

## PROSECUTORIAL DEFERENCE VERSUS DUE PROCESS: THE FEDERAL POWER ACT AND PERPETUAL STATUTES OF LIMITATIONS

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**Synopsis:** Although the anti-manipulation provisions of the Federal Power Act and the Federal Energy Regulatory Commission’s adoption of additional administrative processes further complicate an already complex penalty assessment, the applicable statute of limitations does not. The basic legal standard for when a claim accrues for purposes of the statute of limitations, pursuant to 28 U.S.C. § 2462, has remained unchanged. As the Commission acknowledged when it adopted the anti-manipulation rule, the penalty action must “be commenced within five years of the date of the [underlying] fraudulent or deceptive conduct.”

In *Gabelli v. SEC*, the Supreme Court held that claims subject to the five-year statute of limitations under 28 U.S.C § 2462 accrue at the time of the fraudulent or manipulative conduct giving rise to the penalty, because statutes of limitations should not persist in perpetuity subject to the whims of law enforcement. Nonetheless, FERC continues to advocate an interpretation of the statute of limitations under the Federal Power Act’s anti-manipulation provision (to which § 2462 applies) that would grant virtually limitless authority to the government to extend the limitations period by delaying its internal investigative penalty assessment process.

Three federal district courts, and now a federal appellate court, have confronted these issues and adopted differing interpretations of the applicable statute. Two district courts and an appellate court would grant significant deference to FERC, either suspending the statute of limitations until FERC assesses a penalty or restarting the clock *after* the penalty assessment is issued. This article outlines a different approach, embraced by another federal district court in *FERC v. Barclays Bank PLC* and more consistent with Supreme Court precedent, applying the strong statutory and policy bases underlying *Gabelli* to proceedings under the anti-manipulation provisions of the Federal Power Act.

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## I. INTRODUCTION

Two federal district courts in different circuits (one affirmed by a federal appellate court) have allowed the Federal Energy Regulatory Commission (FERC or the Commission) to pursue penalties under the Federal Power Act (FPA)<sup>1</sup> for violations of the FPA’s anti-manipulation provision more than five years after the underlying conduct occurred, notwithstanding the applicable five-year statute of limitations. Those rulings in *FERC v. Silkman*<sup>2</sup> and *FERC v. Powhatan Energy Fund, LLC*<sup>3</sup> contradict both the Supreme Court’s ruling in *Gabelli v. SEC*<sup>4</sup> and FERC’s own guidance regarding the statute of limitations. Both also stand in contrast to another recent decision dismissing FERC penalty claims as barred by the five-year statute of limitations, *FERC v. Barclays Bank PLC*.<sup>5</sup> The *Silkman* and *Powhatan* litigations remain ongoing, and in February 2020, the Fourth Circuit affirmed the *Powhatan* district court’s ruling (which the district court certified for interlocutory appeal), holding that the “statutory prerequisites to filing suit” under the FPA are unique and distinguish it from every other federal statute, thereby warranting a different application of the statute of limitations.<sup>6</sup>

Notwithstanding FERC’s differing interpretation, which some courts have adopted, an analysis of the relevant statute and case law shows that penalty claims brought more than five years after the underlying statutory violation are

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1. 16 U.S.C. § 823b(d) (1986). This article does not address the statutes of limitations under the Natural Gas Act (NGA), the Natural Gas Policy Act (NGPA), or the FPA’s reliability provisions, which each set forth different procedures for determining violations and penalties, including for fraud and manipulation. *See* 15 U.S.C. § 717 (2005); 15 U.S.C. § 3414 (2005); 16 U.S.C. § 824o (2005). The NGPA provides for de novo review by a district court of the penalty assessment, while the NGA and FPA reliability provisions provide for exclusive FERC administrative proceedings before an administrative law judge (ALJ) or the Commission and appeal to a federal circuit court. *See* 15 U.S.C. § 3414(b)(6)(F); 15 U.S.C. § 717t-1; 16 U.S.C. § 824o(e). Arguments for requiring de novo review in district court of an NGA anti-manipulation penalty have been advanced, *inter alia*, on due process grounds, but not yet adopted by a court. *See, e.g.*, *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865 (S.D. Tex. July 15, 2016), *aff’d*, 859 F.3d 325 (5th Cir. 2017).

2. *FERC v. Silkman*, 359 F. Supp. 3d 66, 122 (D. Me. 2019).

3. *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682, 711 (E.D. Va. 2018), *aff’d*, 949 F.3d 891 (4th Cir. Feb. 11, 2020), *petition for reh’g or reh’g en banc filed* No. 18-2326 (4th Cir. Mar. 27, 2020).

4. *Gabelli v. SEC*, 568 U.S. 442, 454 (2013).

5. The authors of this article represented two of the individual defendants in the *Barclays* case. *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093, 2017 U.S. Dist. LEXIS 161414 (E.D. Cal. Sept. 29, 2017).

6. *Powhatan*, 949 F.3d at 897.

barred by the statute of limitations. Not only do the relevant statute and case law require this result, any other interpretation would effectively eviscerate the statute of limitations and afford FERC authority to pursue endless investigations, exposing market participants to the risk of charges years after the alleged conduct occurred, thereby stripping respondents of their ability to defend themselves as litigation costs explode, memories fade, witnesses disappear, documents are lost, and reputations are irreparably damaged with the passage of time. Fairness and justice demand a more balanced approach.

## II. SECTION 2462 PROVIDES THE RELEVANT STATUTE OF LIMITATIONS FOR FEDERAL POWER ACT ANTI-MANIPULATION VIOLATIONS

Congress patterned the FPA's anti-manipulation provision<sup>7</sup> and FERC's accompanying anti-manipulation rule<sup>8</sup> after the SEC's antifraud authority.<sup>9</sup> Like with respect to the securities laws, Congress chose not to adopt a separate statute of limitations for FPA manipulation and fraud claims, and instead determined that the general federal statute of limitations under 28 U.S.C. § 2462 should govern.<sup>10</sup> Section 2462 requires commencement of "an action, suit or proceeding" for the "enforcement" of a civil money penalty within five years after the claim "accrued."<sup>11</sup> Critical to its application is the determination of when a claim "accrues."<sup>12</sup>

"In common parlance a right accrues when it comes into existence. . . ."<sup>13</sup> The Supreme Court in *Gabelli v. SEC* held that a § 2462 claim accrues when the underlying fraudulent or manipulative conduct giving rise to the statutory violations occurred.<sup>14</sup> The Court based its holding on the longstanding premise that "a claim accrues [under § 2462] 'when the plaintiff has a complete and present

7. 16 U.S.C. § 824v(a) (2005).

8. 18 C.F.R. § 1c.2 (2006).

9. See *Prohibition of Energy Market Manipulation*, 114 F.E.R.C. ¶ 61,047 at PP 2, 6-7 (2006), *reh'g denied*, 114 F.E.R.C. ¶ 61,300 (2006) ("[T]he proposed regulations were patterned after the Securities and Exchange Commission's (SEC) Rule 10b-5, and were 'intended to be interpreted consistent with analogous SEC precedent that is appropriate under the circumstances.'").

