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Kokesh v. SEC: The Demise of Disgorgement

I. INTRODUCTION

In the wake of serious securities violations leading to the stock market crash of 1929, Congress established a series of laws to ensure the “highest ethical standards prevail in every facet of the securities industry.”¹ As part of this reform, the Securities Exchange Act of 1934 (the “Exchange Act”) created the Securities and Exchange Commission (the “SEC”), granting it broad authority to enforce federal securities laws and adopt rules to protect investors and promote the public interest.² The Exchange Act also vested the SEC with the power to investigate possible federal securities violations and initiate federal judicial proceedings against wrongdoers.³ Under the original language of the Exchange Act, the SEC was permitted to pursue only injunctive relief against these defendants in civil enforcement actions barring future violations.⁴

Despite the fact that Congress had not explicitly authorized it to do so, the SEC began seeking judicial enforcement of remedies outside of injunctive relief in the late 1960s.⁵ In 1970, the SEC succeeded in convincing a federal district court to permit the remedy of disgorgement under the premise that the SEC had the “inherent equity power to grant

1. *Kokesh v. SEC*, 137 S.Ct. 1635, 1639–1640 (2017) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186–187 (1963)).

2. *See id.* at 1640 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728 (1975)); *see also* William B. Snyder, Jr., *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 673 (2007) (stating that the Exchange Act provided for a “broader regulation of securities markets.”).

3. 15 U.S.C. §§ 77v(b), 78u(c); *see also* *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 741 (1984) (stating that Congress vested the SEC with broad authority to investigate securities violations).

4. *See* THOMAS LEE HAZEN, *LAW OF SECURITIES REGULATION* § 1:37 (7th ed., rev. 2016) (stating that the Commission was given the authority to seek injunctive relief for securities violations in both administrative and federal courts); *see also* ANTONIA M. APPS ET AL., *UNITED STATES SUPREME COURT CONCLUDES SEC DISGORGEMENT IS A “PENALTY” SUBJECT TO FIVE-YEAR LIMITATIONS PERIOD* (June 12, 2017) [hereinafter *SEC DISGORGEMENT IS A “PENALTY”*] <https://s3.amazonaws.com/documents.lexology.com/b81ac0ae-ba89-4700-a3fc-5a25a5d8a355.pdf> (stating that the only remedy initially available to the SEC in 1934 was injunctive relief).

5. *SEC DISGORGEMENT IS A “PENALTY,” supra* note 4.

relief ancillary to an injunction.”⁶ Relying on case law interpreting the Exchange Act, the United States District Court for Southern District of New York in *SEC v. Texas Gulf Sulphur Co.* ruled that the SEC could seek equitable remedies instead of injunctive relief, “so long as such relief [was] remedial relief.”⁷ The court ordered Texas Gulf Sulphur to pay restitution, disgorging the profits they had obtained from their illegal activity.⁸ According to the court, these measures were to “deprive . . . [Texas Gulf Sulphur] of their profits in order to remove any monetary reward for violating” securities laws and to “protect the investing public by providing an effective deterrent to future violations.”⁹

In 1990, Congress amended the Exchange Act by adopting the Securities Enforcement Remedies and Penny Stock Reform Act (the “1990 Remedies Act”), authorizing the SEC to pursue civil monetary penalties.¹⁰ The 1990 Remedies Act also explicitly affirmed that the SEC had the power “to order disgorgement of illegal profits in administrative proceedings against regulated entities.”¹¹ While this gave the SEC the express authority to seek disgorgement in administrative actions, Congress was silent as to the SEC’s authority to pursue disgorgement awards in federal court proceedings.¹²

6. Disgorgement is “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.” *Disgorgement*, BLACK’S LAW DICTIONARY (10th ed. 2014); *See SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW. INST. 2011) (permitting the remedy and referencing “disgorgement” as a form of “restitution measured by the defendant’s wrongful gain.”).

7. *See Texas Gulf Sulphur Co.*, 312 F. Supp. at 91 (ruling that equitable relief sought by the SEC must be “remedial” in nature).

8. *See id.* (ordering the disgorgement of profits); *see also* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 3 (Nov. 15, 2013), http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/#_ftn13 (stating that *Texas Gulf Sulphur* was the first case in which the SEC pursued and obtained disgorgement, which was referred to by some earlier courts as “restitution.”).

9. *See Texas Gulf Sulphur Co.*, 312 F. Supp. at 91 (stating the purposes of disgorgement and equitable relief available to the SEC).

10. *See, e.g.*, Securities Enforcement Remedies and Penny Stock Reform Act §§ 101, 202, 20(d), 21B, 104, 15 U.S.C. §§ 77t, 78u-2 (1990) (permitting “the SEC to seek, and courts to impose, among other things, monetary penalties, officer-director bars, and penny-stock bars against any violator and authorizing the SEC to impose monetary penalties and other sanctions administratively against persons and entities in SEC-regulated industries.”).

11. Comm’r Philip R. Lochner, Jr., Sec. & Exchange Comm’n, *The SEC’s New Powers Under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990*, Remarks at the Association of General Counsel (Oct. 4, 1990) (transcript available at SEC.gov).

12. Dixie L. Johnson et al., *King & Spalding Discusses Potential Effects of SEC Disgorgement As a Penalty*, THE CLS BLUE SKY BLOG (June 21, 2017) [hereinafter *King & Spalding*], <http://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses->

The Exchange Act was further amended in 2002 through the Sarbanes-Oxley Act, providing that in an SEC civil enforcement action, “the Commission may seek, and any federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”¹³ Although the Sarbanes-Oxley Act still did not address whether the SEC had the explicit power to seek disgorgement, the widespread assumption remained that disgorgement could be pursued as an equitable remedy.¹⁴ Through this line of reasoning, the government continued to seek disgorgement, citing the Sarbanes-Oxley Act as statutory authority for ordering the remedy.¹⁵

However, in June 2017, the Supreme Court of the United States decided *SEC v. Kokesh*, relabeling disgorgement as a “penalty.”¹⁶ As a result, disgorgement is now subject to the five-year statute of limitations found in 28 U.S.C. § 2462 (“Statute of Limitations”) applying to all civil monetary penalties.¹⁷ The ruling in *Kokesh* has serious consequences for SEC investigations as well as for the future of disgorgement as a remedy at law.¹⁸ *Kokesh* not only severely limits the government’s ability to pursue disgorgement payments in the event of civil violations, but also calls into question whether the practice of disgorgement is permissible at all.¹⁹

potential-effects-of-sec-disgorgement-as-penalty/ (discussing the lack of express statutory authority regarding the SEC’s authority to pursue disgorgement in federal court).

13. Sarbanes-Oxley Act § 305(b), 15 U.S.C. § 78u(d)(5) (2002).

14. See U.S. S.E.C. v. Quan, 817 F.3d 583, 595 (8th Cir. 2016) (stating that disgorgement is an equitable remedy authorized by 78u(d)(5)); see also SEC v. World Capital Market, Inc., 864 F.3d 996, 1003 (9th Cir. 2017) (stating that federal courts may grant equitable relief “necessary to the benefit of investors,” including disgorgement).

15. Ryan, *supra* note 8 (noting that despite the lack of apparent authority, the SEC continued to seek disgorgement as an equitable remedy under the Sarbanes-Oxley Act).

16. See *Kokesh v. SEC*, 137 S.Ct. 1635, 1645 (2017) (ruling that disgorgement is a penalty within the meaning of 28 U.S.C. 2462).

