KING & SPALDING

Client Alert

Special Matters & Government Investigations Practice Group

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For more information, contact:

Dixie L. Johnson
+1 202 626 8984
djohnson@kslaw.com

Carmen Lawrence
+1 212 556 2193
clawrence@kslaw.com

M. Alexander Koch
+1 202 626 8982
akoch@kslaw.com

Matthew H. Baughman
+1 404 572 4751
mbaughman@kslaw.com

Jessica L.K. Rapoport
+1 202 626 5549
jrapoport@kslaw.com

Abraham N.M. Shashy, Jr.
+1 202 626 5614
hshashy@kslaw.com

Gregory S. Lucas
+1 404 572 2711
glucas@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521

New York
1185 Avenue of the Americas
New York, New York 20036-2601

www.kslaw.com

Reflections on *Kokesh v. SEC*: Potential Ramifications of SEC Disgorgement Being a Penalty

In the week since the Supreme Court's unanimous decision in *Kokesh v. SEC*,[1] which rejected the Securities and Exchange Commission's longstanding position that disgorgement was an equitable remedy not subject to the five-year statute of limitations in 28 U.S.C. § 2462, many have commented about the increased need for the SEC's enforcement attorneys to complete their investigations quickly and the frustration that hidden ill-gotten gains would never be recovered due to the five-year limit. These are important and valid ramifications, and we include them in this article.

But the *Kokesh* decision raises other potential consequences that have not been as widely noted. We address many of those other consequences here, including the following:

- Does the five-year statute of limitations apply to administrative actions?
- Will the five-year statute of limitations hinder SEC enforcement?
- Will the SEC tie cooperation credit to prompt action?
- Can the SEC continue to obtain disgorgement?
- Can the SEC continue to obtain pre-judgment interest on disgorgement amounts?
- Can the SEC continue to obtain disgorgement from relief defendants?
- Can defendants and respondents still seek indemnification or insurance coverage for disgorgement and pre-judgment interest?
- Is disgorgement paid to a government deductible for U.S. federal tax purposes?
- Can those who paid disgorgement for conduct outside the five-year statute of limitations period get money back?

The SEC's Enforcement Action and the Supreme Court's Opinion in *Kokesh*

The relevant facts and case history are straightforward.

- The SEC filed its civil action against Charles Kokesh, the owner of two investment advisers that advised business development companies, in

October 2009. The Commission alleged that between 1995 and 2009, through his firms, Kokesh violated antifraud and other provisions of the federal securities laws by misappropriating $34.9 million from business development companies and causing the filing of "false and misleading SEC reports and proxy statements."[2]

- After a jury verdict in the SEC's favor, the court ordered Kokesh to pay a $2,354,593 civil monetary penalty, $34.9 million in disgorgement, and $18.1 million in prejudgment interest, calculated based on the disgorgement amount.[3] The District Court applied 28 U.S.C. § 2462 five-year limitations period to the civil monetary penalty,[4] but agreed with the Commission that the statute of limitations did not apply to disgorgement because it was not a "penalty."
- On appeal, Kokesh argued that the disgorgement amount should have been only $5 million because the five-year statute of limitations in § 2462 also applied to disgorgement. But the Court of Appeals for the Tenth Circuit upheld the district court,[5] and the Supreme Court subsequently granted certiorari to resolve a Circuit split on the issue.[6]
- The Supreme Court unanimously and unambiguously reversed the appellate decision. Although the Court could have ruled narrowly by ruling that disgorgement *as applied in this case* constituted a penalty, it took a different approach by ruling much more broadly: "We hold that SEC disgorgement constitutes a penalty." The Court also held that "the 5-year statute of limitations in §2462 therefore applies when the SEC seeks disgorgement." [7]

The Court determined that three principles demonstrated that SEC disgorgement is a penalty within the meaning of § 2462.