10. Section 2462 applies unless a statute provides an alternative state of limitations, and the FPA contains no limitations period. 28 U.S.C. § 2462 (1948) ("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. . . ."); see also *Powhatan*, 949 F.3d at 895.

11. 28 U.S.C. § 2462.

12. See *Powhatan*, 949 F.3d at 897.

13. *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

14. *Gabelli*, 568 U.S. at 447-48. In *Gabelli*, the SEC sought civil penalties for investment adviser fraud under the Investment Advisers Act. *Gabelli* argued that the relevant statute of limitations had expired under 28 U.S.C. § 2462, because the SEC filed its complaint more than five years after the underlying fraudulent conduct occurred. *Id.* at 446-47. The district court dismissed on this basis, and the Second Circuit reversed, applying the discovery rule (which provides that claims do not "accrue" until the claim is discovered), because the alleged violations involved fraud. *Id.* at 447. The Supreme Court reversed, rejecting application of the discovery rule in favor of the "standard rule" that a claim accrues "when the plaintiff has a complete and present cause of action." *Id.* at 448 (citation and internal quotation marks omitted).

cause of action.”<sup>15</sup> In a penalty action, the claim is complete when the relevant statute was violated, not when the injury was discovered, because neither reliance nor proof of damages is an element of a penalty claim.<sup>16</sup> In *Kokesh v. SEC*, the Supreme Court reaffirmed *Gabelli* and held that the five-year statute of limitations applied to all penalties imposed and enforced by the government to punish or “to deter others from offending in like manner” for an “offen[s]e against its laws.”<sup>17</sup>

The *Gabelli* Court rejected application of the discovery rule to lengthen the limitations period.<sup>18</sup> It also highlighted the important principles underlying the setting of “a fixed date when exposure to the specified Government enforcement efforts ends.”<sup>19</sup> Such limits are “vital to the welfare of society,”<sup>20</sup> because “[s]tatutes of limitations are intended to ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’”<sup>21</sup> As the Court noted, “even wrongdoers are entitled to assume that their sins may be forgotten,”<sup>22</sup> especially in enforcement actions brought by government agencies, which “go beyond compensation, are intended to punish, and label defendants wrongdoers.”<sup>23</sup> Importantly, *Gabelli* did not consider the various procedures the agency adopted in order to decide whether to file an action seeking penalties.<sup>24</sup> For example, the Supreme Court did not consider relevant the Wells regulatory process adopted by the SEC for providing respondents notice and opportunity to be heard on the question of whether penalties should be imposed.<sup>25</sup>

*Gabelli* resolved conflicting approaches taken by courts considering accrual under § 2462, as exemplified by the First Circuit’s prior decision in *United States v. Meyer* and the Fifth Circuit’s prior decision in *United States v. Core Laboratories, Inc.*<sup>26</sup> *Meyer* has been mischaracterized and used to justify extending the relevant statutory period beyond five years, thereby causing significant confusion. In *Meyer*, the First Circuit held that “any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged vio-

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15. *Id.* at 448 (citation and internal quotations omitted).

16. *See* 114 F.E.R.C. ¶ 61,047 at PP 48-49 & n.102 (“[R]eliance, loss causation and damages are not necessary for a violation.”).

17. *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) (citations and internal quotation marks omitted).

18. *See generally Gabelli*, 568 U.S. 442.

19. *Id.* at 448.

20. *Id.* at 449 (citation omitted).

21. *Id.* at 448 (citation omitted).

22. *Id.* at 449 (citation omitted).

23. *Gabelli*, 568 U.S. at 451-52.

24. *See generally id.*

25. *Id.*

26. *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *United States v. Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985).

lation.”<sup>27</sup> The court also held that, with respect to the government’s action to judicially enforce the “final assessment of an administrative penalty,” the five-year statute of limitations does not begin to “accrue” until the government issues a final administrative judgment assessing the penalty.<sup>28</sup> Thus, *Meyer* arguably established two independent five-year limitations periods: one for commencement of the “administrative proceeding” culminating in the “final” administrative decision assessing the penalty, and another for the commencement of the federal district court action to enforce the penalty assessed.<sup>29</sup> For its part, although its position has evolved over the years, FERC recently embraced this construction of *Meyer* in its oral argument before the Fourth Circuit in the *Powhatan* case,<sup>30</sup> which the Fourth Circuit in large part adopted, albeit without express reliance on *Meyer*.<sup>31</sup>

In so holding, however, the *Meyer* court distinguished between an administrative evidentiary adjudication controlled by the Administrative Procedure Act (APA), where the respondent is afforded certain procedural rights (including discovery), and an agency process to assess a penalty, in which the agency controls the timing of the investigation and filing of the lawsuit to enforce the penalty and the respondent is denied discovery.<sup>32</sup> As the court noted:

In a situation like that at bar, when the Department issues a charging letter, the imperatives of the Administrative Procedure Act (APA) come into play. From that point on, the timing of the case is largely beyond the Department’s control. Additionally, regulations which implement the APA’s adjudicatory rules, designed to ensure procedural fairness, afford the private litigant a wide range of protections during the administrative processing of his case. By way of illustration, these rules provide a full panoply of discovery devices. *See* 15 CFR § 388.9(b) (interrogatories, requests for admission, and production of documents), § 388.9(c) (depositions), § 388.10 (subpoenas), § 388.11 (protective orders) (1986) . . . Moreover, even after the ALJ [Administrative Law Judge] has issued an initial decision, the Department cannot necessarily sue to enforce the resultant penalty; the respondent enjoys a right of appeal to the Assistant Secretary of Commerce for Trade Administration. *See* 15 CFR § 388.22. These kinds of procedures necessarily take time; indeed, in the instant case, administrative activity consumed over three years.<sup>33</sup>

The *Meyer* court thus distinguished the statute at issue in that case, the Export Administration Act, which required full “adjudicatory administrative proceedings” pursuant to the APA, from those more akin to “prosecutorial determi-

27. *Meyer*, 808 F.2d at 914. *Meyer* examined whether the statute of limitations under 28 U.S.C. § 2462, as applied to the Export Administration Act, was “triggered on the date the predicate violation occurs or on the date the penalty is subsequently imposed,” adopting the date the penalty was imposed. *Id.* at 913.

28. *Id.* at 922.

29. *Id.*

30. *See generally* Oral Argument, *Powhatan*, 949 F.3d 891 (No. 18-2326), <https://www.ca4.uscourts.gov/OAarchive/mp3/18-2326-20191211.mp3>.

31. *Powhatan*, 949 F.3d at 901 (“[I]t is plain that FERC’s claim did not accrue under § 2462, for purposes of filing the district court action, until it had issued the [penalty assessment order] and appellants refused to pay the assessed penalties for 60 days.”).

32. *See Meyer*, 808 F.2d at 919.