17. While other remedies are not subject to a statutory period, “penalties” are limited by the five-year statutory limitation provision listed in 28 U.S.C. § 2462. See JACULIN AARON, SHEARMAN & STERLING LLP, UNITED STATES SUPREME COURT HOLDS SEC DISGORGEMENT ORDERS SUBJECT TO FIVE-YEAR STATUTE OF LIMITATIONS (June 12, 2017), <http://www.shearman.com/en/newsinsights/publications/2017/06/us-sc-sec-subject-to-five-yr-statute-limitations> (indicating that penalties, not equitable remedies, are subject to the five-year statutory period).

18. See SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4 (describing several implications resulting from the *Kokesh* ruling).

19. See SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4, at 1 (stating that the *Kokesh* ruling may not only limit the SEC’s ability to pursue disgorgement payments, but also calls into question the legality of the remedy).

From *Texas Gulf Sulphur* through *Kokesh*, the SEC routinely pursued disgorgement as a standard remedy in civil enforcement cases.²⁰ During this time, the boundaries of disgorgement were tested and expanded.²¹ With the general language provided by Congress and the broad authority granted by courts, the SEC was able to pursue disgorgement as an equitable remedy with successful results.²²

This Note proceeds in five parts. Part II provides a synopsis of the Supreme Court's decision in *Kokesh v. SEC*.²³ Part III explains the implications of *Kokesh* upon SEC enforcement strategies and resulting monetary judgments.²⁴ Part IV discusses the future of disgorgement and the potential challenges it will face in the future.²⁵ Finally, Part V provides a conclusion of the consequences resulting from the ruling in *Kokesh*.²⁶

II. KOKESH V. SEC

On June 5, 2017, the Supreme Court of the United States decided *Kokesh v. SEC*, altering how disgorgement claims are defined.²⁷ In *Kokesh*, the SEC brought a civil enforcement action against Charles Kokesh, the owner of two investment-adviser firms that provided investment guidance to business-development companies.²⁸ The government alleged that, from 1995 to 2009, Kokesh had misappropriated funds from four business-development companies.²⁹ The SEC also alleged that Kokesh had concealed the misappropriation of

20. See Ryan, *supra* note 8 (“[T]he SEC has been seeking disgorgement for decades, and courts have been granting it for nearly as long.”).

21. See *King & Spalding*, *supra* note 12 (describing the “aggressive” expansion of the boundaries of disgorgement past a defendant’s personal ill-gotten gains); see also *SEC v. Banner Fund Int’l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (rejecting the defendant’s argument that disgorgement was limited to personal ill-gotten gains and asserting that the defendant’s approach would incentivize violators to “spend or transfer tainted profits”); *SEC v. Whittemore*, 691 F. Supp. 2d 198, 207 (D.D.C. 2010) (holding that it was “not germane” whether a defendant continued to possess the illicit funds).

22. See Ryan, *supra* note 8 (stating that disgorgement actions were routinely pursued and granted regularly in federal court).

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Part IV.

26. See *infra* Part V.

27. See *Kokesh v. SEC*, 137 S.Ct. 1635, 1645 (2017) (ruling that disgorgement would now be considered a “penalty” rather than an “equitable remedy” at law).

28. *Id.* at 1641.

29. *Id.*

these illicit gains by filing false and misleading SEC reports and proxy statements.³⁰ The SEC sought monetary penalties, injunctive relief, and disgorgement from Kokesh.³¹ The district court determined that the five-year Statute of Limitations barred the claim for monetary penalties, but not the claim for disgorgement because it was not a “penalty” to which the Statute of Limitations applied.³² Since charges had been brought against Kokesh in 2009, the government was precluded from pursuing penalties based on the defendant’s actions prior to 2004, limiting the civil monetary penalty to approximately \$2.35 million.³³ However, because the court ruled that disgorgement was not restricted by the five-year statutory period, Kokesh was found liable and ordered to pay the full \$34.9 million disgorgement payment, \$29.9 million of which resulted from illegal acts committed outside the statutory period.³⁴

On appeal to the Tenth Circuit, Kokesh argued that the Statute of Limitations applied to disgorgement, stating that the disgorgement payment was equivalent to either a penalty or forfeiture.³⁵ The Tenth Circuit determined that disgorgement was not a “penalty” within the meaning of the Statute of Limitations.³⁶ The Tenth Circuit distinguished the meaning of disgorgement from that of forfeiture, holding that disgorgement was a non-punitive remedy, unlike civil asset forfeiture.³⁷ This ruling contrasted with the Eleventh Circuit’s ruling in *SEC v. Graham*, holding that “disgorgement” and “forfeiture” were so similar in nature that the Statute of Limitations applied to both remedies.³⁸

The Supreme Court granted certiorari in *Kokesh* in order to resolve the circuit split over the application of the Statute of Limitations to disgorgement claims in SEC enforcement actions.³⁹ Upon review, the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Kokesh v. SEC*, 137 S.Ct. 1635, 1641 (2017).

34. *Id.*

35. *See SEC v. Kokesh*, 834 F.3d 1158, 1162 (10th Cir. 2016) (describing Kokesh’s argument against the SEC’s pursuit of the disgorgement claim on appeal).

36. *Id.* at 1164 (reversing the lower court ruling and stating that disgorgement, when “[p]roperly applied . . . does not inflict punishment.”).

37. *See id.* at 1166 (describing the rationale in determining that disgorgement was not a penalty, unlike asset forfeiture).

38. *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (equating the penalty of “forfeiture” to “disgorgement”).

39. *See Kokesh v. SEC*, 137 S.Ct. 1635, 1641 (2017) (describing the reasoning for granting certiorari to hear Kokesh’s case).

Supreme Court held that civil disgorgement is a penalty similar to civil asset forfeiture, and therefore subject to the five-year Statute of Limitations.⁴⁰ According to the Court, whether a statute is considered a penalty is determined by two points of inquiry.⁴¹ The first considers whether the statute seeks to ameliorate a wrong to the public or a wrong to an individual.⁴² The second looks at whether the payment sought is for the purpose of punishment or deterrence, or to compensate an injured party.⁴³

Applying these principles, the Supreme Court in *Kokesh* found that “SEC disgorgement constitutes a penalty within the meaning of 28 U.S.C. § 2462.”⁴⁴ First, the Supreme Court determined that SEC enforcement actions seeking disgorgement were meant to remedy public wrongs rather than compensate individual victims.⁴⁵ Second, the Court decided that “SEC disgorgement is imposed for punitive purposes,” on the basis that sanctions created for the purpose of deterrence “are inherently punitive because deterrence is not a legitimate non-punitive governmental objective.”⁴⁶ The court also relied on the fact that disgorgement often left defendants in worse position due to the fact that judgments were ordered without considering expenses, which often reduce the illegal profits.⁴⁷ Consequently, because “disgorgement orders go beyond compensation, are intended to punish, and label defendants wrongdoers as a consequence of violating public laws, they represent a penalty and thus fall within [the Statute of Limitations].”⁴⁸

40. *Id.* at 1645.

41. *Id.* at 1642.

42. *See id.* (“First, whether a sanction represents a penalty turns in part on ‘whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.’”) (citing *Huntington v. Attril*, 146 U.S. 657, 668 (1892)).

43. *See id.* (“Second, a pecuniary sanction operates as a penalty if it is sought ‘for the purpose of punishment, and to deter others from offending in like manner’ rather than to compensate victims.”) (citing *Huntington v. Attril*, 146 U.S. 657, 668 (1892)).

44. *Id.* at 1643.

45. *See id.* (considering the first inquiry: whether the statute seeks to ameliorate a wrong to the public).

46. *Kokesh v. SEC*, 137 S.Ct. 1635, 1643 (2017) (considering the second line of inquiry: whether the statute seeks punish or deter versus compensate injured parties).

