

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2132/December 15, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16213

In the Matter of

DAVID G. DERRICK, SR.

: ORDER DENYING MOTION FOR
: MORE DEFINITE STATEMENT

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on October 24, 2014, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934. The hearing is scheduled to begin on April 20, 2015, in Salt Lake City, Utah. Under consideration are Respondent's Motion for More Definite Statement, filed December 4, 2014, the Division of Enforcement's Opposition, filed December 10, 2014, and the Respondent's Reply, filed December 15, 2014 (Reply).

Respondent contends that "a critical legal issue in this case" is "what specific alleged offense conduct occurred within the statute-of-limitations period." Reply, p. 1. The sanctions authorized in the OIP include a cease-and-desist order. Cease-and-desist orders are not subject to the five year statute of limitations provided in 28 U.S.C. § 2462. *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996); see also *United States v. Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998). As to any sanction that may be subject to the statute of limitations, acts outside the statute of limitations may be considered to establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations. *Sharon M. Graham*, Exchange Act Release No. 40727, 1998 SEC LEXIS 2598, at *41 n.47 (Nov. 30, 1998) (citing Fed. R. Evid. 404(b) and *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960)), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000); *Terry T. Steen*, Exchange Act Release No. 40055, 1998 SEC LEXIS 1033, at *14-15 & n.16 (June 1, 1998) (citing *H.P. Lambert Co. v. Sec'y of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965)). Further, such acts may be considered in determining the appropriate sanction if violations are proven. *Steen*, 1998 SEC LEXIS 1033, at *14-17.

Respondent cites *SEC v. Graham*, --- F. Supp. 2d ---, 2014 WL 1891418 (S.D. Fla. May 12, 2014), *appeal docketed*, No. 14-13562 (11th Cir. Aug. 8, 2014), for the proposition that injunctive relief and disgorgement claims are subject to the five year statute of limitations under 28 U.S.C. § 2462. Right now, *SEC v. Graham* is an outlier, and I am not persuaded by its reasoning that the longstanding precedents on the pertinent limitations period were swept aside, in effect, by the Supreme Court's decision in *Gabelli v. SEC*, --- U.S. ---, 133 S. Ct. 1216 (2013), which specifically noted that its holding did not extend to injunctive relief and disgorgement claims. 133 S. Ct. at

1220 n.1. *See SEC. v. LeCroy*, No. 09-cv-2238, 2014 WL 4403147, at *1 n.1 (N.D. Ala. Sept. 5, 2014) (collecting cases inconsistent with *SEC v. Graham*).¹

Thus, Respondent is on sufficient notice that he should be prepared to address potential misconduct both before the five year period, such as the Amended Distribution Agreement of April 2008, and within the five year period, such as the allegedly misleading financial statement of January 2010. *Cf.* Reply, p. 4. The OIP otherwise provides Derrick with legally sufficient notice of the allegations against him. *See Morris J. Reiter*, Exchange Act Release No. 6108, 1959 SEC LEXIS 588, at *4-5 (Nov. 2, 1959) (“We have pointed out on prior occasions that appropriate notice of proceedings is given when the respondent is sufficiently informed of the nature of the charges against him so that he may adequately prepare his defense, and that he is not entitled to a disclosure of evidence.”).

Accordingly, the Motion for More Definite Statement will be DENIED.

IT IS SO ORDERED.

Jason S. Patil
Administrative Law Judge

¹ Respondent will be welcome to address this issue, among others, in its pre and post hearing briefs, incorporating any subsequent developments in binding and non-binding authorities.