- First, SEC disgorgement is imposed as a consequence for violations where the victim is the public at large, rather than an aggrieved individual.[8]
- Second, SEC disgorgement's primary purpose is to deter future violations, which is inherently punitive.[9]
- Third, SEC disgorgement does not directly compensate victims, because a court has discretion over whether disgorged funds will be distributed to harmed investors or transferred to the U.S. Treasury. As a result, the Court held, "[w]hen an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty."[10]

The Court dismissed the Commission's argument that disgorgement is "remedial." Because SEC disgorgement sometimes exceeds profits, the Court found that disgorgement in such cases "does not simply restore the status quo . . . [but] leaves the defendant worse off." [11] For example, the opinion noted that SEC disgorgement may not consider defendants' expenses that reduced illegal profits, and courts have ordered insider trading tipper defendants to disgorge the profits of their tippees, even though the tippers never received any profits. Thus, according to the Court, SEC disgorgement is not a remedy that simply returns defendants to their prior position, but rather goes beyond and *penalizes* defendants for their conduct.

Potential Ramifications of *Kokesh*

Most commentators have focused on the 5-year limitations period, which certainly carries important ramifications for the SEC. But as we describe here, the Supreme Court's ruling that "SEC disgorgement constitutes a penalty" has more far-reaching ramifications.

Does the Five-Year Statute of Limitations Apply to Administrative Actions?

The Kokesh holding arose in the context of a federal court case, but the holding broadly applies to "SEC disgorgement." Because the remedy has been consistently applied in both federal courts and the SEC's own administrative courts, and because courts have held that § 2462 applies in SEC administrative proceedings, there is little doubt that the five year limitations period would apply equally in administrative proceedings as well as in federal court.[12]

Will the Five-Year Statute of Limitations Hinder SEC Enforcement?

The five-year statute of limitations will not impact the SEC in most cases because the Commission typically acts, or preserves claims, within five years of the misconduct.

Where misconduct does not come to light until well after it occurred, however, or where investigations are inherently time-consuming, the SEC's hands may now be tied. These include matters involving the Foreign Corrupt Practices Act ("FCPA"), long-running Ponzi and pyramid schemes, accounting fraud, or investigations requiring the staff to gather information through time-consuming requests to foreign regulators.[13]

In those types of matters, we expect that the SEC enforcement staff may now move more aggressively, be less willing to agree to extensions for the production of documents and scheduling of testimony, and focus on fewer lines of inquiry in their investigations. We also expect that the staff will more routinely ask entities and individuals under investigation to enter tolling agreements, and will do so at an earlier stage of the investigation than has been customary in the past.

Will the SEC Tie Cooperation Credit to Prompt Action?

Since at least 2001, the SEC has expressly included promptness (in self-reporting, volunteering evidence, and responding to the SEC's requests) as factors in evaluating the extent to which cooperation credit should be awarded in enforcement settlements.[14] These promptness factors may become more prominent to the SEC's assessment of cooperation in the wake of *Kokesh*, because this will maximize the potential remedies available to the SEC. For better or for worse, we expect that this dynamic will make the already-difficult analysis of whether or when to self-report potential violations and cooperate with the SEC even more complex. As one example, *Kokesh* adds to considerations companies must evaluate in deciding whether or when to self-report conduct taking place at or near the five-year statute of limitations period.

Can the SEC Continue to Obtain Disgorgement?

As it considers the impact of *Kokesh*, we expect that the SEC staff will be less aggressive in its disgorgement demands and more open to arguments limiting how disgorgement is calculated. At the same time, defendants and respondents who litigate will undoubtedly follow up on the Supreme Court's apparent invitation, in a footnote, to challenge whether disgorgement is available ***at all*** as an SEC remedy in enforcement actions. Footnote three 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 § 2462's limitations period.[15]

At least two amicus briefs submitted in connection with the *Kokesh* case argued that, if disgorgement is not an equitable remedy, then the SEC has no statutory authority to seek disgorgement, at least in district court cases.[16] Furthermore, four different justices asked questions or made comments about the issue during oral arguments, including Chief Justice Roberts' remark that, "One 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 limitations that goes with it."[17]