33. *Id.* at 919-20.

nations”—where the government controls “decisions to bring suit.”<sup>34</sup> In the latter case, the government—not the respondent—retains discretion over the timing of the assessment, such that if the statute of limitations expired before suit, the government “would have only its own indecision to blame.”<sup>35</sup> While it seems apparent that *Gabelli* and *Kokesh* overruled *Meyer*, an analysis of *Meyer*’s facts and reasoning also reveal its limited holding—one that does *not* apply to agency penalties imposed where the agency (not an ALJ) controls the process and assumes a more prosecutorial role, and the respondent is not afforded basic procedural rights (such as discovery).<sup>36</sup>

In contrast, the Fifth Circuit took a different approach in *Core Labs*.<sup>37</sup> Relying on the origins of and predecessors to the modern statute (§ 2462), the *Core Labs* court embraced the notion that claims accrue at the time of the statutory violation, regardless of the procedure or process followed.<sup>38</sup> “[T]he date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the [limitations period] began to run.”<sup>39</sup> Contrary to *Meyer*, the Fifth Circuit found that the “progress of administrative proceedings” is irrelevant because it is “largely within the control of the Government” to determine the starting point and thus the length of the process.<sup>40</sup> “A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none.”<sup>41</sup>

The subsequent *Gabelli* decision endorsed the rationale underlying *Core Labs*, noting that, unlike private litigants, the “central ‘mission’ of the [SEC] is to ‘investigat[e] potential violations’” of its laws.<sup>42</sup> Indeed, the government “has many legal tools at hand to aid in that pursuit,” including regulatory rights to inspect books and records or request other detailed information or action, and the power to subpoena documents and witnesses, pay whistleblowers, or offer cooperation agreements to alleged violators or co-conspirators—all of which gives the agency paramount control over the investigative process and the timing of any penalty claims.<sup>43</sup>

*Gabelli* is particularly relevant here, not just because it interpreted § 2462, but also because it interpreted § 2462’s application in the context of the securi-

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34. *Id.* at 920.

35. *Id.*

36. *See id.* at 919.

37. *Core Labs.*, 759 F.2d at 481, 483. In *Core Labs*, the Commerce Department initiated an action to enforce a penalty for alleged violations of the Export Administration Act’s anti-boycott provisions more than five years after the last alleged violation occurred. *Id.* at 481. The defendant moved for judgment on the pleadings, contending that the government’s action was time-barred under 28 U.S.C. § 2462. *Id.* The trial court agreed with the defendant, and the Fifth Circuit affirmed, holding the claim first accrued when the underlying conduct giving rise to the Export Administration Act violation occurred. *Id.* at 481, 483.

38. *Id.* at 483.

39. *Core Labs.*, 759 F.2d at 482.

40. *Id.*

41. *Id.* at 483.

42. *Gabelli*, 568 U.S. at 451 (citation omitted).

43. *Id.* at 451-52.

ties fraud statute upon which the FPA's anti-manipulation authority was patterned.<sup>44</sup> The 2005 Energy Policy Act's (EPAAct 2005) anti-manipulation provisions adopted by Congress "closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934" and specifically provide that "the terms 'manipulative or deceptive device or contrivance' are to be used 'as those terms are used in section 10(b) of the Securities Exchange Act of 1934.'"<sup>45</sup> EPAAct 2005 is the statutory basis for the FPA and its anti-manipulation authority.<sup>46</sup> In sum, the conduct prohibited by the securities laws, and the standard used to assess it, are the same under the FPA.

### III. *GABELLI* GOVERNS VIOLATIONS OF THE FEDERAL POWER ACT'S ANTI-MANIPULATION PROVISION

Although the Supreme Court's decision in *Gabelli* appeared to settle the matter, courts have struggled with § 2462's application under the unique FPA penalty assessment procedure, as exemplified by *Silkman* and *Powhatan*.<sup>47</sup> The *Silkman* district court applied *Meyer*, concluding it had no choice in light of what it viewed as still-controlling authority in the First Circuit.<sup>48</sup> In contrast, the *Powhatan* district court rejected *Meyer*<sup>49</sup> but concluded that a claim does not accrue under § 2462 until the statutory prerequisites for filing the district court action are met: namely, the FERC penalty assessment and the respondent's failure to pay it within 60 days.<sup>50</sup> The Fourth Circuit subsequently affirmed the *Powhatan* district court's decision.<sup>51</sup> A third decision, *Barclays*, relied upon *Gabelli* and, applying its rationale, found that the FPA penalty claim accrued at the time of the statutory violation, not at some later point in time.<sup>52</sup>

#### A. *Federal Power Act Section 31(d) Violations Procedure*

To understand these decisions, a closer look at the FERC penalty assessment process is required. FPA Section 31(d) governs the "assessment" of civil money penalties for violations of the FPA's anti-manipulation provisions.<sup>53</sup> The

44. *Id.* at 452-54.

45. 114 F.E.R.C. ¶ 61,047 at P 6.

46. *Id.* at P 1.

47. See generally *Silkman*, 359 F. Supp. 3d 66; *Powhatan*, 949 F.3d 891.

48. *Silkman*, 359 F. Supp. 3d at 68 ("Based on *Meyer*, which the Court views as binding, the Court concludes that the FERC enforcement action is not time-barred."); see also *id.* at 120-21.

49. *Powhatan*, 949 F.3d at 901 (showing that the Fourth Circuit did not expressly reject *Meyer* but ultimately reached the same conclusion as the *Powhatan* district court).

50. *Id.*

51. *Powhatan*, 949 F.3d 891. The FPA provides that if the civil penalty is not paid within 60 calendar days after the assessment order, the Commission "shall institute an action in the appropriate district court . . . for an order affirming the assessment of the civil penalty." 16 U.S.C. § 823b(d)(3)(B).

52. *Barclays*, 2017 U.S. Dist. LEXIS 161414, at \*25-27, \*41-44. The *Barclays* court's decision rendered the bulk of FERC's case time-barred, precipitating a settlement and dismissal of the FERC action with prejudice. See generally Joint Stipulation of Dismissal with Prejudice, *Barclays*, No. 2:13-cv-02093, Docket No. 243 (E.D. Cal. Dec. 11, 2017); *Barclays Bank PLC*, 161 F.E.R.C. ¶ 61,147 (2017).

53. See 16 U.S.C. § 823b(d).

statute requires notice of the proposed penalty, but is silent on the method of notice.<sup>54</sup> The statute instead describes in some detail the respondent's right to determine the venue where the facts and law will be adjudicated.<sup>55</sup> Specifically, the statute provides for two adjudicatory options and grants the respondent the right to choose the trier of fact to adjudicate the facts and law.<sup>56</sup> Under the first option, also known as the "ALJ Option" or "Default Option," the determination of a violation and penalty assessment are made "on the record" after an agency hearing before an ALJ pursuant to section 554 of title 5 of the APA, where the ALJ makes "findings" of fact and sets forth the basis for the assessment decision, and respondents are granted certain procedural rights.<sup>57</sup> The violation and penalty decision then may be appealed to the appropriate circuit court of appeals for judicial review in accordance with the APA.<sup>58</sup> The other option, the "Federal Court Option," results in an adjudication of the facts and law in federal district court, where the respondent is afforded similar procedural rights under the federal rules of civil procedure.<sup>59</sup> The Federal Court Option provides that, following 60 days after a "prompt" penalty assessment, FERC may "institute an action in the appropriate" federal district court, where the court shall be empowered to "review de novo the law and the facts involved," and to enforce, modify, enforce as modified, or set aside in whole or in part, any penalty assessed.<sup>60</sup> Thus, the statute affords respondents the right to elect the venue in which the penalty viola-

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54. *Id.* §§ 823b(a), (c), (d)(1) ("Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a), inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.").