47. *See id.* (ruling that because disgorgement often left defendants “worse off,” it went beyond the sole purpose of unjust enrichment).

48. *Id.*

III. IMPLICATIONS OF KOKESH

A. *On SEC Strategies*

Since *Kokesh*, many have contemplated the potential implications the ruling will have upon the SEC's pursuit of civil enforcement actions.⁴⁹ Some contend that the new application of the Statute of Limitations will have little to no effect on most SEC enforcement actions due to the fact that "the Commission typically acts, or preserves claims, within five years of the misconduct."⁵⁰ However, it is more likely that the ruling in *Kokesh* will have a significant impact on the SEC's ability to pursue disgorgement payments, the strategies it uses to investigate such enforcement actions, and the resulting settlements and judgments for cases involving disgorgement.⁵¹

The application of the Statute of Limitations to disgorgement cases sets up potential problems for the SEC in the pursuit of these claims.⁵² Before *Kokesh*, the SEC could methodically evaluate all options in investigating its case, knowing that disgorgement would still be available as an equitable remedy.⁵³ However, the SEC will face new

49. *King & Spalding, supra* note 12.

50. *See King & Spalding, supra* note 12 (stating that the ruling in *Kokesh* will have only a minor effect upon the SEC in investigating enforcement actions due to the fact that it often pursues claims within the five-year statutory period); *see also* Antoinette Gartrell, *Justices' Ruling Will Limit SEC Settlement Clout, Lawyers Say*, BLOOMBERG, (June 6, 2017), <https://www.bna.com/justices-ruling-limit-n73014451932/> (quoting lawyer, Jonathan A. Shapiro of Baker Botts LLP, that the decision will have "zero impact" on the SEC and its ability to bring cases long term).

51. *See King & Spalding, supra* note 12 (describing the potential effects of the *Kokesh* ruling upon SEC investigative strategies); *see also* IRIS E. BENNETT ET AL., SMITH PACTHER McWHORTER PLC, SUPREME COURT LIMITS POWERFUL SEC ENFORCEMENT TOOL, HOLDING THAT DISGORGEMENT IS SUBJECT TO FIVE-YEAR STATUTE OF LIMITATIONS (June 7, 2017), <http://www.smithpachter.com/post-detail.php?id=30217> (describing the effects of the *Kokesh* ruling upon settlements); Gartrell, *supra* note 50 (indicating that the ruling may affect settlement negotiations by reducing government leverage); MAXIMILIEN FETAZ ET AL., BROWNSTEIN HYATT FARBER SCHRECK, LLP, KOKESH MAY LEAD TO LOWER MONETARY SANCTIONS IN SEC ENFORCEMENT PROCEEDINGS (June 21, 2017), <https://www.bhfs.com/insights/alerts-articles/2017/kokesh-may-lead-to-lower-monetary-sanctions-in-sec-enforcement-proceedings> (describing the effect of the *Kokesh* ruling upon monetary judgments).

52. *See King & Spalding, supra* note 12 (describing potential roadblocks that the SEC may encounter in pursuing disgorgement claims against those committing securities violations).

53. Jeff Kern et al., *Supreme Court Deals Blow to SEC By Applying Five-Year Statute of Limitations to Disgorgement Remedies in SEC Enforcement Actions*, SHEPPARD, MULLIN, RICHTER & HAMPTON LLP: GOV'T CONTRACTS & INVESTIGATIONS BLOG (June 28, 2017),

and difficult challenges with the Statute of Limitations now applying to disgorgement claims.⁵⁴ These issues become especially relevant in cases involving violations of the Foreign Corrupt Practices Act (“FCPA”), long running schemes, accounting fraud, or investigations requiring the government to gather information from foreign regulators.⁵⁵ In these cases, it may take longer than the five-year Statute of Limitations period to gather the necessary information to mount a claim against defendants.⁵⁶

As a result of the ruling in *Kokesh*, the SEC will become more aggressive in its tactics involving the investigation of civil enforcement actions in order to bring charges more quickly.⁵⁷ First, the SEC might add more weight to “self-reporting,” a factor which it considers favorably in determining what charges should be levied against defendants.⁵⁸ The SEC has formally honored self-reporting since the adoption of its cooperation program in 2010, identifying it as one of several factors to be

<https://www.governmentcontractslawblog.com/2017/06/articles/securities-exchange-commission-sec/sec-disgorgement-remedies/> (describing the prior timeline which the SEC was able to work with involving disgorgement claims).

54. *King & Spalding, supra* note 12 (describing the impact which the *Kokesh* decision may have upon the SEC’s pursuit of disgorgement claims); *see also* Gartrell, *supra* note 50 (discussing the way that SEC examinations and settlements will be reshaped due to the newly imposed limitation period).

55. *King & Spalding, supra* note 12 (indicating the types of cases where the new time limitation might be especially relevant); SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4 (stating that the SEC may now encounter difficulty in pursuing disgorgement in cases involving long-running frauds and FCPA claims).

56. *King & Spalding, supra* note 12 (indicating that these particular types of cases involve long-term investigations, which may run past the five-year tolling period).

57. *King & Spalding, supra* note 12 (describing the change in speed which the SEC may now work to move in long-running investigations).

58. *See* LORRAINE B. ECHAVARRIA, WILMER CUTLER PICKERING HALE AND DORR LLP, WHEN THE INEVITABLE HAPPENS: WHEN TO SELF-REPORT SECURITIES LAW VIOLATIONS AND WHAT TO EXPECT WHEN YOU DO (Sept. 27, 2017), [https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2017-09-27-When-the-Inevitable-Happens-When-to-Self-Report-Securities-Law-Violations-and-What-to-Expect-When-You-Do\(1\).pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2017-09-27-When-the-Inevitable-Happens-When-to-Self-Report-Securities-Law-Violations-and-What-to-Expect-When-You-Do(1).pdf) (“[I]n some cases, there is flexibility as to how to calculate disgorgement, and the Enforcement Staff might take a narrower view of what should be disgorgement in recognition of cooperation.”); *see also* *King & Spalding, supra* note 12 (describing the effect that the *Kokesh* decision may have upon the SEC’s factor of “self-reporting” in enforcement investigations); JUNAID A. ZUBAIRI ET AL., VEDDER PRICE, IS COOPERATION CREDIT WORTHWHILE? CONSIDERATIONS IN SELF-REPORTING TO THE SEC (Aug. 30, 2016), <https://www.vedderprice.com/is-cooperation-credit-worthwhile-considerations-in-self-reporting-to-the-sec/> (“The SEC offers real benefits—such as reduced charges or penalties, deferred prosecution agreements or non-prosecution agreements—to those who self-report and cooperate . . . The SEC will measure a company’s cooperation efforts at the end of an investigation . . .”).

considered in determining the appropriate charges and remedies sought in enforcement actions.⁵⁹ In an effort to speed up investigations, the SEC may increase the weight given to self-reporting, incentivizing companies to provide the government with more information earlier in the investigative process.⁶⁰ This decision would add a layer of complexity to the already difficult balancing test companies consider when weighing the advantages and disadvantages of self-reporting.⁶¹

Second, the SEC may focus its efforts on expediting the production of information.⁶² In 2015, the U.S. Chamber of Commerce submitted a recommendation to the SEC indicating that promoting expediency during document production is a vital step in “improv[ing] the efficiency and effectiveness of the SEC investigation process.”⁶³ In following this advice, the Commission will likely reach out to companies earlier to request information and begin a dialogue concerning the scope of production.⁶⁴ The SEC will also be hesitant to grant time extensions for document production and rescheduling testimony, as both present significant delays for investigations.⁶⁵ Overall, it is likely that there will

59. See ZUBAIRI ET AL., *supra* note 58, at 2 (stating that the SEC has indicated “self-policing, self-reporting, remediation, and cooperation” as the key factors to be considered when determining which charges and remedies to seek against defendants).

