federal Criminal Cases




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Statutes of limitations are an important check on prosecutorial power. As the U.S. Supreme Court has noted, they "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice" and "are made for the repose of society and the protection of those who may … have lost their means of defense." *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *Pub. Sch. v. Walker*, 76 U.S. (9 Wall.) 282, 288 (1869)). Defense counsel in complex white-collar investigations are often asked to waive these important protections by entering into tolling agreements, stopping the clock on the statute of limitations at issue.

Whether such an agreement is actually in a target or subject's best interest presents a difficult question. Among other things, defense counsel must weigh the scope and duration of the proposed agreement, the likelihood that the government will bring charges in the absence of a stipulated standstill, and the possibility that a valid statute of limitations defense to any subsequent charges might exist. In recent months, COVID-19 has also impacted the calculus, since the pandemic has impeded the government's ability to conduct investigations and thus materially lengthened the amount of time necessary to secure an indictment.

Statutes of Limitations

The phrase "statute of limitations" refers to the time period in which formal criminal charges must be brought after a crime has been committed. Under Title 18, United States Code, §3282, the applicable statute of limitations for most federal crimes is five years. The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) established a 10-year statute of limitations for bank and wire fraud, among other offenses, so long as the government alleges and can demonstrate that the defendant's action "affected a financial institution."

The applicable statute of limitations normally begins to run on the date when the offense is complete. In the context of a conspiracy charge, the clock starts ticking when the last (most recent) overt act in furtherance of the scheme was committed by any co-conspirator.

The statute of limitations runs until an indictment is "found" or an information "instituted" within the applicable period. Courts are split on the question of when exactly an indictment has been "found" in those instances in which the prosecution asks the court to keep the indictment under seal, usually to allow time to make an arrest. The Tenth Circuit, for example, has held that an indictment is "found" whenever it has been returned by the grand jury and that subsequent sealing has no effect in determining this date. See *United States v. Thompson*, 287 F.3d 1244 (10th Cir. 2002). In contrast, other Circuits have held that the indictment has not been "found" if for some reason it was improperly sealed (e.g., for tactical advantage, rather than a valid reason such

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as to prevent the escape of the target), and such improper sealing prejudiced the defendant. See, e.g., *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (en banc).

Tolling

The statute of limitations may be "tolled" (legally suspended) for a variety of reasons outside of the defense's control. Under Title 18, United States Code, §3290, a person fleeing from justice is not entitled to the benefit of the statute of limitations during the period in which he or she is a fugitive. Similarly, under §3292, the government may seek to stop the clock while it awaits receipt of evidence pursuant to a Mutual Legal Assistance Treaty or letters rogatory request issued to a foreign country.

Moreover, beginning in March 2020 some federal courts have tolled statutes of limitations periods across the board (without the need for any specific showing) as investigations encountered obstacles created by the COVID-19 pandemic. For instance, the Chief Judge for the Western District of Texas issued an order tolling all deadlines, including statutes of limitation, beginning on March 16, 2020. See *Additional Order Regarding Grand Jury Proceedings Under the Exigent Circumstances Created by the COVID-19 Pandemic* (March 16, 2020). The order was subsequently extended through June 30, 2020.

In the absence of a legal provision, the parties in an investigation may agree to stop the clock on any applicable statute of limitations by entering into a voluntary tolling agreement. The regulator or prosecutorial agency handling the matter will typically propose these agreements in the first instance. The parties presumably enter into them with the mutual understanding that important charging decisions should not be made in haste in situations where all of the relevant information bearing on such decisions has not yet been collected or made available. Such agreements typically include: (1) a recitation of the statutory offense(s) at issue in the inquiry; (2) a statement that the parties agree it is in their interests and the interests of justice to enter the agreement to provide time for the government to review information; (3) a specifically defined tolling period (subject to extension); (4) a provision stating that nothing in the tolling agreement shall revive a claim or charge for which the applicable statute of limitations has already run; and (5) an acknowledgment that the act of entering into the agreement does not constitute an admission of wrongdoing.

Issues in Enforcement Of Tolling Agreements

A number of issues can arise in the event that, notwithstanding the benefits seemingly afforded by a tolling agreement, a target or subject nevertheless ends up as a defendant in the case caption.

One area of common dispute centers on whether the target or subject knowingly and intelligently waived their rights. In some cases, the language of a tolling agreement itself will guide a court's determination of this question. The fact that a party lacked advice of counsel at the time it entered into the agreement does not invalidate an otherwise knowing and intelligent waiver, since the Sixth Amendment generally does not attach until charges are brought. See, e.g., *United States v. Helbling,* 209 F.3d 226 (3d Cir. 2000) (previously unrepresented defendant was not unduly pressured into signing waiver in light of extensive negotiations and repeated advice to retain or request counsel).

