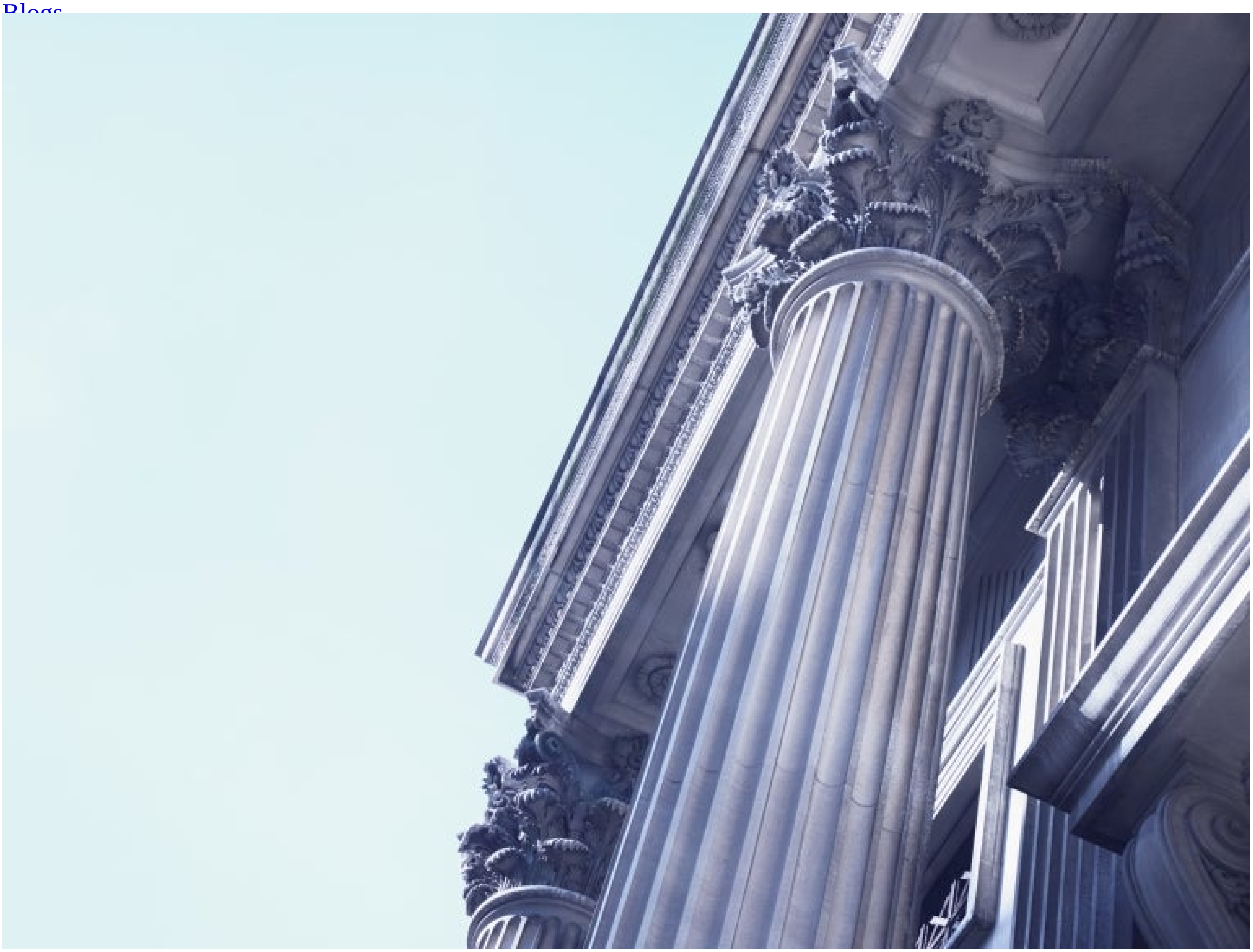

On June 22, 2020, the U.S. Supreme Court decided in *Liu v. SEC* that in an SEC civil proceeding a disgorgement award that does not exceed a wrongdoer's profit and is awarded for victims is equitable relief permissible under the applicable statute.

The opinion answers an important question left open by the Court in *Kokesh v. SEC* that disgorgement operates as a "penalty," rendering claims for disgorgement subject to the five-year statute of limitations. *See* Supreme Court Reigns in SEC's Disgorgement Power. *Liu* closes the door on speculation that the Court was poised to hold that the SEC did not have authority to seek disgorgement. The Court relied on longstanding equity practice that authorized courts to strip wrongdoers of their ill-gotten gains. However, because the remedy is a form of equitable relief, the Court established limitations on disgorgement. The Court noted courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by awarding the proceeds of fraud to be deposited to the Treasury instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct legitimate expenses. Thus, the Court held legitimate expenses must be deducted from a wrongdoer's profits to avoid transforming a profits award into a penalty. The Court also stated the equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit. With this decision, the SEC is free again to rely upon disgorgement as one of its tools to deter violations of securities laws. If the Court had ruled otherwise in *Liu*, the SEC's enforcement powers would have been significantly curtailed, which in turn could have extended similar challenges to the authority of other regulatory agencies. This decision is especially relevant since legislation that could potentially overturn *Kokesh* by extending the statute of limitations and codifying the SEC's ability to seek disgorgement are still being considered by Congress. While a victory for the SEC, it is tempered by practical considerations given the Court's limitations on the scope of disgorgement. Defendants are now free to argue their expenses should be deducted from any contemplated disgorgement award. The SEC may also be forced to craft a distribution plan for victims before seeking disgorgement. This is a significant change as current practice allows disgorgement to be deposited to the Treasury while the SEC takes the time necessary to identify victims.

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