60. *King & Spalding*, *supra* note 12 (indicating that the SEC may add more weight to the factor of self-reporting as a means to increase efficiency during investigations).

61. See KARA NOVACO BROCKMEYER ET AL., DEBEVOISE & PLIMPTON LLP, U.S. SUPREME COURT’S RULING ON DISGORGEMENT HAS BROAD IMPLICATIONS FOR FCPA MATTERS 5 (June 2017), https://www.debevoise.com/~media/files/insights/publications/2017/06/fcpa_update_june_2017a.pdf (discussing how companies may balance the advantages and disadvantages of self-reporting SEC violations to the government); see also KURT WOLFE, ALLEN & OVERY LLP, KOKESH IS A GAME CHANGER FOR THE SEC’S FCPA ENFORCEMENT PROGRAM (June 29, 2017), <http://www.aoinvestigationsinsight.com/kokesh-is-a-game-changer-for-the-secs-fcpa-enforcement-program/> (discussing how companies may decide not to self-report at all should all the conduct fall outside the Statute of Limitations); Thomas R. Fox, *The Kokesh Decision - One Question Answered, Others Left Open*, FCPA COMPLIANCE & ETHICS BLOG (June 7, 2017), <http://fcpacompliancereport.com/2017/06/12782/>.

62. *King & Spalding*, *supra* note 12 (describing the impact which the *Kokesh* ruling may have upon other aspects of SEC investigations).

63. CENTER FOR CAPITAL MKT. COMPETITIVENESS, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 6 (July 2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

64. See *id.* at 7 (stating that increasing efficiency during document production can increase the effectiveness and speed of investigations).

65. See *King & Spalding*, *supra* note 12 (discussing the SEC’s potential hesitancy to postpone testimony or delay document production in post-*Kokesh* investigations).

be renewed efforts by the SEC to streamline the procedures it follows during enforcement investigations.⁶⁶

Third, the SEC is also likely to change its strategy on how it pursues tolling agreements with targeted companies and individuals.⁶⁷ A tolling agreement is “an agreement between a potential plaintiff and potential defendant by which the defendant agrees to extend the statutory limitations period on the plaintiff’s claim . . . so that both parties will have more time to solve their dispute without litigation.”⁶⁸ Many defendants choose to enter into these agreements with the government to avoid the risk and publicity of a lawsuit.⁶⁹ While the SEC currently uses tolling agreements during investigations, the government may now pursue these agreements earlier and more frequently than in past years for those investigations expected to continue for a significant amount of time.⁷⁰ However, responding to the ruling in *Kokesh*, there may be a shift in defendants’ willingness to enter into tolling agreements with the SEC.⁷¹ Since disgorgement payments often account for a greater portion of the monetary settlement than civil penalties, defendants will likely reconsider

66. See LEVI MCALLISTER & PAMELA TSANG WU, MORGAN, LEWIS & BOCKIUS LLP, US SUPREME COURT IMPOSES LIMITATIONS ON DISGORGEMENT (June 16, 2017), <https://www.morganlewis.com/blogs/ferc/2017/06/us-supreme-court-imposes-limitations-on-disgorgement> (describing renewed efforts to streamline SEC enforcement investigations); see ANDREW M. LAWRENCE ET AL., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, SUPREME COURT APPLIES STATUTE OF LIMITATIONS TO SEC DISGORGEMENT ORDERS (June 7, 2017), <https://www.skadden.com/insights/publications/2017/06/supreme-court-applies-statute-of-limitations> (stating that SEC may recommit to previous efforts to streamline internal procedures to expedite investigations).

67. MAURO M. WOLFE ET AL., DUANE MORRIS LLP, TIME IS RUNNING OUT FOR THE SEC: THE CIRCUIT SPLIT ON LIMITING SEC DISGORGEMENT TO A FIVE-YEAR STATUTE OF LIMITATIONS SIGNALS AN IMPENDING MAJOR CHANGE (Apr. 13, 2017), <https://blogs.duanemorris.com/whitecollarcriminallaw/2017/04/13/time-is-running-out-for-the-sec-the-circuit-split-on-limiting-sec-disgorgement-to-a-five-year-statute-of-limitations-signals-an-impending-major-change/>.

68. *Tolling Agreement*, BLACK’S LAW DICTIONARY (10th ed. 2014).

69. See Dina ElBoghdady, *Clock Ticking for SEC to Pursue Fraud Charges in Financial Crisis Cases*, WASH. POST (July 19, 2012), https://www.washingtonpost.com/business/economy/clock-ticking-for-sec-to-pursue-fraud-charges-in-financial-crisis-cases/2012/07/19/gJQAZvjW_story.html?utm_term=.5bd24861b802 (stating that defendants prefer to enter into these agreements to “avoid a dramatic event such as a lawsuit”).

70. See *King & Spalding*, *supra* note 12 (describing the increase in frequency and earlier timeline for pursuing tolling agreements); see also, LAWRENCE ET AL., *supra* note 66 (discussing the implications of *Kokesh* related to the SEC seeking tolling agreements during investigations).

71. See LAWRENCE ET AL., *supra* note 66 (predicting pushback from clients concerning their willingness to enter into tolling agreements with the SEC).

signing these agreements.⁷² With the newly imposed time limitation on disgorgement claims, some defense attorneys may advise clients to play hardball with investigators, forcing the SEC to either file charges based on potentially “poorly investigated matters” or walk away from the case altogether.⁷³ However, to avoid the “wide-ranging, time-sensitive demands for documents, information, and witness testimony,” it is likely that defendants will continue to enter into tolling agreements, but firmly negotiate the terms of the contract to apply to only the conduct at issue.⁷⁴

Finally, there may be an increase in the number of criminal referrals to the Department of Justice (“DOJ”) in matters involving long-running illegal activity.⁷⁵ In cases where the SEC may not be able to reach back to capture all “ill-gotten gains” from a defendant’s illegal activity, it may choose to pass the case to the DOJ to pursue criminal forfeiture proceedings.⁷⁶ Unlike civil forfeiture and other penalties sought by the SEC, criminal forfeiture proceedings are not subject to a statutory period.⁷⁷ Although the government must meet a higher burden of proof to succeed in these criminal claims, the absence of the limitations period may incentivize the SEC to forward more cases to the DOJ as a way to capture all profits obtained from a defendant’s illegal conduct.⁷⁸

72. See MARY P. HANSEN ET AL., DRINKER BIDDLE & REATH LLP, SUPREME COURT UNANIMOUSLY CURBS SEC’S POWER TO OBTAIN DISGORGEMENT (June 8, 2017), <https://www.drinkerbiddle.com/insights/publications/2017/06/the-supreme-court-curbs-secs-power> (stating that counsel to defendants may advise defendants to carefully consider whether to agree to requests for tolling agreements).

73. See WOLFE ET AL., *supra* note 67 (discussing the decrease in leverage that the SEC might expect during negotiations involving tolling agreements after the *Kokesh* ruling).

74. See WOLFE ET AL., *supra* note 67 (stating that companies should negotiate tolling agreements to limit the scope to only the conduct at issue); see ECHAVARRIA, *supra* note 58 (indicating that disgorgement amounts may now be on the table for negotiations because it is considered a civil monetary penalty).

75. SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4.

76. SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4 (discussing the potential increase in criminal referrals to the DOJ of cases involving long-running illegal activity).

77. SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4 (stating that the relaxed criminal standard in pursuing forfeiture may be an incentive for the SEC to refer enforcement cases to the DOJ).