55. *Id.* §§ 823b(a), (c).

56. *Id.* § 823b(d).

57. *Id.* § 823b(d)(2)(A).

58. 16 U.S.C. § 823b(d)(2) ("In the case of the violation of a final order issued under subsection (a), or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment," and "Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part, the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.").

59. *Id.* § 823b(d)(3).

60. *Id.* ("In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty," and "If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such assessment.").



tion and assessment will be adjudicated—either before an ALJ or in federal court—pursuant to similar due process procedures.<sup>61</sup>

Prior to the assessment, FERC controls the process and timing of the investigation.<sup>62</sup> The “investigatory process the Commission conducts [is] as an *enforcer*, not a neutral arbiter.”<sup>63</sup> Respondents have no discovery rights, and no ability (or usually incentive) to delay the process because they have no procedural rights that could be used to cause delay—every procedure and process is controlled by FERC. In most instances, respondents wish to have investigations completed as quickly as possible to avoid reputational damage, or at least put the investigation behind them and start anew. To the extent FERC Enforcement Staff believe respondents are delaying unnecessarily, there are remedies—both before the Commission and in court.<sup>64</sup> Moreover, FERC may (and routinely does) seek tolling agreements with respondents if it has concerns about a looming limitations period.<sup>65</sup> Respondents have no such remedies when FERC procrastinates, and instead must wait until the Commission acts.

The nature, timing, and scope of the process is dictated by the Enforcement Staff, in consultation with the Commission.<sup>66</sup> The Staff issues a preliminary findings and conclusions letter (which sets forth in detail the results of the Staff investigation), after which the Staff may obtain settlement authority.<sup>67</sup> The next step is the 1b.19 notice and briefing (which discuss further the legal and factual basis of the proposed penalty).<sup>68</sup> The Commission is involved at each step. While the preliminary findings and 1b.19 papers are issued by the Enforcement Staff, they are issued only after consultation with and approval of the Commission.<sup>69</sup> In our experience, these typically occur well over a year prior to any Order to Show Cause in order to facilitate and promote settlement discussions. Any settlement authority also must be authorized by the Commission.<sup>70</sup>

If the parties do not settle, the assessment process is initiated by the Commission’s issuance of an Order to Show Cause.<sup>71</sup> The Order to Show Cause process is not required by the statute, but instead is adopted by regulation as the process for providing notice of the proposed penalty and the respondent’s right to choose where the public hearing will be held. The Order to Show Cause attaches and adopts an Enforcement Staff Report setting forth the results of the

61. *Id.* § 823b(d).

62. *See id.* § 823b(a).

63. *FERC v. Powhatan Energy Fund LLC*, 286 F. Supp. 3d 751, 766 (E.D. Va. 2017) (emphasis in original); *see also id.* at 766 n.25.

64. *See generally* 18 C.F.R. §§ 1b.13-1b.15; *J.P. Morgan Ventures Energy Corp.*, 141 F.E.R.C. ¶ 61,131 (2012).

65. 141 F.E.R.C. ¶ 61,131 at P 64.

66. *See* 16 U.S.C. § 823b(d)(6)(A).

67. *Revised Policy Statement on Enforcement*, 123 F.E.R.C. ¶ 61,156 at PP 32-34 (2008).

68. 18 C.F.R. § 1b.19 (2008).

69. 141 F.E.R.C. ¶ 61,131 at PP 32-34 & n.24.

70. *Id.*

71. *Id.* at P 35.

Staff's investigation and a proposed penalty.<sup>72</sup> In practice, the Staff Report largely mirrors the prior preliminary findings letter and the Staff's 1b.19 submission.

FERC controls the timing and substance of the Order to Show Cause and accompanying Staff Report, which it can initiate or issue at any time of its own choosing. The Commission generally accepts and uniformly adopts the Staff Report as the basis for its Order to Show Cause. The Order to Show Cause thus provides notice of the proposed penalty and the respondent's right to elect the adjudication venue, after which the respondent has 30 days to choose between the two procedural options.<sup>73</sup>

The procedures required under the two options differ substantially and provide the rules pursuant to which an adjudication of the penalty will occur—either before an ALJ or in federal court.<sup>74</sup> Under the Default Option, the Staff Report provides the basis for the Commission's complaint in the administrative proceeding initiated before the ALJ. Under this option, respondents have the right to a public hearing “on the record” before an ALJ, at which testimony may be heard, witnesses may be cross-examined, and evidence may be offered and admitted into the record.<sup>75</sup> The ALJ (not FERC Enforcement Staff) controls the record and determines what may be admitted.<sup>76</sup> Respondents thus have equal procedural rights under the Default Option, similar to the co-extensive rights afforded the *Meyer* respondents, including, among other things, discovery, depositions, and third party subpoenas.<sup>77</sup>

In contrast, the FERC penalty assessment under the Federal Court Option is a paper process, during which no additional fact-finding occurs. “[N]o procedural requirements apply to the order assessing penalties except that it be ‘promptly assessed.’”<sup>78</sup> No public hearing of the evidence or testimony occurs prior to the subsequent federal court action.<sup>79</sup> Only after FERC issues the penalty assessment order is the respondent afforded any procedural rights, including discovery rights, which occur during the subsequent proceedings in federal court. The penalty assessment process under the Federal Court Option thus is not an adjudication. The statute provides for only one “adjudication” of the evidence—either in federal court (after FERC issues the penalty assessment) or before an ALJ.<sup>80</sup>

The Commission has described the “prompt assessment” under the Federal Court Option as one in which the burden is on the respondent to disprove the Staff Report: “We find that the [Enforcement] Staff Report [attached to the Order

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72. *Id.*

73. 16 U.S.C. § 823b(d)(1).

74. *Id.* §§ 823b(d)(2)-(3).

75. *Id.* § 823b(d)(2)(a); 5 U.S.C. § 554(a), (c) (1978).

76. 16 U.S.C. § 823b(d)(2)(a).

77. *Id.* § 823b(d)(2); 5 U.S.C. § 554(c).

78. *Powhatan*, 286 F. Supp. 3d at 760 (quoting 16 U.S.C. § 823b(d)(3)(A)).

79. 16 U.S.C. § 823b(d)(3)(A).

80. *See id.*

to Show Cause] establishe[d] a prima facie case that Respondents effectuated a manipulative scheme,” and the “burden, therefore, falls upon Respondents to rebut the prima facie case established in the Staff Report.”<sup>81</sup> Not surprisingly, in every penalty assessment under the Federal Court Option, FERC has determined “that Respondents’ *answers fail[ed] to rebut* the case for the appropriateness of the civil penalties,”<sup>82</sup> and FERC’s resulting penalty assessments have substantially adopted the Staff Report recommendations.<sup>83</sup> In sum, “nothing in the statute, regulation, or policy statement” (or in practice) compels FERC “to act as a neutral decision-maker when making its penalty assessment” under the Federal Court Option.<sup>84</sup>

The Federal Court Option penalty assessment, which occurs before FERC files the federal action, is very different from that in *Meyer*: until FERC assesses the penalty and seeks to enforce it in federal court, respondents have no rights to take depositions, subpoena third parties or appear at third party depositions taken by FERC staff, issue document subpoenas or receive document productions produced in response to FERC subpoenas, cross-examine witnesses, or participate in any hearing of the evidence before an independent trier of fact (such as an ALJ).<sup>85</sup> It is not a two-sided process, and there is no evidentiary standard im-

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81. *In re Barclays Bank PLC*, 144 F.E.R.C. ¶ 61,041 at P 17 (2013). This paper process, with the burden imposed on the respondents to convince FERC not to assess penalties, is very similar to the SEC Wells (or white paper) process described in *Gabelli*. See *Gabelli* 568 U.S. at 451; see also SECURITIES AND EXCHANGE COMM’N, ENFORCEMENT MANUAL, § 2.4 (Nov. 28, 2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

82. 144 F.E.R.C. ¶ 61,041 at P 16 (emphasis added).

