Blogs
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SEC Disgorgement Power - Time Running Out?


On April 18, 2017, the U.S. Supreme Court heard oral argument in *Kokesh v. Securities and Exchange Commission*—a case which could determine whether the Securities and Exchange Commission's power to disgorge ill-gotten gains is subject to a statute of limitations.

The SEC currently uses disgorgement as a tool to take in billions of dollars in payments annually from defendants in its enforcement actions. The arguments before the Court centered on whether disgorgement constitutes a penalty and consequently, if there is a limited period in which the SEC could impose it. The Court is expected to resolve a circuit split. As with other circuits, the 10th Circuit held in *SEC v. Kokesh* that disgorgement was *not* subject to a statute of limitations while the 11th Circuit recently found in *SEC v. Graham* that disgorgement was similar to forfeiture, as covered by 28 USC § 2462, and thus any action imposing it must be brought within a five-year limitations period. The consequences of limits being imposed on the SEC's disgorgement power could be far reaching. As an initial matter, disgorgement is a significant component of the billions of dollars the SEC's enforcement program generates. In 2016 alone, the SEC obtained over $4 billion in penalties and disgorgement. And with no time limits impinging on the SEC's ability to collect disgorgement, investigations could proceed at their own pace. However, if the SEC's ability to recoup investor losses faced a deadline, this could force the SEC to reprioritize what leads it pursues and how much pre-litigation investigation it engages in before formally filing a claim. Moreover, the imposition of time limits could align the SEC's investigative cadence more closely with criminal law enforcement who routinely work under statutes of limitation. This in turn could lead to an increase in joint resolutions or, alternatively, cause more SEC cases to be stayed if their criminal counterparts are in the midst of court proceedings. Finally, it's possible that defendants could use any newly applied limits on the SEC's disgorgement power to strategically reassess requests for tolling agreements or push for better settlement terms before the SEC's time runs out. Irrespective of their ideological leanings, the Justices appeared to signal during oral argument that they believe the SEC is bound by a five-year statute of limitations when it seeks disgorgement. Chief Justice Roberts commented that it was "utterly repugnant" for the government to have limitless power to impose penalties. And Justice Ginsburg characterized the SEC's position as having "kind of an unreality to it."

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