78. SEC DISGORGEMENT IS A “PENALTY,” *supra* note 4 (indicating why criminal forfeiture may be a more effective remedy in cases involving illegal conduct occurring over a long period of time).

B. *On Monetary Settlements*

The ruling in *Kokesh* may also have a significant impact upon the civil monetary settlements resulting from SEC enforcement actions involving disgorgement.⁷⁹ Specifically, negotiations may be affected by the *Kokesh* decision, which has removed the “specter of litigation” of the past that had left defendants vulnerable to monetary exposure well past five years.⁸⁰ With the SEC’s power now restricted by the Statute of Limitations, the agency will encounter reduced leverage in SEC settlement negotiations.⁸¹ Prior to *Kokesh*, defendants with disgorgement liability extending well over five years might have felt a strong incentive to settle on the government’s terms, knowing that the SEC could pursue the illicit funds as far back as the illegal activity occurred.⁸² With the *Kokesh* decision limiting the government’s ability to pursue disgorgement, defendants in similar situations may now choose to negotiate with the SEC for a lower settlement figure.⁸³ These settlements may also be reached in a shorter amount of time since there may now be more certainty as to the amount of disgorgement the SEC will be permitted to seek in judicial proceedings.⁸⁴

C. *On Other Remedies*

The *Kokesh* ruling may also have an impact on the types of remedies pursued by the SEC.⁸⁵ By statute, the SEC has the authority to

79. Mary Jo White et al., *What Kokesh v. SEC Means For Enforcement Actions*, LAW360 (June 8, 2017, 4:54 PM), <https://www.law360.com/articles/932661/what-kokesh-v-sec-means-for-enforcement-actions>.

80. See Mary Jo White et al., *supra* note 79 (explaining how disgorgement negotiations may be affected by the ruling in *Kokesh*, which set the Statute of Limitations upon disgorgement actions).

81. See Mary Jo White et al., *supra* note 79 (discussing the reduction in leverage for the SEC during negotiations involving disgorgement).

82. See Mary Jo White et al., *supra* note 79 (indicating that, before *Kokesh*, the SEC enjoyed a greater amount of negotiating ability due to its unhindered ability to pursue disgorgement).

83. WOLFE, *supra* note 67 (discussing the shift in the bargaining paradigm after *Kokesh* and how defendants may have increased power to negotiate settlements in SEC enforcement actions).

84. See Gartrell, *supra* note 50 (“New York Lawyer Jack Yoskowitz [of Seward & Kissel LLP] . . . said, some cases could settle faster because there may now be certainty as to the amount in disgorgement the SEC can seek in court.”).

85. See LAWRENCE ET AL., *supra* note 66 (stating that the ruling in *Kokesh* may push the SEC to pursue other remedies which are not subject to the Statute of Limitations).

pursue other remedies for securities violations beyond penalties or disgorgement.⁸⁶ Post-*Kokesh*, there may be a rise in equitable remedies that are sought which are not affected by the Statute of Limitations, such as injunctive relief or professional bars.⁸⁷ Additionally, the SEC might attempt to seek restitution for claimants in cases “where the objective is more clearly remedial and not a sanction by the government.”⁸⁸

However, some believe that the ruling in *Kokesh* may have “cascad[ing] effects” upon equitable sanctions as well, calling into question the remedial nature of injunctions and bars against serving as officers or directors of an organization.⁸⁹ The Fifth Circuit last grappled with this issue in *S.E.C. v. Bartek*, when the government sought injunctive relief and professional bars against defendants based on illegal activity occurring prior to the five-year Statute of Limitations.⁹⁰ While the SEC argued that the remedies were equitable in nature, the Fifth Circuit disagreed.⁹¹ The Fifth Circuit ruled that the two forms of relief were punitive, rejecting the notion that “penalties” referred solely to sanctions affecting a defendant’s monetary or property interests.⁹² In reaching this decision, the court applied an objective analysis, looking to the nature of the remedies sought.⁹³ Because the two remedies: (1) would have a “stigmatizing effect and long-lasting repercussions;” (2) did not remedy the past harm caused by the defendants; (3) would not prevent future harm “in light of minimal likelihood of similar conduct in the future;” and (4) were “disproportionately severe compared to similar cases,” they

86. 15 U.S.C. § 78u(d)(5) (2016) (“In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”).

87. See LAWRENCE ET AL., *supra* note 66 (stating that the SEC may pursue equitable remedies which are not time-barred by the Statute of Limitations for illegal activity occurring prior to the five-year mark).

88. See LAWRENCE ET AL., *supra* note 66 (stating that restitution might be permissible where the profits are returned directly to the injured party). This would remove the “characteristics that the Court viewed as penal in the disgorgement context,” making it more likely that the court would see these remedies as equitable rather than punitive.

89. White et al., *supra* note 79 (stating that there may be “cascaded effects” onto other types of remedies available to the SEC); *S.E.C. v. Bartek*, No. 11-10594, 2012 WL 3205446, at *957 (5th Cir. Aug. 7, 2012) (addressing whether injunctive relief barring future violations and professional bars were “penalties” under the language of the statute).

90. *Bartek*, No. 11-10594, 2012 WL 3205446, at *950.

91. *Id.* at *956.

92. *Id.*

93. *Id.*

were considered penalties.⁹⁴ For this reason, the Fifth Circuit ruled that the remedies were time-barred by the Statute of Limitations.⁹⁵

The decision in *Bartek* sheds light on the judiciary's ability to set boundaries for the government in its pursuit of both equitable remedies and civil monetary penalties.⁹⁶ While few courts have labeled claims for injunctive relief and professional bars as penalties,⁹⁷ the reasoning in *Bartek*, coupled with the *Kokesh* ruling, sets the foundation for future challenges to the two sanctions.⁹⁸ Nevertheless, there remains no clear answer as to whether all historically equitable remedies are potentially vulnerable to the Statute of Limitations.⁹⁹ Since *Bartek*, the Eleventh Circuit has split with the Fifth Circuit's decision, holding that injunctive relief was not a penalty, but rather an "equitable, forward-looking remed[y]."¹⁰⁰ Thus, it remains to be seen how courts will come out on this issue and whether the SEC will face further constraints in enforcing claims in civil enforcement actions.¹⁰¹ However, should there be a decision to extend *Bartek's* rationale to injunctive relief, professional bars, and other forms of seemingly equitable relief, the appeal of pursuing these remedies in place of disgorgement would likely be substantially reduced for the SEC.¹⁰²

94. *Id.*

95. *Bartek*, No. 11-10594, 2012 WL 3205446, at *957 (5th Cir. Aug. 7, 2012).

96. *See id.* at *956 (ruling that the injunction and officer-and-director bars were penalties at law and subject to the Statute of Limitations).

97. *See id.* at *957 (5th Cir. August 7 2012) (holding that the injunction and professional bars were "penalties" subject to the Statute of Limitations); *see also* SEC v. Jones, 476 F. Supp. 2d 374 (S.D.N.Y. 2007) (ruling that because the SEC had not established that there was a reasonable likelihood that the permanent injunction would prevent future harm, the remedy was sought as a "penalty" and time-barred by the Statute of Limitations).

98. *See* White et al., *supra* note 79 (stating that defendants may now find success in arguing that seemingly equitable remedies are "penalties," based on the language of *Kokesh*).

99. *See* White et al., *supra* note 79 (indicating that the decisions in *Kokesh* and past cases may call into question whether equitable remedies are subject to the Statute of Limitations); *but see* SEC v. Graham, 823 F.3d 1357, 1360 (11th Cir. 2016) ("Our precedent forecloses the argument that § 2462 applies to injunctions, which are equitable remedies.").