83. Of the approximately nine penalty assessments under the Federal Court Option, only three involved significant changes from the Staff Report recommendations; in one instance, the Commission dropped the Staff’s recommended charges against an individual; and in two instances, the Commission modified the Staff’s recommended penalty amounts (increasing the proposed penalty in one instance, and in the other increasing the proposed penalty against the individual but decreasing the proposed penalty against the company charged). See *generally* FED. ENERGY REG. COMM’N, ORDERS TO SHOW CAUSE PROCEEDINGS, <https://ferc.gov/enforcement/civil-penalties/show-cause-orders.asp> (last updated Feb. 14, 2020); Brief for Edison Elec. Inst. et al. as Amici Curiae Supporting Respondents at 8-10 & Table 1, *FERC v. Powhatan Energy Fund, LLC* (4th Cir. Jan. 22, 2019) (No. 18-2326), 2019 WL 324524.

84. *Powhatan*, 286 F. Supp. 3d at 767 (citation and internal quotation marks omitted). The Fourth Circuit somewhat disagreed with this characterization, finding that the “Show Cause Process is . . . not simply a unilateral prosecutorial decision,” because it is governed by FERC’s Rules of Practice and Procedure and requires FERC Commissioners to “act as neutral decisionmakers,” thereby rendering it “difficult to characterize this adjudicatory process as merely a discretionary decision to prosecute.” *Powhatan*, 949 F.3d at 902. The Fourth Circuit did not consider the Commission’s intimate involvement with the investigatory process prior to the Order to Show Cause, when it does not act as a neutral decision-maker, however. See *generally Powhatan*, 949 F.3d 891.

85. See 16 U.S.C. § 823b(d)(3). Some have argued that discovery is unnecessary because all the evidence of manipulation and fraud is in the possession of the accused. But this ignores the fundamental elements of the alleged claims—manipulation requires proof of artificial price effects on the market, and fraud requires proof that someone was deceived. Thus, both require discovery of facts uniquely held by third parties. While FERC has subpoena power, respondents do not prior to an adjudication before an ALJ or in federal district court. Moreover, the Enforcement Staff is not required to provide (and rarely provides) respondents with notice of or access to any third-party productions or testimony. Third parties rarely agree to voluntarily produce information without a subpoena, due to concerns over confidentiality and potentially angering Enforcement Staff.

posed on FERC. Any public hearing and adjudication of the evidence must await the federal court action subsequently brought by FERC.<sup>86</sup>

The final step under the Federal Court Option before the matter proceeds to federal court for adjudication is nonpayment of the penalty, which is the only mechanism by which the respondent may express disagreement with the penalty assessment.<sup>87</sup> After the expiration of sixty days from the assessment order, FERC may file an action in federal court.<sup>88</sup> Thus, subject to a few regulatory requirements, which the Commission imposed on itself, the timing of the Federal Court Option remains almost exclusively in the Commission's control.

Section 31(d) further provides that if any respondent fails to pay "an assessment of a civil penalty after it has become a final and unappealable order" pursuant to the Default Option, or "after the appropriate district court has entered final judgment in favor of the Commission" pursuant to the Federal Court Option (that is, after a federal court adjudication of the penalty assessment has occurred, following appropriate motions practice, discovery, and other characteristics of a normal civil action, and the federal court has entered a judgment "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part," the penalty assessment),<sup>89</sup> FERC may "institute an action to recover the amount of such penalty in any appropriate" federal court.<sup>90</sup> Thus, the Commission is authorized to institute an action to recover the penalty only after the matter has been fully and fairly litigated, and a final penalty judgment has been entered. The two procedural options therefore provide two different routes for achieving the same result: an adjudication of the proposed penalty—one before an ALJ, and one in federal district court.<sup>91</sup>

### B. Applying Section 2462 to the Federal Court Option

The respondents in both *Powhatan* and *Silkman*, as well as *Barclays*, chose the Federal Court Option.<sup>92</sup> The *Silkman* court concluded that *Gabelli's* application of § 2462 should be limited to circumstances in which the agency does not engage in an adjudication (affording respondents certain basic rights) before commencing an action in court, but in so concluding emphasized that it was required to follow *Meyer* in deciding the issue.<sup>93</sup> Constrained by *Meyer*, the *Silkman* court focused on certain briefing opportunities afforded the respondent under the Order to Show Cause procedure, finding that the briefing was uncharacteristic of a prosecutorial determination, and thus fell outside *Meyer's*

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86. *See id.*

87. *See id.* § 823b(d)(3)(B).

88. *Id.*

89. *Id.*

90. 16 U.S.C. § 823b(d)(5).

91. *Id.*

92. *Powhatan*, 286 F. Supp. 3d at 756-57; *Silkman*, 359 F. Supp. 3d at 69-70.

93. *Silkman*, 359 F. Supp. 3d at 118-21. *Silkman* involved allegations of fraudulent conduct relating to respondents' participation in the ISO-New England Day Ahead Load Response Program ("DALRP"), a demand response tool that helps to reduce energy prices and compensates entities offering load reductions. *Id.* at 71.

own exception language.<sup>94</sup> But the administrative processes that precede a federal court action under the FPA are very similar to the briefing opportunities afforded a respondent in a securities investigation, such as those afforded the defendants in *Gabelli*, and are far more analogous to a prosecutorial determination than an adversarial administrative adjudication.<sup>95</sup> In both instances, the administrative processes prior to the penalty assessment fall almost exclusively within the government's discretion, and section 554 of title 5 does not apply.<sup>96</sup> The respondent has few, if any, procedural rights and is afforded no discovery or hearing of the evidence; a respondent's only right is to respond to the allegations asserted. Moreover, nothing under the FPA or Order to Show Cause process interferes with the government's ability to investigate, initiate, and assess a penalty as quickly as it desires. As the court in *Barclays* aptly concluded, "[t]he Administrative Penalty Assessment Process [under the Federal Court Option] is tantamount to a decision to prosecute rather than a 'prosecution'"—because respondents have no discovery rights and no ability to cross-examine adverse witnesses at a trial—and as such, "does not constitute a 'proceeding' within the meaning of § 2462."<sup>97</sup>

This procedural distinction should be of little consequence, however, given *Gabelli*'s clear directive and the legislative history of the FPA's anti-manipulation rule. In *Gabelli*, the Supreme Court rejected application of the discovery rule,<sup>98</sup> because

[t]he SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central 'mission' of the [SEC] is to 'investigat[e] potential violations' . . . Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit . . . even without filing suit, [because] it can subpoena any documents and witnesses it deems relevant or material to an investigation.<sup>99</sup>

The same is true of FERC. Importantly, FERC endorsed the *Gabelli* approach when it adopted its anti-manipulation rule, stating: "The five-year limitation runs 'from the date the claim first accrued' . . . We intend that any . . . action for violation of the Final Rule be commenced *within five years of the date of the fraudulent or deceptive conduct*."<sup>100</sup>

The *Gabelli* Court was particularly concerned that extending the statute of limitations beyond five years 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,"<sup>101</sup> effectively mooting the statute of limi-

94. *Id.* at 120-22.