The question might not have arisen if the SEC had not expanded the original concept of disgorgement and had not touted it as a deterrent for violations by others. As the Court recounted in *Kokesh*, courts have awarded disgorgement in SEC actions since the 1970 *Texas Gulf Sulphur* case, which held that courts could order defendants to disgorge ill-gotten gains as "an exercise of their 'inherent equity power to grant relief ancillary to an injunction.'"[18] The defendants in *Texas Gulf Sulphur* were company insiders who purchased or tipped others to purchase company stock based on material non-public insider information. Defendants were ordered to pay "restitution" of their own illicit trading profits to the company, and one defendant was ordered to pay "restitution for the profits derived by his tippees."[19]

The SEC took that ill-gotten gains concept and ran with it for decades, making disgorgement a standard remedy in enforcement cases. The concept became so ingrained that, in 1990, Congress specifically authorized the SEC to seek civil penalties in district court proceedings, and gave the SEC the express authority to seek disgorgement in administrative proceedings, but did not add statutory authority for disgorgement in district court proceedings.[20] Similarly, in the 2002 Sarbanes-Oxley Act, Congress added language to the Exchange Act stating that the SEC "may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors," but again did not expressly include disgorgement by federal courts in the statute. The legislative histories of both laws demonstrate that, because *Texas Gulf Sulphur* confirmed that disgorgement was part of a federal court's inherent equitable powers, Congress did not see a need to provide federal courts with express authority to order disgorgement.[21]

Meanwhile, over time the SEC argued, and courts accepted, that disgorgement had a deterrence objective.[22] The SEC also aggressively expanded the boundaries of disgorgement beyond a defendant's personal illicit gains. For example, the SEC recently has been successful in holding a portfolio manager liable for disgorging the illicit gains made by the fund he managed based on his insider trading[23] and holding a stock seller jointly and severally liable for the proceeds of a pump and dump scheme, even though he transferred some of the profits to other participants in the fraud.[24]

Now that the Court has ruled that SEC disgorgement is not an equitable remedy, and has appeared to invite a challenge to the question of whether the SEC has any basis to seek disgorgement as a remedy, defendants no doubt will press the issue. Furthermore, because the maximum amount of penalties is limited by statute, we expect defendants to argue that the SEC cannot impose a penalty (including disgorgement) greater than that statutory limit. For example, under Exchange Act § 21(d)(3), the SEC is entitled to obtain penalties in civil actions that do not exceed either the greater of a maximum dollar amount per violation or the defendant's gross pecuniary gain as a result of the violation. Up until now, it has been common for the staff to seek substantial penalties under this provision *in addition to* full disgorgement of the defendant's illicit gains. Following *Kokesh*, however, defendants may argue that such a monetary remedy would be impermissible because the combination of disgorgement and traditional civil penalty would exceed the maximum statutory penalty. To avoid such an argument, the SEC might choose to proceed in its own administrative forum, where the availability of disgorgement is expressly authorized by statute. In response, defendants likely would argue that the SEC should not be able to circumvent *Kokesh* through its choice of forum, and that total monetary remedies should not exceed the maximum available statutory penalty, regardless of whether the case is brought as a civil action or administrative proceeding.

To address this fundamental challenge to its enforcement program, we expect that the SEC may take action in one or more of the following ways, none of which is ideal from the SEC's perspective.

- First, the Commission could define disgorgement more narrowly as restitution to the victims of the illegal conduct, in keeping with the original holding of *Texas Gulf Sulphur* and therefore more in line with the traditional equitable powers of federal courts. Renaming the remedy to clarify that it is different from the "SEC disgorgement" analyzed by the Court, and removing it from deterrence rhetoric, could help clarify that this is remedial, not a penalty. In this regard, it is notable that on the same day that Justice Sotomayor delivered the Court's unanimous opinion in *Kokesh*, she also authored a unanimous opinion finding that the criminal forfeiture statute did not allow a defendant to be held jointly and severally liable for property that his co-conspirator derived from the crime, but which the defendant himself did not acquire.[25] Taken together, the decisions signal a clear desire by the Court to rein in the government's more aggressive theories of monetary remedies.