100. *Graham*, 823 F.3d at 1363.

101. *See* Thomas O. Gorman, *SEC Injunction Not Time Barred – In This Case*, SEC ACTIONS (July 5, 2017), <http://www.secactions.com/sec-injunction-not-time-barred-in-this-case/> (noting that the Circuit Courts are split over whether an injunction is considered a penalty under the Statute of Limitations).

102. *See* LAWRENCE ET AL., *supra* note 66 (explaining that the increased pursuance of other equitable remedies would be for the purpose of evading the Statute of Limitations period).

D. *On Administrative Proceedings*

Kokesh not only poses problems for the SEC in federal court, but in administrative courts as well.¹⁰³ As the ruling in *Kokesh* applies generally to “SEC disgorgement,” and the Statute of Limitations is not limited to use in federal court, it is very likely that the five-year time limitation will apply to administrative actions.¹⁰⁴ Moreover, treating the remedy differently in an administrative court would leave an “odd situation,” where the government can pick and choose its remedy based upon which court it decides to bring the claim in.¹⁰⁵ In sum, there is little doubt that courts will apply the Statute of Limitations equally in both federal and administrative proceedings.¹⁰⁶

IV. THE FUTURE OF DISGORGEMENT

A. *Redefining the Scope of Disgorgement*

Other recent decisions indicate a trend in the court system towards limiting the scope of disgorgement as well as other civil monetary penalties.¹⁰⁷ In 2017, in *Honeycutt v. United States*, the court addressed the issue of whether a defendant may be held jointly and severally liable under criminal forfeiture law, even if the individual never received the ill-gotten gains.¹⁰⁸ In *Honeycutt*, two brothers, Tony and

103. *King & Spalding*, *supra* note 12.

104. *See King & Spalding*, *supra* note 12 (discussing the equal affect that *Kokesh* will have upon administrative actions).

105. *See* Peter. J Henning, *Supreme Court Casts Doubt on a Potent S.E.C. Weapon*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/business/dealbook/supreme-court-casts-doubts-on-a-potent-sec-weapon.html> (stating that permitting disgorgement in administrative courts and not in federal district courts would result in an “odd situation”).

106. *King & Spalding*, *supra* note 12.

107. *See* TREAZURE R. JOHNSON ET AL., DENTONS, CLIENT ALERT: SUPREME COURT SHARPLY LIMITS SEC’S ABILITY TO ORDER DISGORGEMENT, RULING THAT FIVE-YEAR STATUTE OF LIMITATIONS APPLIES (June 7, 2017), <https://www.dentons.com/en/insights/alerts/2017/june/7/supreme-court-sharply-limits-sec-ability-to-order-disgorgement> (stating that “*Kokesh* [*sic*] is only the most recent case to suggest that courts will no longer rubber stamp the discretion of enforcement authorities.”); *see also* Jessica S. Mussallem et al., *Supreme Court Curbs SEC’s Disgorgement Power: Holds That the SEC Can’t Escape the SOL*, Am. Bar Ass’n (July 2017), https://www.americanbar.org/publications/blt/2017/07/keeping_current.html (“*Nelson v. Colorado* and *Honeycutt v. United States*, which limited state and federal forfeiture . . . show[] a skepticism for such powerful – and often less regulated – government penalties.”).

108. *Honeycutt v. United States*, 137 S.Ct. 1626, 1628 (2017).

Terry Honeycutt, were indicted for federal drug crimes related to the distribution of methamphetamine.¹⁰⁹ The government sought forfeiture in the amount of \$269,751.98 of “property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of certain drug crimes.”¹¹⁰ Tony, who owned the store from which the products were sold, pled guilty and agreed to forfeit \$200,000.¹¹¹ Terry was convicted at trial.¹¹² Although Terry never maintained a controlling interest in the store and did not directly benefit from the illegal dealings, the government asked the court to hold him jointly and severally liable for the profits from the illegal sales, seeking to impose a monetary judgment against him for the remaining \$69,751.98.¹¹³ The Supreme Court concluded that joint and several liability, “a creature of tort law,” could not be used to enforce a criminal forfeiture statute.¹¹⁴ In its analysis of the forfeiture statute, the court stated that the provision applied only to property “obtained . . . as a result of” the criminal act.¹¹⁵ Because the definition of the verb “obtain” clearly refers to property brought into one’s own possession, rather than property acquired by another, the defendant could not be held jointly and severally liable for property he never possessed.¹¹⁶

The decisions in *Kokesh* and *Honeycutt*, in tandem, may signal change for the future of disgorgement.¹¹⁷ According to some, a strong argument exists for applying the holding in *Honeycutt* to SEC civil enforcement actions seeking disgorgement.¹¹⁸ As the SEC conceded in *Kokesh*, “[t]he equitable remedy of disgorgement . . . simply prevents unjust enrichment by forcing the defendant to give up funds he *acquired* unlawfully, thereby placing him in the same position that he would have

109. *Id.*

110. 21 U.S.C. § 853(a)(1); *Honeycutt*, 137 S.Ct. at 1628.

111. *Honeycutt*, 137 S.Ct. at 1628.

112. *Id.*

113. *Id.*

114. *Id.* at 1631.

115. *Id.* at 1632.

116. *Id.* at 1635.

117. See Maranda Fritz et al., *Demise of Disgorgement? Kokesh and Honeycutt In Tandem*, LAW360 (July 3, 2017), <https://www.law360.com/articles/939021/demise-of-disgorgement-kokesh-and-honeycutt-in-tandem> (discussing the effects of *Honeycutt* and *Kokesh* “in tandem,” and the limiting effect they have upon the government’s pursuit of monetary awards).

118. See *id.* (stating that there may be a strong case for applying “*Honeycutt’s* rationale” concerning joint and several liability to SEC civil enforcement actions).

occupied but for the securities-law violation.”¹¹⁹ Other pivotal disgorgement cases of the past also indicate that the purpose of disgorgement is to compel the defendant to “give up the amount by which he was unjustly enriched.”¹²⁰ Applying the *Honeycutt* rationale, defendants may challenge the scope of disgorgement, arguing that the penalty must be limited to the funds *actually acquired* by the defendant as a result of his or her illegal acts.¹²¹ Proponents of this theory face an uphill battle, as case law has been overwhelmingly permissive in allowing the government to pursue disgorgement awards against parties who did not personally possess the ill-gotten gains.¹²² However, the ruling in *Honeycutt* sets a valid foundation for future challenges to the practice of disgorgement.¹²³

Statements made by the Court during *Kokesh* also indicate concerns with the current scope of the remedy.¹²⁴ During oral arguments, Justice Kagan stated that she found it “unusual that the SEC has not given some guidance to its enforcement department [and] that everything is just sort of up to the particular person at the SEC who decides to bring such a

119. Brief for Respondent at 10, *Kokesh v. SEC*, 137 S.Ct. 1635 (Mar. 27, 2017) (No. 16-529).

120. See Fritz et al., *supra* note 117 (stating that a number of cases, dating back to *Texas Gulf Sulphur* delineate the scope of disgorgement as “the amount by which a defendant profited”); *S.E.C. v. Contorinis*, 743 F.3d 299, 310 (2d Cir. 2014) (“Disgorgement is an equitable remedy, imposed to forc[e] a defendant to give up the amount by which he was unjustly enriched.”); see, e.g., *SEC v. Blatt*, 583 F.2d 1325, 1336 (5th Cir. 1978) (“The court’s power to order disgorgement extends *only* to the amount with interest by which the defendant profited from his wrongdoing.”).