95. *Gabelli*, 568 U.S. at 454.

96. Indeed, section 554(a) provides that it does not apply to an adjudication of a "matter subject to a subsequent trial of the law and the facts de novo in a court." 5 U.S.C. § 554(a)(1).

97. *Barclays*, 2017 U.S. Dist. LEXIS 161414, at \*35-41.

98. Under the discovery rule, usually applied in situations involving fraud, the statute of limitations is tolled until the plaintiff discovers the violation. *See Gabelli*, 568 U.S. at 451.

99. *Id.* (citations omitted).

100. 114 F.E.R.C. ¶ 61,047 at P 62 n.124 (quoting 28 U.S.C. § 2462) (emphasis added).

101. *Gabelli*, 568 U.S. at 452.

tations.<sup>102</sup> In assessing the statute of limitations applicable under the Federal Court Option, the *Barclays* court deemed *Gabelli* a “plain directive . . . that the clock starts to tick when the underlying violations occurred.”<sup>103</sup> *Gabelli, Meyer*, and FERC’s interpretation of its own rule thus afford no room for *Silkman*’s application of *Meyer* in cases involving the Federal Court Option.<sup>104</sup>

The *Powhatan* district court, in turn, rightly rejected *Meyer*’s application, acknowledging that “cases following *Meyer* contain important procedural safeguards absent from those in [the Federal Court Option],”<sup>105</sup> but deemed the period between the penalty assessment and the commencement of the federal court action the only period of relevance for statute of limitations purposes.<sup>106</sup> While acknowledging that unlike the Default Option, the Federal Court Option mandates an “adversarial adjudication” in a “judicial context”<sup>107</sup>—thus acknowledging that no “adjudication” occurs prior to the penalty assessment—the court nonetheless found that the cause of action under § 2462 does not accrue until certain statutory prerequisites are met.<sup>108</sup>

The *Powhatan* district court did not reach this decision without equivocation, however, stating that § 2462 “fits imperfectly with” the Federal Court Option.<sup>109</sup> While acknowledging that defendants’ arguments (that the claim accrues when the conduct occurred) “seem more consistent with the overall statutory scheme of [the FPA’s anti-manipulation provision] and the purposes of the statute of limitations,”<sup>110</sup> the court nevertheless found that FERC “lack[ed] the authority to institute an action” (and thus the claim could not accrue) under the Federal Court Option unless and until two statutorily mandated events occurred first: the penalty was assessed, and respondents did not pay the penalty within 60 days.<sup>111</sup> In sum, the court found that FERC “could not ‘have brought suit without first resorting to administrative remedies,’” which included the “extended

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102. *Id.* at 447 (citation and internal quotations omitted); *see id.* at 449-54.

103. *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1131 (E.D. Cal. 2015). *Barclays* involved alleged manipulation of the electricity markets in and around California, pursuant to which respondents allegedly “engaged in a coordinated scheme . . . to take the physical positions they had built and liquidate them in the cash markets—generally at a loss—to impact the ICE daily index settlement” to benefit related financial positions settling against those indexes. *FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1122 (E.D. Cal. 2017) (citation omitted).

104. *See generally Gabelli*, 568 U.S. 442; *Silkman*, 359 F. Supp. 3d 66.

105. *Powhatan*, 345 F. Supp. 3d at 705. In *Powhatan*, respondents “conducted financial trades through the wholesale electricity market administered by PJM Interconnection, LLC (‘PJM’), an organization that operates various electricity markets throughout the Mid-Atlantic . . . Certain energy trades qualified market participants to receive a payment, known as a ‘Marginal Loss Surplus Allocation,’ or MLSA, which PJM distributed to customers making certain trades,” and respondents allegedly “‘designed and implemented a fraudulent . . . trading scheme to receive excessive amounts of MLSA payments,’ by manipulating ‘day-ahead’ and ‘real-time’ energy trades to engage in wash trades.” *Id.* at 686 (citation omitted).

106. *Id.* at 711.

107. *Id.* at 703.

108. *Id.* at 711.

109. *Powhatan*, 345 F. Supp. 3d at 695.

110. *Id.* at 711.

111. *Id.* at 695 (citation and internal quotation marks omitted).

timeframe of non-adversarial agency actions that preceded the filing of a Complaint here.”<sup>112</sup> Given this “imperfect fit” and the importance of the issue, the court certified its decision for interlocutory appeal.<sup>113</sup>

For its part, the Fourth Circuit affirmed the *Powhatan* district court, but in even less equivocal terms, finding that “[o]n balance, the procedures mandated by FERC’s Show Cause Process more closely resemble an adjudicative ‘proceeding’ than a prosecutor’s charging decision.”<sup>114</sup> The Fourth Circuit also stated that the claim to collect the penalty (as opposed to the assessment) did not accrue until after the penalty had been assessed and the respondent failed to pay the fine, finding that a cause of action could not be brought before the legal prerequisites for the claim had been satisfied.<sup>115</sup> Unlike the district court, the Fourth Circuit did not reject *Meyer* and instead suggested that two limitations periods apply, albeit without express reliance upon *Meyer*: first, “FERC must issue the OSC [Order to Show Cause] and commence its administrative process within five years” of the underlying conduct, thus commencing a “proceeding” under § 2462, and second, if a respondent elects the Federal Court Option, FERC must file suit in federal court to enforce the penalty assessment within five years and 60 days after the issuance of the penalty assessment (thus allowing the respondent the requisite 60 days to pay the penalty before filing suit).<sup>116</sup>

The Fourth Circuit based its reasoning on other decisions where “administrative proceedings . . . seek[ing] to impose civil [money] penalties” were deemed to be “proceedings for the enforcement of penalties and § 2462 thus applie[d].”<sup>117</sup> The principal cited decision, *3M Co.*,<sup>118</sup> however, involved very different circumstances than the Federal Court Option. In *3M Co.*, the penalty assessment occurred after a public hearing before an ALJ pursuant to the same procedures required by the FPA under the Default Option (5 U.S.C. § 554),<sup>119</sup> where discovery occurred, evidence was admitted on the record, and testimony (together with cross-examination) of witnesses took place. Thus, *3M Co.* equated the administrative imposition of a penalty with an adjudication in which the respondent is accorded procedural rights akin to a trial.<sup>120</sup> More importantly, none of the cases cited by the Fourth Circuit (other than *Silkman*) involved statutes similar to the FPA, which establishes a right to an adjudication of the evidence in one of two venues (before an ALJ or in federal district court).<sup>121</sup> Where the respondent elects the Federal Court Option, the proceeding where evidence is

112. *Id.* at 711 (citations omitted).