- Second, the SEC could back away from seeking disgorgement in district court actions, and instead focus on seeking higher penalties where authorized by statute, in order to make up the difference in overall monetary remedies. Given concomitant pressure on corporate penalties, which may injure shareholders a second time after the violation injured them the first time, this could raise additional challenges for the Enforcement Division.
- Third, the SEC could seek a legislative fix from Congress, although obtaining that fix may be unlikely in the current political climate.[26]
- Finally, the SEC could turn to filing more cases as administrative proceedings, where it arguably has express statutory authority to seek disgorgement. While this may work for settled matters, it will create its own challenges for the SEC to turn to this option for litigated matters when it already is facing heavy criticism for using administrative proceedings to benefit from its purported "home court" advantage and where the very authority of the ALJs is under attack.

Can the SEC Continue to Obtain Pre-Judgment Interest on Disgorgement Amounts?

In every case involving disgorgement, whether filed in federal court or administratively, it is the SEC's practice to seek pre-judgment interest, calculated at the IRS underpayment rate. In contrast, the SEC does not seek pre-judgment interest on civil penalty amounts. Federal courts typically have held that requiring the payment of prejudgment interest on disgorgement was appropriate as an equitable remedy to deprive the wrongdoer of the benefit of holding the illicit gains over time by approximating the cost of borrowing the funds.[27] Now that "SEC disgorgement constitutes a penalty," it is not at all clear that the SEC has the authority to obtain pre-judgment interest in cases filed in federal court. The SEC may have a stronger argument in administrative proceedings, where it has express statutory authority to seek disgorgement and has promulgated a rule concerning the recovery of prejudgment interest.[28]

Can the SEC Continue to Obtain Disgorgement from Relief Defendants?

Similarly, the SEC frequently seeks to recover disgorgement from "relief defendants," third-parties that did not engage in wrongdoing but have received illicit gains resulting from violations committed by others and have no legitimate claim to the funds. As recently stated by the Second Circuit, "[e]quitable relief against a third-party non-wrongdoer may be entered where such an individual (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds."[29] Courts typically have viewed such requests to be within their equitable authority, but in the wake of *Kokesh*'s holding that disgorgement is a penalty, it is not clear that the SEC will be able to obtain disgorgement from non-wrongdoers.

Can Defendants and Respondents Still Seek Indemnification or Insurance Coverage for Disgorgement and Pre-Judgment Interest?

The SEC's standard settlement papers have long prohibited settling defendants from seeking or accepting reimbursement or indemnification for "penalties," while staying silent on that topic with respect to disgorgement and pre-judgment interest. This issue can be particularly important to individual defendants, who often would not be able to afford to pay disgorgement without indemnification from their former employer, insurance company, or some other source.

In the wake of *Kokesh*, there now is an argument that settling defendants may not be able to accept indemnification or insurance coverage for disgorgement without violating their agreement with the Commission. Indeed, within days after the *Kokesh* decision, counsel for a group of insurance companies argued that their policy did not require payment of penalties in a long-running dispute over coverage for disgorgement paid by Bear, Stearns & Co., Inc. for its 2006 market-timing settlement by the SEC.[30]

As a result, counsel for individuals, companies, and insurers will be evaluating their rights and obligations, and may consider seeking appropriate modifications to the language of governing documents, including SEC settlement documents, going forward.

Is Disgorgement Paid to a Government Deductible for U.S. Federal Tax Purposes?

Kokesh says absolutely nothing about taxation, but it may hold implications for the deductibility of certain payments to a government made pursuant to a court judgment or settlement. The Internal Revenue Code permits deductions of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[31] Payments made pursuant to court judgments or settlements in a business context generally satisfy the "ordinary and necessary" requirement of § 162(a) and may be deducted by the taxpayer. Section 162(f), however, imposes a limitation on deductions under § 162(a), stating that "no deduction shall be allowed . . . for any fine or similar penalty paid to the government for the violation of any law." This limitation applies to actual fines and penalties, as well as to amounts "[p]aid in settlement of the taxpayer's actual or potential liability for a fine or penalty (civil or criminal)."[32]

