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Supreme Court Limits SEC Disgorgement Orders With Five-Year Statute of Limitations

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Seyfarth Synopsis: *On June 5, 2017, the United States Supreme Court resolved a split among the federal circuit courts by unanimously holding that disgorgement collected by the Securities and Exchange Commission is subject to the five-year statute of limitations on civil penalties.*

On June 5, 2017, the United States Supreme Court decided *Kokesh v. Securities and Exchange Commission*, No. 16-529, unanimously holding that disgorgement collected by the SEC is subject to the five-year statute of limitations on civil penalties. In an opinion written by Justice Sonia Sotomayor, the Court overruled the decision of the Tenth Circuit Court of Appeals on this issue, which had been in conflict with the Eleventh Circuit's earlier opinion addressing the same topic.

The justices concluded that SEC disgorgement is a penalty by examining "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual" and whether it is sought "for the purpose of punishment, and to deter others from offending in like manner" rather than to compensate victims. As to the first point, the Court noted that disgorgement is generally imposed as a consequence for violating public laws and that, although funds disgorged may be returned to aggrieved investors, they may also be sent to the Treasury, suggesting that the wrong redressed is public rather than solely individual. As to the second point, the Court observed that SEC disgorgement often does not simply return a victim to the status quo, but actually exceeds the profits the defendant gained from his or her violations, such as by failing to take into account that defendant's expenses. Thus, the Court concluded, disgorgement constitutes a punitive sanction, not a remedial measure, and is subject to the statute of limitations applicable to civil penalties under 28 U.S.C. § 2462.

The impact of the ruling will be substantial in the *Kokesh* matter, as $29.9 million of the $34.9 million judgment resulted from violations outside the five-year limitations period. It may be even more consequential in future cases, as the SEC will now be precluded from seeking any disgorgement nationwide for any conduct more than five-years old. As the Court noted, the SEC has continued to seek disgorgement broadly despite the fact that it has been authorized to seek -- and has been seeking -- monetary civil penalties since 1990. In fact, the SEC has sought disgorgement broadly; opposed restrictions on how disgorgement should be calculated; and sought disgorgement for not just amounts gained by the defendant, but those gained by third parties as a result of the defendant's misconduct, such as in insider trading cases. With the Court's ruling in *Kokesh*, it is likely that these practices will be further curtailed on a moving forward basis.

Additionally, in resolving the case the Court stated in a footnote that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether

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courts have properly applied disgorgement principles in this context." This footnote may serve to motivate the defense bar to further challenge the SEC's ability to seek disgorgement by suggesting that at least some members of the Court may question whether disgorgement has properly been allowed and calculated under current case law. As such, it is possible that the *Kokesh* decision may be just the beginning -- and not the end -- of the road when it comes to limiting SEC disgorgement.

Seyfarth Shaw's White Collar, Internal Investigations and False Claims Team has substantial experience handling SEC investigations and enforcement actions. If you would like additional information, please contact the firm's National Co-Chair of the White Collar, Internal Investigations and False Claims Team, Andrew S. Boutros at aboutros@seyfarth.com; Co-Chair of the National Whistleblower Team Christopher F. Robertson at crobertson@seyfarth.com; or White Collar Team Member John R. Schleppenbach at jschleppenbach@seyfarth.com.

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