113. *Id.* at 695; see *Powhatan*, No. 3:15-cv-00452, Docket No. 108 (E.D. Va. Sept. 24, 2018).

114. *Powhatan*, 949 F.3d at 902.

115. *Id.* at 899-900.

116. *Id.* at 901.

117. *Id.* at 902 (citation and internal quotation marks omitted).

118. See *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); see also *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669-70 (4th Cir. 1997) (adopting the reasoning of *3M Co.*); *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967) (interpreting another statute of limitations, not § 2462).

119. See *3M Co.*, 17 F.3d at 1456.

120. *Id.*

121. *Powhatan*, 949 F.3d 891.

taken, findings of fact are made, and liability is determined occurs in the federal district court, not before or during the Order to Show Cause briefing.

The Fourth Circuit also was concerned about the prospect for delay, stating that to conclude otherwise would “put a suspected violator in control of the enforcement timeline and give it ‘considerable incentive to employ the available procedures to work delay.’”<sup>122</sup> But again, this finding does not comport with the procedure before FERC, where the respondent has no procedural rights other than the opportunity to respond in writing pursuant to a schedule set by FERC. In these circumstances, there are no procedural rights available to respondents to delay any judgment or decision of the Commission. Under the Federal Court Option, the procedural mechanisms for delay that concerned the Fourth Circuit—the public hearing of evidence on the record, discovery, testimony, and other basic due process rights—are reserved for the federal district court action.<sup>123</sup> Thus, FERC has full control over the timing and substance of its decision to impose penalties at all times prior to the filing of the federal action.

More importantly, the *Powhatan* decision cannot be reconciled with *Gabelli* and is inconsistent with FPA section 31(d). As an initial matter, *Powhatan* essentially contemplates a statute of limitations period spanning more than ten years—five years from the time of the conduct to the issuance of the Order to Show Cause, another five years and 60 days after the penalty assessment to file suit in court, and an undetermined—and potentially unlimited—amount of time between the issuance of the Order to Show cause and the penalty assessment, cabined only by the statutory admonition that any penalty assessment must occur “promptly.”<sup>124</sup> Nothing in the FPA contemplates a limitations period spanning more than a decade.

Further, the underlying claims in both *Powhatan* and *Gabelli* sought to impose penalties on defendants for violations of law: in *Gabelli*, for violations of the antifraud provisions of the securities laws; in *Powhatan*, for violations of FERC’s fraud and anti-manipulation law (which was modeled after the securities laws).<sup>125</sup> “Because liability for the penalty attaches at the moment of the violation, one would expect this to be the time when the claim for the penalty ‘first accrued.’”<sup>126</sup> Damages or the timing of any delayed penalty action are irrelevant because it is the violation that gives rise to the penalty:

An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency’s enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others . . . [N]othing in the language of § 2462 even arguably makes the

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122. *Id.* at 900 (quoting *Meyer*, 808 F.2d at 919).

123. *Id.*

124. 16 U.S.C. § 823b(d)(3)(A).

125. See 114 F.E.R.C. ¶ 61,047 at PP 2, 6-7.

126. *3M Co.*, 17 F.3d at 1461 (citation omitted).



running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.<sup>127</sup>

This approach also is in accord with harmonizing the statute of limitations under both options; if the cause of action accrues when the violation occurs, then it necessarily accrues at the same time regardless of which procedural option a respondent chooses. Indeed, it would make little sense for the limitations period to turn upon a respondent's procedural election. Rather, once a respondent elects the Default Option, an administrative adjudication before an ALJ commences with the filing of an administrative complaint. So long as the ALJ proceeding is commenced within five years of the alleged violation, the proceeding falls within the five-year limitations period—just as FERC must file its complaint in federal court within five years of the alleged violation under the Federal Court Option.<sup>128</sup>

Nothing in the language of § 2462 makes the determination of when the limitations period begins contingent on the agency's predicate steps and process for authorizing and filing a penalty action.<sup>129</sup> Indeed, *Gabelli* did not refer to or analyze the SEC procedures (including its Wells briefing process) for bringing a penalty action, making it clear that accrual was based on the unlawful acts giving rise to the penalty violation—not any procedural acts undertaken by the Commission prior to filing the action.<sup>130</sup> Similarly, the SEC has the authority to bring its claim administratively or in federal court, at its discretion (whereas under the FPA, the respondent chooses the venue).<sup>131</sup> *Gabelli* also assumes the respondent did not pay the penalty when notified of it; otherwise, there would have been no lawsuit and no need for the court to review it.<sup>132</sup> Nothing in the FPA or § 2462 requires a different approach for an FPA anti-manipulation violation.<sup>133</sup> The district and appellate courts in *Powhatan* appear to draw a distinction between the factual and legal predicates for filing suit, finding that while the factual predicates were complete, the legal predicates were not until after the respondents refused to pay the proposed penalty.<sup>134</sup> Indeed, the Fourth Circuit endeavored to distinguish *Gabelli* on this point, finding that the “FPA’s statutory prerequisites to filing suit set this case apart from *Gabelli*,” and unlike the SEC in *Gabelli*, “here, FERC could not proceed to district court until it had issued a PAO [penalty assessment order] and 60 days had passed.”<sup>135</sup> But, as *Gabelli* makes clear, the agency's delay in pursuing its investigation and assessment does not delay the limitations period, because the only factual and legal predicates to be analyzed are whether the conduct at issue violated the law.<sup>136</sup> Whether the statutory

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127. *Id.*

128. *See generally* Oral Argument at 5:50-7:20, *Barclays*, No. 2:13-cv-02093, Docket No. 228 (E.D. Cal. Aug. 24, 2017).

129. *See* 28 U.S.C. § 2462.

130. *Gabelli*, 568 U.S. at 445.

131. *See Powhatan*, 949 F.3d at 899.

132. *See Gabelli*, 568 U.S. at 451-52.

133. *See generally* 28 U.S.C. § 2462; 16 U.S.C. § 824v.

134. *See Powhatan*, 949 F.3d at 898.

135. *Id.* at 899.

136. *Gabelli*, 568 U.S. at 449-50.

period begins when “either . . . the defendant commits his [or her] wrong or when the substantial harm matures” is a question for civil damages claims, not penalty actions.<sup>137</sup> Damages, investigations to discover the facts, and any other acts subsequent to the violation are not elements of a penalty claim, and the harm matures when the conduct violates the law.<sup>138</sup> The amount of time it takes the government agency to uncover it is irrelevant.

