

Securities and Exchange Commission v. The NIR Group, LLC:
E.D.N.Y. holds that SEC's 180-day Enforcement Requirement
under Section 929U of the Dodd-Frank Act is not a Statute of Limitations

On March 24, 2013, Magistrate Judge Gary Brown of the United States District Court for the Eastern District of New York held in *Securities and Exchange Commission v. The NIR Group, LLC*¹ that the expiration of the 180-day period under section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78d-5 (“section 929U”), within which the Securities and Exchange Commission (“SEC”) must file an enforcement action or obtain an extension of time from a Commission director “does not create a jurisdictional bar to SEC enforcement actions” brought outside this period and as such defendants were not entitled to discovery of evidence concerning the SEC’s compliance with the section 929U deadline under Rule 26 of the Federal Rules of Civil Procedure (“Rule 26”).²

I. Background

An SEC enforcement action was brought against The NIR Group, LLC hedge fund and former employees (“Defendants”) for allegedly defrauding investors in connection with securities transactions. Defendants filed a motion to dismiss based upon the SEC’s failure to allege compliance with section 929U, which provides that:

“Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.”
Section 929U(a)(1).

Section 929U(a)(2) contains an exception to the general rule, permitting extensions for one or more additional 180-day periods where “a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1).” In response to Defendants’ motion, the SEC provided a declaration from its counsel of record in the action setting forth the procedures followed by the SEC in order to obtain extensions beyond the initial 180-day period set forth in section 929U(a)(1). Defendants’ motion was terminated after the SEC was granted leave to file an amended complaint and Defendants filed an answer without renewing their motion to dismiss.

Defendants noticed the deposition of and production of documents by the SEC’s attorney concerning statements made in his declaration about the procedures followed by the SEC in order to obtain extensions under section 929U(a)(1). Defendants also noticed the deposition of an SEC representative under Rule 30(b)(6) of the Federal Rules of Civil Procedure. The SEC filed a motion to quash the depositions and requests for documents on the grounds that discovery of the testimony and documents was not required under Rule 26 because section 929U is “not a limitations period and [does] not otherwise divest the agency of its authority to act” and therefore “cannot be the basis for any right or claim by Defendants, [and] is utterly irrelevant to this action.”³ Additionally, the SEC argued that production of the requested documents was also barred by the attorney-client privilege, the attorney work-product privilege, the deliberative process privilege, and the law enforcement privilege.⁴

¹ *SEC v. The NIR Group, LLC, No. 2:11-cv-04723*, slip op. (E.D.N.Y. Mar. 24, 2013) (hereinafter “Slip Opinion”).

² Slip Opinion at 8.

³ *Id.* at 4.

⁴ *Id.* at 5.

II. The Court's Decision

The court granted the SEC's motion to quash, rejected Defendants' argument that the 180-day time limit acts as a *de facto* statute of limitations and instead concluded that "the expiration of the 180-day deadline imposed by section 929U does not create a jurisdictional bar to SEC enforcement actions." Consequently, "evidence concerning compliance with the statutory deadline is not relevant to a claim or defense in this action, and is not discoverable."⁵ In reaching this conclusion, the court drew from two Supreme Court decisions in which the Court found that statutory deadlines within which state agencies were required to act did not create jurisdictional defenses. For example, in *Brock v. Pierce County* the Court held that expiration of the 120-day deadline within which the Secretary of Labor was required to investigate complaints about recipients' misuse of funding under the Comprehensive Employment and Training Act did not "void[] subsequent agency action," reasoning that "[w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act."⁶ Similarly in *Barnhart v. Peabody Coal Co.* the Court found that the requirement that the Commissioner of Social Security make funding assignment for retired miners under the Coal Industry Retiree Health Benefit Act of 1992 "before October 1, 1993" did not impact the validity of assignments made after that date, reasoning that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."⁷ The court also noted a decision by the United States District Court for the Southern District of Florida, which similarly concluded, relying on the *Barnhart* decision, that section 929U "imposes only an internal deadline on the SEC, not a private right to be free from agency action occurring beyond the internal deadline."⁸

The court rejected Defendants' argument that the failure to read a limitations period into section 929U would render the 180-day deadline superfluous, explaining that although "[t]he statute may not confer upon defendants the right to dismiss an enforcement action against them . . . that does not mean that failure to comply with the deadline would necessarily be without consequences."⁹ For example, the court noted that "[t]he targets of an SEC probe that extended beyond the deadline may well be entitled to initiate administrative proceedings or file a declaratory judgment action to compel agency action."¹⁰

The court also noted that, even setting aside its conclusion on the relevance of evidence concerning the SEC's compliance with the statutory deadline of section 929U, discovery of such evidence would be barred by the attorney-work product privilege and the deliberative process privilege. Additionally, the court noted that Defendants had not satisfied the heightened standard required to compel the deposition of the SEC's attorney particularly in light of the fact that Defendants had "already obtained substantial detail" concerning the procedures followed by the SEC in order to obtain extensions beyond the initial 180-day period as set forth in the declaration submitted by the SEC attorney.¹¹ Under these circumstances, the court found that Defendants' "attempt to obtain further discovery on these issues constitutes an unnecessary burden and waste of resources."¹²

⁵ *Id.* at 8.

⁶ *Id.* at 6 (quoting *Brock v. Pierce County*, 476 U.S. 253, 265-57 (1986)).

⁷ *Id.* at 7 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003)).

⁸ *Id.* (quoting *SEC v. Levin*, 2013 WL 594736, *13 (S.D. Fla. Feb. 14, 2013)).

⁹ *Id.* at 8.

¹⁰ *Id.*

¹¹ *Id.* at 9.

¹² *Id.*

CAHILL

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Christine Mott at 212.701.3015 or cmott@cahill.com.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.