121. Bill Maguire et al., *Understanding the Full Impact of ‘Kokesh’ on SEC Enforcement Proceedings*, 258 N.Y. L.J. 1, 3 (Nov. 2, 2017), <https://s3.amazonaws.com/hhr-web/files/Understanding-the-Full-Impact-of-Kokesh.pdf>.

122. In the past, the SEC has successfully held defendants liable for funds obtained by third parties, despite the fact that the defendant never possessed the illicit gains nor acted jointly with the third party. This was especially clear in *Contorinis*, where the Second Circuit ruled that a portfolio manager, whose insider trading led to \$7.2 million in profit for the fund he managed, could be ordered to pay the full amount based on the reasoning that “a tipper could be required to disgorge profits made by others on the basis of the tip.” See Jay Musoff et al., *Blurred Lines: Disgorgement, Forfeiture, and Punishment*, AM. BAR ASS’N (April 2, 2014), <http://apps.americanbar.org/litigation/committees/criminal/articles/spring2014-0414-blurred-lines-disgorgement-forfeiture-punishment.html> (citing *Contorinis*, 743 F.3d at 310).

123. See Fritz et al., *supra* note 117 (“These decisions, read together, strongly suggest that disgorgement can only be imposed based on — and cannot exceed — profits that were actually obtained or acquired by the defendant and must not leave the defendant ‘worse off.’”).

124. See Transcript of Oral Argument at 29, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529) (indicating Justice Kagan’s concerns with the lack of guidance given to SEC investigators pursuing the remedy).

case.”¹²⁵ The Justices noted that disgorgement actions were particularly “ripe for abuse” due to the expansive discretion awarded to the SEC in pursuing these claims and the relative inconsistencies in the past in determining whether disgorgement actions were punitive or nonpunitive in nature.¹²⁶ These sentiments are echoed by others who believe that the SEC has been misusing the remedy for years, ignoring the “well-established meaning” of disgorgement in order to pursue awards which go far beyond the actual benefits obtained by the defendant.¹²⁷

The standard for calculating disgorgement has historically been relatively relaxed compared to that of civil monetary penalties.¹²⁸ This is due to the difficulty the SEC often encounters in determining which profits are derived from illegal activity.¹²⁹ Federal courts have broad discretion in their consideration of the amount to be disgorged and need only find a “reasonable approximation of profits causally connected to the violation.”¹³⁰ Once established by the government, the defendant faces the difficult task of showing that the amount calculated is not a “reasonable approximation” of the funds derived from the illegal activity.¹³¹

125. *Id.* at 30.

126. See DAN MCCAUGHEY ET AL., ROPES & GRAY LLP, CLIENT ALERT: JUSTICES SKEPTICAL OF SEC DISGORGEMENT WITHOUT TIME LIMITS (Apr. 20, 2017) (“Chief Justice Roberts noted that the government has argued disgorgement is punitive when it has been advantageous to do so (in the area of tax and bankruptcy) but nonpunitive when it is not (securities enforcement).”).

127. Andrew J. Morris, “*Kokesh v. SEC*”: Its Wide-Ranging (and Mostly Good) Implications for Disgorgement Actions, THE WLF LEGAL PULSE (June 14, 2017), <https://wlflegalpulse.com/2017/06/14/kokesh-v-sec-its-wide-ranging-and-mostly-good-implications-for-disgorgement-actions/>.

128. See Rita D. Mitchell, *Fines, Disgorgement, Injunctions, Debarment: The US Perspective*, GIR (Jan. 4, 2017), <http://globalinvestigationsreview.com/insight/the-practitioner's-guide-to-global-investigations/1079348/fines-disgorgement-injunctions-debarment-the-us-perspective> (discussing the methodology of the SEC for calculating civil monetary penalties and disgorgement).

129. See *id.* (“Given the challenges in distinguishing between legally and illegally derived profits . . .”).

130. See *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (stating that disgorgement must represent a “reasonable approximation of profits causally connected to the violation . . .”); see also *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (“[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation.”).

131. See Sasha Kalb & Marc Alain Bohn, *An Examination of the SEC's Application of Disgorgement in FCPA Resolutions*, CORPORATE COMPLIANCE INSIGHTS (April 12, 2010), <http://www.corporatecomplianceinsights.com/disgorgement-fcpa-how-applied-calculated/> (indicating that burden shifts to the defendant to prove, often with some difficulty, that the amount presented by the government is not a “reasonable approximation” of the illicit funds).

Given the concerns of the Court and the ruling in *Kokesh*, the SEC will likely be forced to revisit the way that it calculates the remedy.¹³² With disgorgement now labeled a penalty, arguments may arise as to whether this form of relief should be subject to federal securities laws and calculated with the same framework used to determine civil monetary penalties.¹³³ Redefining the scope of the remedy in this manner and applying a set of concrete standards for calculating disgorgement would seem to ease the concerns of those Justices who expressed discomfort with the level of discretion the SEC currently enjoys in determining these awards.¹³⁴

B. *Challenging Disgorgement*

While the implications of *Kokesh* are far-reaching concerning SEC investigations, they also sound a warning for the future of disgorgement.¹³⁵ During oral arguments, four different justices expressed discomfort with the lack of explicit authority permitting the SEC to seek disgorgement as a remedy in the federal court system.¹³⁶ Justice Roberts specifically commented that a “reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress. If Congress had provided, here’s a disgorgement remedy, you would expect them, as they typically do, to say, here’s a statute of

132. PAUL V. GERLACH ET AL., SIDLEY AUSTIN LLP, SEC’S DISGORGEMENT POWER LIMITED 4 (2017), <https://www.sidley.com/-/media/update-pdfs/2017/07/anti-corruption-quarterly-2017-q2.pdf> (stating that “*Kokesh* raises a number of question regarding how disgorgement should be calculated”); LUCINDA A. LOW ET AL., STEPTOE & JOHNSON LLP, IN THE WAKE OF KOKESH V. SEC: WHITHER DISGORGEMENT IN FCPA CASES (July 13, 2017), <https://www.stepto.com/publications-12058.html> (stating that *Kokesh* opens up conversation as to how the SEC should be calculating disgorgement).

133. GERLACH ET AL., *supra* note 132, at 4 (stating that there may be a convincing argument that disgorgement should be calculated using the statutory framework to determine other civil monetary penalties).

134. *See* Transcript of Oral Argument at 7, 13, 15–16, 31–33, 52, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529) (indicating that Justice Kagan’s concerns with the remedy of disgorgement derives from the lack of guidance currently provided by the SEC to its enforcement department as well as the broad discretion awarded to individual’s responsible for pursuing these claims).

135. *King & Spalding*, *supra* note 12 (stating that there may be challenges in the future as to whether disgorgement is available as a remedy for the SEC).

136. *See* Morris, *supra* note 127 (“*Kokesh* raises . . . the threshold question of whether the SEC has the authority to obtain any disgorgement at all. SEC disgorgement is a creation of the courts, not Congress.”); *see also* *King & Spalding*, *supra* note 12 (explaining that several Justices expressed made comments during oral arguments concerning the lack of statutory authority to seek disgorgement).

limitations that goes with it.”¹³⁷ The fact that disgorgement was a “creation of the courts, not Congress” is especially troubling, as the SEC is “purely a creature of statute,” empowered to act only to the extent authorized by Congress.¹³⁸

Others challenge disgorgement based on the absence of explicit statutory authority, arguing that disgorgement is impermissible as an implied right of action.¹³⁹ For many years, the courts broadened the scope of liability through the creation of implied private rights of action.¹⁴⁰ However, recent decisions indicate a trend towards conservatism in the court regarding this particular area of law.¹⁴¹ Notably, the late Justice Powell stood vehemently against the judicial creation of implied rights, stating that “[w]hen this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned.”¹⁴² The Supreme Court remains persuaded by Justice Powell’s argument, as it has been generally unwilling to “expand previously-recognized implied rights of action or to recognize ‘new’ implied private rights of action.”¹⁴³ With potential challenges to come, it is likely that defendants will use this rationale as a basis for attacking the validity of disgorgement.¹⁴⁴

137. Transcript of Oral Argument at 31, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529).

138. Ryan, *supra* note 8.

139. See Stephen M. Bainbridge, *Kokesh Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases* 12 (UCLA Sch. of L., Research Paper No. 17-12, 2017), available at <https://ssrn.com/abstract=2992719> [hereinafter *Kokesh Footnote 3*] (noting that decisions involving implied rights of action no longer have the “vitality” that they had in earlier years).