Courts have wrestled with questions of what types of payments to a government are penal and nondeductible, as opposed to compensatory and deductible. A payment imposed by criminal statute will generally not be deductible, but a payment characterized in settlement documents as "compensation" or "restitution" likely will be deductible. The proper treatment of a payment that is characterized as a forfeiture or disgorgement is less clear. The IRS Chief Counsel has recently opined that disgorgement in the securities context is sometimes compensatory and sometimes penal.[33] Specifically, where the amount of the disgorgement equals the damages incurred by the victims of the illegal activity and the SEC uses the disgorgement to compensate those investors, the IRS recognized that SEC disgorgement might be compensatory. On the other hand, where the disgorgement is intended to deprive the wrongdoer of illegal profits or deter future illegal conduct, it is more likely to be penal for tax purposes. Additional situations that suggest that disgorgement is penal include where a settlement agreement mandates that disgorged amounts paid by the government to harmed investors may not offset subsequent recoveries by those investors in civil suits against the wrongdoer, or where the disgorgement is imposed as a substitute for a civil penalty.

Last year, in *Nacchio v. United States*, the Court of Appeals for the Federal Circuit held that a payment required under a criminal forfeiture statute for violations of the securities laws was a fine or penalty within the meaning of § 162(f).[34] In reaching this holding, the Federal Circuit cited two factors that the Supreme Court would cite in *Kokesh*. The Federal Circuit noted that although the government may direct forfeiture payments to the victims of a crime, this does not make forfeiture a species of compensation. First, whereas compensation is measured by the damages incurred by the victims, forfeiture is measured by the illicit gains to the perpetrator. Forfeitures may thus exceed or fall short of the amount necessary to compensate victims. Second, the Federal Circuit noted that even where the government subsequently distributes a forfeiture payment to victims of the criminal activity, the forfeiture is first and foremost a remedy for public harms, not private harms.

Because the Federal Circuit found these features of forfeiture to weigh against deductibility under § 162(a), the fact that the Supreme Court cited those same features in *Kokesh* as supporting the penal nature of disgorgement supports the likely conclusion that the Federal Circuit (and other courts of appeals) could use *Kokesh* to extend *Nacchio* and cases like it to deny the deduction of payments characterized as disgorgement. The IRS will undoubtedly be attuned to this possibility, and thus the implications of *Kokesh* and *Nacchio* remain to be seen.

Can Those who Paid Disgorgement for Conduct Outside the Five-Year Statute of Limitations Period Get Money Back?

Based on *Kokesh*, defendants who previously litigated unsuccessfully against the SEC or settled enforcement actions likely will wonder whether they are entitled to recover disgorgement payments that they were ordered to make for conduct outside the five-year statute of limitations. The answer may depend on the forum in which the action was brought and whether the case was litigated or settled.

Federal Rule of Civil Procedure ("FRCP") 60(b) permits courts to vacate final judgments when the judgment is "void" (FRCP 60(b)(4)), "based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable" (FRCP 60(b)(5)), or for "any other reason that justifies relief" (FRCP 60(b)(6)).[35] Courts have held that Rule 60(b) is a "provision for extraordinary relief" and that "[t]he general purpose of Rule 60(b) is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done."[36] Although the case law is mixed on whether changes in the law due to Supreme Court decisions can qualify parties for relief under FRCP 60(b), some circuits appear to be more open to such an argument than others.[37]

There is no direct counterpart to FRCP 60(b) in the SEC's Rules of Practice, which govern administrative proceedings. Defendants in litigated administrative proceedings may appeal an administrative law judge's decision to the Commission, file a motion for reconsideration of a final order issued by the Commission, and ultimately may seek judicial review of Commission orders.[38]

Of course, most SEC enforcement cases settle. While a proposed settlement of a district court action requires judicial approval and the entry of judgment that could be subject to FRCP 60(b), a defendant that wishes to resolve an administrative proceeding submits an offer of settlement that is either accepted or rejected by the Commission, with no requirement of federal court approval. Indeed, a defendant submitting an offer to settle an administrative proceeding waives, subject to Commission acceptance of the offer, "all post-hearing procedures" and "judicial review by any court."[39]