Under principles of contract law, any ambiguity in the terms of a tolling agreement is often construed against the government as drafter. An example may be found In *United States* v. *FedEx*, 2016 WL 107065 (N.D. Cal. March 18, 2016). In that case, the government indicted three FedEx entities: the parent corporation, FedEx Corporation (FedEx), and two subsidiaries, Federal Express Corporation (FedEx Express) and FedEx Corporate Services (FedEx Services), on charges related to Internet pharmacies. After initiating its inquiry, the government suspended its investigation for two and a half years in order to foster negotiations related to a potential non-prosecution agreement. During this period the government entered into four tolling agreements with attorneys for the various entities, each of which identified the parties as the United States and "Federal Express Corporation (FedEx) and its subsidiaries." Following the indictment, FedEx and FedEx Services moved to dismiss the charges as time-barred, arguing that they were never formally and specifically named in the relevant tolling agreements, and were therefore not bound by them. The court agreed, finding that while the agreements bound FedEx Express and its "subsidiaries," this definition included neither FedEx nor FedEx Services. The court was unmoved by the government's plea to reform the language of the agreements to effect the parties' "intended" meaning, noting that the defendants disclosed volumes of

evidence from which the government could have ascertained FedEx's corporate structure (which in any case was publicly available), and the record revealed no evidence of misdirection or fraud.

Defendants have also challenged tolling agreements on the basis that they were executed after the relevant statute of limitations period had expired. In *Bachman v. Bear Stearns & Co.*, 57 F. Supp. 2d 556 (N.D. Ill. 1999) (a civil action), the court found that the parties' tolling agreements did not toll claims which expired two years before the first agreement was executed. There the parties' tolling agreement was limited to "any applicable statute of limitations" as of a specific date. Because the relevant statute of limitations had long since expired, the statute was not "applicable" under the agreements and therefore not tolled.

Other largely fact-specific disputes include whether the tolling agreement in question covers a government investigation other than the one led to the instant charges. See, e.g., *SEC v. Mannion*, 2013 WL 5999657 (N.D. Ga. Nov. 12, 2013) (court rejected defendants' argument that tolling agreement was limited to claims derived from single SEC investigation, where agreement broadly addressed an investigation that the Commission "is conducting" into "violations of certain provisions of the federal securities laws"); *United States v. Mergen*, 764 F.3d 199 (2d Cir. 2014) (ambiguity in defendant's cooperation agreement tolling statutes of limitations was interpreted against the government; the term "among other things" did not include charges premised upon evidence derived from the criminals the defendant helped to catch and convict).

Practice Pointers

Even if the odds of running out the statutory clock are slim (especially when the longer 10-year limitations period applies), most white-collar defense lawyers correctly assume that the passage of time typically works to their advantage. As the events at issue in a criminal investigation recede further into the past, memories may dim, witnesses may die or otherwise become unavailable, and crucial documentary evidence may be lost. Based on these assumptions, defense lawyers naturally are wary of doing anything to stop the clock.

In entering into any tolling agreement, defense counsel should endeavor to limit its scope to a specifically defined investigation arising out of a particular set of facts with carefully enumerated potential charges.

However, signing a proposed tolling agreement may be in your client's best interests in certain situations. Making this decision requires an assessment of the prosecutor's motivations. Stopping the clock makes sense, for instance, if you believe that you have a good story to tell, and you are dealing with a prosecutor with an open mind, who is operating in good faith, and is under significant time pressure to determine whether wrongdoing occurred. Under these circumstances, you would readily enter into a standstill for the purpose of preparing a white paper submission, for example, that would benefit from careful, unhurried consideration by the authorities, or even just as a way to help to maintain a good relationship with the government's team. These accommodations may pay off when it comes to decisions regarding bail, plea offers, or sentencing.

Conversely, defense counsel must be more skeptical when a prosecutor in a long-running inquiry requests a tolling agreement a few months before the statute is set to expire and it is clear from all of the circumstances that nothing you say or do will deter the government from charging your client at the end of the day. In those situations, counsel would be wise to decline to toll in order to preserve a potentially viable statute of limitations defense. This may be especially important during the pandemic, which has forced some federal prosecutors to scramble to assemble a quorum of grand jurors needed to indict cases.

In any event, in entering into any tolling agreement, defense counsel should endeavor to limit its scope to a specifically defined investigation arising out of a particular set of facts with carefully enumerated potential charges. Such meticulous drafting may prove useful in preserving a limitations defense down the line, in the event the investigation leads in a previously unforeseen direction.

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