140. See, e.g., *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (1970) (affirming prior decisions and finding that there was an implied right of private action under the Exchange Act); see, e.g., *Kardon v. Nat’l Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946) (finding an implied private right of action for material misrepresentations in the inducement of securities sales); see *Kokesh Footnote 3*, *supra* note 139.

141. See Carmen Germaine, *SEC Dealt Major Blow With Justices’ Disgorgement Decision*, LAW360 (June 5, 2017), <https://www.law360.com/articles/931437/sec-dealt-major-blow-with-justices-disgorgement-decision> (indicating that a requirement of statutory authority would reflect the “increasing conservative approach of the court . . .”).

142. See *Kokesh Footnote 3*, *supra* note 139, at 12–13 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting)).

143. See *Kokesh Footnote 3*, *supra* note 139, at 13 (quoting *Ciliv v. UXB Int’l, Inc.*, 2012 WL 5245323, at *4 (W.D. Va. Oct. 22, 2012)).

144. See *Kokesh Footnote 3*, *supra* note 139, at 13 (“By undermining the precedents upon which *Texas Gulf Sulphur* relied, this line of Supreme Court cases thus necessarily also calls the continuing validity of disgorgement into question.”).

What may be the most compelling argument for challenging disgorgement lies not in the general text of the *Kokesh* opinion, but in a seemingly innocuous footnote.¹⁴⁵ The *Kokesh* footnote states:

Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to the Statute of Limitations.¹⁴⁶

While the language of the text may seem mild, many believe that the footnote indicates an interest by the Justices to review the scope of the SEC's authority and the court's power to award disgorgement.¹⁴⁷ Combined with the Justices' comments during oral arguments, this footnote likely signals future challenges to the agency's use of disgorgement in enforcement actions.¹⁴⁸

As for the outcome in a case challenging SEC authority regarding disgorgement, many feel as though there is clear footing to uproot the contentious practice.¹⁴⁹ By zoning in on the Justices' concern over lack of statutory authority, defendants may successfully remove this powerful

145. Morris, *supra* note 127 (“This footnote all but invites defendants to make a challenge”); King & Spalding, *supra* note 12 (stating that the footnote may leave disgorgement open to challenge as to whether the remedy is available at all in civil enforcement actions).

146. *Kokesh v. SEC*, 137 S.Ct. 1635, 1642 n.3 (2017).

147. See *Kokesh Footnote 3*, *supra* note 139, at 4 (stating that the footnote is an “apparent nod” to concerns of the Justices’ expressed during oral arguments regarding the SEC’s authority to obtain disgorgement); King & Spalding, *supra* note 12 (indicating that the footnote may be an invitation by the Supreme Court to challenge disgorgement).

148. See Sean Casey et al., *Footnote In Kokesh Signals Bigger Changes On The Horizon*, LAW360 (June 19, 2017), <https://www.law360.com/articles/935752/footnote-in-kokesh-signals-bigger-changes-on-the-horizon> (stating that the footnote in *Kokesh* may “present an opportunity to an aggressive litigant bold enough to challenge the SEC’s long-established disgorgement authority”).

149. See King & Spalding, *supra* note 12 (indicating that at least two amicus briefs stated that the SEC has no authority to seek disgorgement since it is now considered an equitable remedy).

tool from SEC enforcement actions in federal court.¹⁵⁰ However, while this result is possible, many individuals think it more likely that courts will explore options to preserve disgorgement, limiting its punitive nature and redefining the scope of the remedy.¹⁵¹

C. *Changing Law*

A potential product of the concerns related to statutory authority in *Kokesh* is the creation of new law defining the SEC's authority to pursue disgorgement payments in enforcement actions.¹⁵² Following challenges to the SEC's authority to pursue disgorgement, the agency may seek express authorization from Congress to pursue the remedy in federal court, as it has given in the past for administrative proceedings.¹⁵³ While a legislative fix such as this would not free disgorgement from the Statute of Limitations, it would put to rest concerns over whether the SEC has the authority to pursue this remedy in federal court at all.¹⁵⁴

V. CONCLUSION

The decision in *Kokesh* is likely to have a significant and ongoing impact upon SEC's enforcement claims.¹⁵⁵ In the short-term, the case will likely affect the strategies used by the government in investigating claims and negotiating settlement agreements in both federal and

150. See LAWRENCE ET AL., *supra* note 66 (stating that while Congress has authorized the SEC to seek disgorgement in administrative proceedings, it has not explicitly authorized the SEC to pursue disgorgement in federal court).

151. Daniel R. Walfish, *Other People's Money: SEC Disgorgement After 'Kokesh'*, N.Y. L. J. (September 8, 2017), <https://www.milbank.com/images/content/9/1/v3/91867/NYLJ-SEC-Disgorgement-After-Kokesh-Sept-2017.pdf> (stating that courts will likely "revisit the proper scope of the remedy" rather than dismiss disgorgement).

152. See *King & Spalding*, *supra* note 12 (stating that the SEC might "seek a legislative fix from Congress" to seek disgorgement).

153. Fritz et al., *supra* note 115 (stating that *Kokesh* may result in a substantial rewriting of the law to grant the SEC express authority to pursue disgorgement as Congress provided it for administrative proceedings in the 1990 Remedies Act); FETAZ ET AL., *supra* note 51 (stating that the SEC may seek to change the law to grant it statutory authority to seek disgorgement in district court).

154. See Transcript of Oral Argument at 7–8, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529) (indicating concerns with the lack of statutory authority enabling the SEC to pursue disgorgement actions in federal court).

155. See *King & Spalding*, *supra* note 12 (discussing the effects upon current SEC strategies as well as the future of the remedy at law).

administrative proceedings.¹⁵⁶ Law firms and SEC-regulated institutions may also see an upswing in the number of criminal referrals to the DOJ and in the SEC's pursuit of other equitable remedies explicitly authorized by law.¹⁵⁷

Kokesh also poses long-term ramifications for the future of the remedy in SEC enforcement actions in federal court.¹⁵⁸ Based upon the comments made during oral arguments as well as the language of the footnote in *Kokesh*, defendants will find a basis for challenging the SEC's authority regarding disgorgement.¹⁵⁹ While it remains unclear whether this will result in a removal of disgorgement from the agency's enforcement toolbox, many believe that there is a strong argument for doing so.¹⁶⁰ In order to circumvent any issues regarding the lack of explicit authority to seek disgorgement, the SEC may seek a "legislative fix," calling for Congress to rewrite securities law to explicitly name disgorgement as a remedy the SEC has the power to pursue in federal court.¹⁶¹

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156. *King & Spalding, supra* note 12.

157. SEC DISGORGEMENT IS A "PENALTY," *supra* note 4.

158. *King & Spalding, supra* note 12.

159. *King & Spalding, supra* note 12.

160. *See King & Spalding, supra* note 12 (pointing to several amicus briefs questioning the authority of the SEC to seek disgorgement).

161. *King & Spalding, supra* note 12.

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