In general, it may be more difficult for settling defendants to successfully pursue such a motion.[40] In one recent case, a defendant who had settled an insider trading case sought to have his consent judgment vacated following the Second Circuit's decision in *U.S. v. Newman, et al.* The U.S. District Court for the District of New Jersey held that the defendant had not demonstrated "a significant change in the law which makes legal the conduct for which Defendant accepted liability or that any intervening change in the law represented by the *Newman* decision represents an extraordinary circumstance justifying relief" from the judgment.[41] On the other hand, following *Newman*, the SEC did not oppose a hedge fund's request to have its settlement for insider trading violations vacated, allowing the fund to recoup $9 million in penalties and disgorgement.[42]

As a result, entities and individuals would be well-advised to consult with counsel to assess whether a prior disgorgement payment should be revisited in light of *Kokesh*.

Conclusion

While at first blush the *Kokesh* opinion seems relatively straightforward, the Court's ruling raises a number of complicated legal and strategic questions. It will take time to see how these issues play out, but entities and persons who either face an SEC investigation, previously were the subject of an SEC enforcement action, or have obligations to indemnify persons subject to an SEC action should consider consulting counsel to assess whether the decision impacts their rights and obligations.

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[1] *Kokesh v. SEC.*, No. 16-529, 2017 WL 2407471, at *9 (U.S. June 5, 2017).

[2] *Id*. at *4.

[3] *Id*. at *5.

[4] The Supreme Court held in 2013 that the § 2462 5-year statute of limitations applies when the Commission seeks civil monetary penalties. *Gabelli v. SEC*, 568 U.S. 442, 454 (2013). In *Kokesh*, the 5-year limitations period precluded relief for conduct before October 27, 2004.

[5] *SEC v. Kokesh*, 834 F.3d 1158, 1164-67 (10th Cir. 2016*), cert. granted sub nom*. *Kokesh v. SEC.*, 137 S. Ct. 810 (mem.), *and rev'd sub nom. Kokesh v. SEC.*, No. 16-529, 2017 WL 2407471 (U.S. June 5, 2017).

[6] The Tenth Circuit's opinion, which reflected the majority view among federal courts, created a split with the Eleventh Circuit's decision in *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (holding that disgorgement is a "forfeiture" under § 2462).

[7] *Kokesh*, WL 2407471 at *4-5 and *8.

[8] *Meeker v. Lehigh Valley R. Co*., 236 U.S. 412 (1915).

[9] *Kokesh*, WL 2407471 at *7.

[10] *Id*. at *8.

[11] *Id*. at *10.

[12] *See Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) (holding that SEC order imposing a disciplinary suspension was a "penalty" subject to the five-year statute of limitations in § 2462).

[13] Wire and Cable Manufacturer Settles FCPA and Accounting Charges, SEC press release 2016-823 (Dec. 29, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-283.html (materially misstating financial statements from 2008 to 2012); SEC Charges KKR With Misallocating Broken Deal Expenses, SEC press release 2015-131 (June 29, 2015), *available at* https://www.sec.gov/news/pressrelease/2015-131.html (conduct took place during a six-year period ending in 2011).

[14] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 34-44969 (Oct. 23, 2001), *available at* https://www.sec.gov/litigation/investreport/34-44969.htm.

[15] *Kokesh*, 2017 WL 2407471 at *5.

[16] *See* Brief for Mark Cuban as Amici Curiae in Support of Petitioner, *Kokesh v. SEC*, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529), *available at* http://www.scotusblog.com/wp-content/uploads/2017/03/16-529_amicus_pet_mark_cuban.pdf; Brief for Americans for Forfeiture Reform as Amicus Curiae in Support of Petitioner, *Kokesh v. SEC*, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529), *available at* http://www.scotusblog.com/wp-content/uploads/2017/03/16-529_tsac_Americans_For_Forfeiture_Reform.pdf. *See also* Russ Ryan, The Equity Façade of SEC Disgorgement, HARV. BUS. L. REV., (2013), *available at* http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/ (article by former King & Spalding partner and current FINRA official arguing that the SEC had no authority to seek disgorgement because it was not an equitable remedy and was not authorized by statute).

