White Collar & Criminal Litigation
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Navigating MLAT Tolling in Cross-Border Investigations

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Tolling agreements have become a common tool for prosecutors to effectively extend statutes of limitations in white-collar investigations. Especially in complex cases, government attorneys regularly ask potential defendants to voluntarily toll the limitations period. Whether a target or subject should agree is a sensitive, context-dependent question. Defense counsel must consider the duration of the agreement, its scope, the likelihood that the government will indict in the absence of an agreement, and the possibility that a valid statute-of-limitations defense might already exist or accrue in the near future.

Especially in cross-border investigations, defense counsel must also consider another important factor: the potential that the government already secured tolling under 18 U.S.C. §3292. Section 3292 establishes an *ex parte* process through which the government can obtain a court order tolling the applicable statute of limitations where evidence of the offense under investigation is located abroad. Such orders are almost uniformly kept under seal while an investigation is ongoing, making their existence uncertain. Nonetheless, it is important to consider tolling under section 3292, as an order under that provision may have significant implications for a subject or target's decision to accept or reject a proposed tolling agreement. When confronted with such an agreement in a cross-border investigation, counsel should take the following steps to ensure they adequately account for section 3292.

First: Consider Whether the Government Likely Secured Tolling under Section 3292

Section 3292 provides that if the government proves by a preponderance of the evidence that it "reasonably appears" that "evidence of an offense is in a foreign country" and that "an official request has been made for such evidence," the court "shall suspend the running of the statute of limitations for the offense." 18 U.S.C. § 3292(a)(1). "Official requests" are defined to include "a letter rogatory, a request under a treaty or convention" or "any other

request for evidence made by a court of the United States . . . to a court or other authority of a foreign country." *Id.* §3292(d).

Counsel should consider whether, based on the facts of their case, it is likely that evidence exists abroad. If so, they should analyze whether the United States has a treaty in place through which U.S. prosecutors could make an "official request" to the country in which the evidence might be located. That bar is usually met. Given the significant number of bilateral mutual legal assistance treaties (MLATs) the U.S. maintains, and its adherence to the multilateral Hague Evidence Convention, it is rare for prosecutors to lack a treaty under which they can request foreign evidence. The statute's catch-all clause also suggests that even where no treaty process exists, prosecutors may still be able to satisfy the request prong of section 3292.

If foreign evidence is likely to exist and prosecutors have a way to request it, defense counsel should assess the likelihood the government has done so and sought tolling. Keep in mind that there is usually little downside for the government to take advantage of section 3292 where it can. All that is generally required is a short "application" supported by an affidavit attesting to the likelihood that evidence exists abroad and the steps taken to request it. Given that minimal burden, defense counsel will be well served in many cases to assume the government has or easily could obtain tolling under section 3292.

Where the government has that alternative means of tolling available, it may significantly affect a potential defendant's decision regarding a proposed tolling agreement. If a statute-of-limitations defense is unlikely to accrue in the near future, there may be little to gain from refusing to voluntarily toll the limitations period.

Second: Consider Section 3292's Limitations and Whether They Apply

Next, counsel should assess whether any of section 3292's limits might apply. Where the statute's prerequisites are met, it provides that the "period of suspension . . . shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request." *Id.* §3292(b). That tolling period is qualified by two limitations. First, the statute will not toll the statute of limitations for more than six months if all foreign authorities take final action on the requests before the limitations period would otherwise have expired. *Id.* §3292(c)(2). Second, section 3292 will never toll the statute of limitations for more than three years. *Id.* §3292(c)(1).

While defense counsel may litigate the issue in post-indictment proceedings, they often lack visibility during an investigation into whether final action has been taken. When confronted with a tolling agreement during the investigation stage, counsel therefore must often assume that the government has or could secure tolling up to the three-year limit. That ordinarily provides the government significant leverage in seeking a voluntary tolling agreement. Only when the ordinary limitations period plus the potential three-year extension nears expiration will defense counsel have confidence that the government lacks much additional time to indict. Prior to signing any tolling agreement, counsel should calculate the statute of limitations to assess whether the government is approaching the end of its potentially tolled period under section 3292. And they should revisit those calculations when considering any proposed extensions or renewals of the agreement.

Third: Closely Review the Agreement

Finally, where a client decides to enter a tolling agreement, counsel should thoroughly review the tolling agreement with section 3292 in mind to ensure:

- The tolling agreement is written in a way to avoid double-counting. Careful drafting can ensure that the government does not simultaneously get the benefit of tolling under both section 3292 and a voluntary tolling agreement.
- The tolling agreement is properly scoped. At least where section 3292 is the difference maker that causes a client to enter a tolling agreement, counsel should ensure not to unnecessarily agree to toll for a broader scope of conduct than they reasonably believe the government could obtain tolling for under section 3292.

Many factors impact the decision to voluntarily toll the statute of limitations. Taking account of section 3292 will ensure that those under investigation make that context-dependent decision in a fully informed way.