Further, as the district court in *Powhatan* acknowledged, regardless of the “onesided [sic] nature of investigations the Commission undertakes” and the “unusual procedural pathway” under the Federal Court Option,<sup>139</sup> the timing of the Federal Court Option “remains almost exclusively in the [government’s] control.”<sup>140</sup> If a significant passage of time occurs between the alleged violation and the penalty assessment, any delays are attributable to FERC. The fact that FERC’s identification of the alleged violation may have been delayed, or that FERC had to jump through self-imposed procedural hoops to bring the penalty action, does not change the fact that the underlying violation of law giving rise to the penalty is not the failure to pay the penalty within the prescribed 60 days, but rather the unlawful conduct on which the penalty is based. To the extent that a defendant causes significant delays in the process, other means of relief are available to the government; it is free to enter into a tolling agreement with respondents or subsequently ask the court for equitable tolling of the limitations period, for example.<sup>141</sup>

Under *Powhatan*’s rubric, FERC theoretically could wait to file a federal court action to enforce a civil penalty for well more than five years from the date of the alleged underlying violation without violating § 2462, so long as it filed the federal court action within five years and 60 days of the issuance of its order assessing penalties. Meanwhile, during the potentially lengthy interim period between the violation and the penalty assessment, evidence could spoil and witnesses could die or have their memories impaired, leaving defendants defenseless against a potential enforcement action in perpetuity.<sup>142</sup>

The alternate argument that FERC need only issue its Order to Show Cause within the five-year period is equally unavailing. FERC controls the timing and can bring the Order to Show Cause at any time; it does not have to wait five years. More fundamentally, this proposed construct would delay the adjudication of the proposed penalty for more than five years and deprive respondents of the ability to conduct timely discovery and seek the preservation of evidence—precisely the concerns raised by the *Gabelli* decision.<sup>143</sup> Five years is not a brief

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137. *Powhatan*, 345 F. Supp. 3d at 702 (citation omitted).

138. *Id.*

139. *Id.*

140. *Id.* at 707.

141. *See Core Labs., Inc.*, 759 F.2d at 484 (“[t]he government may, however, be entitled to invoke the equitable powers of the Court to toll the . . . limitations period . . . [i]f it were shown, for example, that the government’s failure . . . was caused by improperly dilatory tactics [of the defendant].”).

142. *Gabelli*, 568 U.S. at 452.

143. *See id.* at 448.

time period, and it provides adequate time for FERC to discover and investigate potential misconduct.

Such a result is inconsistent with Supreme Court precedent and has the potential to create significant injustices—particularly with respect to individuals, whose names, reputations, and livelihoods hang in the balance and remain subject to public ridicule and speculation pending the resolution of FERC’s case—as the *Barclays* court correctly observed. Indeed, the *Barclays* court recognized that, under the Federal Court Option, defendants “never had the power to compel any witness to give an affidavit (or a deposition or to submit to cross-examination),” and thus could not compel witnesses “to submit to a deposition or to produce the evidence that would convince FERC that the charges had no merit.”<sup>144</sup> Instead, defendants “were forced to rely upon [FERC] Enforcement’s investigation, and whatever evidence they could obtain on their own from volunteers, in their efforts to convince FERC not to file this lawsuit.”<sup>145</sup> In our experience, volunteers often wait until after the statute of limitations expires, fearing the unwanted attention or assumed retribution of FERC Enforcement Staff. An unlimited statute of limitations effectively would preempt any such volunteers.

Further, FERC, not defendants, compiles the so-called “administrative record” under the Federal Court Option, which in our experience includes only those materials hand-selected by FERC; it does not consist of the entire investigative record and, in the *Barclays* case, for example, “omitted documents, data, and transcripts,” with no explanation (many of which were helpful to respondents),<sup>146</sup> thus underscoring the one-sidedness and unfairness of FERC’s proffered interpretation of the Federal Court Option.

The *Barclays* court followed *Gabelli* in applying § 2462 and took into account the problematic, and in some instances nonsensical, implications that a contrary application would carry,<sup>147</sup> whereas the approaches in *Silkman* and *Powhatan* stretch the statute of limitations under § 2462 well beyond what Congress intended. The *Gabelli* Court cautioned against suspensions of the statute of limitations for which a statute does not explicitly provide:

As we held long ago, the cases in which a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.<sup>148</sup>

At the same time, the *Gabelli* Court provided a straightforward interpretation of § 2462 that fits well with the FPA statutory framework and the underlying

144. *Barclays*, 247 F. Supp. 3d at 1129. In most cases, those volunteers refuse to volunteer until after the limitations period has expired, out of fear of potential retribution, and thus well after it is of any use to respondents.

145. *Id.*

146. *Id.* at 1130-31.

147. *Id.*

148. *Gabelli*, 568 U.S. at 454 (citation and internal quotation marks omitted).

ing congressional purpose.<sup>149</sup> Indeed, the FPA anti-manipulation law, and its corollary regulation, were patterned after their securities law counterparts—the same provisions interpreted by the *Gabelli* court.<sup>150</sup> Moreover, the Federal Court Option contemplates the filing of a federal district court action, which entails full discovery and other procedural rights inherent to a normal civil action in federal court, after an agency decision to pursue civil money penalties—precisely the circumstance presented in *Gabelli*.<sup>151</sup> It is only in federal court—after FERC has decided on the penalty—that the parties will fully and fairly adjudicate the facts and law of the alleged penalties. Similarly, the Default Option provides full procedural rights to the respondent and a full adjudication of the facts and law only after a formal administrative proceeding is commenced before an ALJ.<sup>152</sup> Thus, the clear congressional purpose was to accord full adjudication of the facts and law underlying the penalty in one of two venues (at the respondent’s discretion) before a neutral trier of fact (either an ALJ or a federal district judge). Whatever procedures an agency follows before filing the administrative or legal action does not change the analysis or the result. Accrual occurs at the time of the allegedly fraudulent or manipulative violation. There is no reason to treat the legal and administrative adjudications provided by either option differently or to diverge from the Supreme Court’s approach and interpretation of § 2462. As FERC stated when it adopted and patterned its anti-manipulation rule after the securities laws, any penalty action shall “be commenced within five years of the date of the fraudulent or deceptive conduct.”<sup>153</sup>

#### IV. CONCLUSION

It is not surprising that government agencies advocate for more time in which to balance the myriad number of interests and pressures they face when pursuing their investigative and oversight roles, which is why many enter into tolling agreements to extend the limitations period. By the same token, however, fairness dictates that agencies should not be able to investigate forever, inflict limitless reputational harm, and impose enormous litigation costs without any end in sight. Endless investigations should not be used as a bludgeon to force settlements and intimidate individuals; rather, every investigation must reach a tipping point at which prosecutorial decisions are made and penalty claims are brought. Congress has mandated that the tipping point must be reached within five years of the violation.<sup>154</sup> Nothing in § 2462 or the FPA countenances a delay beyond five years, and courts should not read one into the statute.<sup>155</sup> Indeed, section 31(d) embodies this balance by allowing the respondent, after Enforcement Staff have proposed penalties for statutory violations, to choose the forum

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149. *Id.*

150. *See id.*; *see generally* 114 F.E.R.C. ¶ 61,047 at P 6.

151. *See Barclays*, 247 F. Supp. 3d at 1131.

152. *Id.* at 1125.

153. 114 F.E.R.C. ¶ 61,047 at P 62 n.124 (quoting 28 U.S.C. § 2462).

154. *See generally* 28 U.S.C. § 2462.

155. *Id.*

and the neutral trier of fact (ALJ or federal judge) to adjudicate the matter.<sup>156</sup> In either forum, the respondent is afforded equal procedural rights, evidence will be admitted pursuant to established evidentiary rules, a trial will occur, and a fair judgment will be rendered—so long as the penalty action is commenced before an ALJ or federal judge within five years of the violation.

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156. 16 U.S.C. § 823(b)(d).