[17] Chief Justice Roberts and Justices Kennedy, Alito, Sotomayor and Gorsuch all asked questions on this subject. Transcript of Oral Argument at 7, 13, 15-16, 31-33, 52, *Kokesh v. SEC*, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-529_21p3.pdf.

[18] *Kokesh*, 2017 WL 2407471 at *3 (citing *SEC v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77, 91 (S.D.N.Y. 1970), *aff'd in part and rev'd in part*, 446 F.2d 1301 (C.A.2 1971).

[19] *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971) ("We conclude that the requirement of restitution in this case was a proper exercise by the trial judge of the district court's equity powers.").

[20] The 1990 Act refers to the Securities Enforcement Remedies and Penny Stock Reform Act. 15 U.S.C. § 77t(d). Sarbanes-Oxley Act § 305(b) is codified at 15 U.S.C. § 78u(d)(5). The legislative history of the 1990 Act acknowledges that "Sections 202, 301, and 401 of the legislation add Section 21B(e) to the Exchange Act, Section 9(e) to the Investment Company Act, and Section 203(j) to the Investment Advisers Act, respectively. Under the legislation, each of these sections provide that the SEC may enter disgorgement orders in its administrative proceedings. The SEC does not have express authority to order disgorgement under current law, although it has obtained agreements from respondents to disgorge profits or make restitution to injured customers as part of settlement of administrative proceedings . . . The Committee believes, however, that the SEC should have the express authority to order disgorgement in its administrative proceedings in order to ensure that respondents in administrative proceedings do not retain ill-gotten gains." Report of the Committee on Banking, Housing, Urban Affairs to Accompany S. 647; The Securities Law Enforcement Remedies Act of 1990 (June 26, 1990).

[21] The Senate Committee Banking, Housing, and Urban Affairs Committee Report on legislation included in the 1990 Act states that, "Courts in civil proceedings currently may order disgorgement under their equitable powers. *See, e.g., SEC v. Materia*, 745 F. 2d 197 (2d Cir. 1984), cert, denied, 471 U.S. 1053 (1984)." The Senate Committee Banking, Housing, and Urban Affairs Committee Report on the Sarbanes-Oxley Act states, "The Commission has also suggested that it should be allowed to obtain additional relief in enforcement cases. For a securities law violation, currently an individual may be ordered to disgorge funds that he or she received 'as a result of the violation.' Rather than limiting disgorgement to these gains, the bill will permit courts to impose any equitable relief necessary or appropriate to protect, and mitigate harm to, investors."

[22] *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1474 (2d Cir. 1996), *cert. den.*, 522 U.S. 812 (1997) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws.").

[23] *SEC v. Contorinis*, 743 F.3d 296 (2d Cir. 2014).

[24] *SEC v. Whittemore*, 659 F.3d 1 (D.C. Cir. 2011).

[25] *Honeycutt v. United States*, No. 16-142, 2017 WL 2407468 (U.S. June 5, 2017).

[26] For example, the Choice Act adopted last week by the House of Representatives continues to refer to "disgorgement," although it does so in the context of expanding when "disgorgement funds" may be made available to victims.

[27] *See, e.g., Contorinis*, 743 F.3d at 307-08.

[28] SEC Rule of Practice 600, 17 CFR § 201.600 ("Prejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement.").

[29] *SEC v. Miller*, 808 F.3d 623, 635 (2d Cir. 2015).

[30] Stewart Bishop Insurers Make Last-Ditch Kokesh Play In Bear Stearns Fight, LAW360 (June 6, 2016), *available at* https://www.law360.com/securities/articles/931944.

[31] 26 U.S.C.A. I.R.C. § 162(a).

[32] Treas. Reg. § 1.162-21(b)(1)(iii).

[33] I.R.S. Chief Couns. Mem. CCA 201619008 (May 6, 2016), *available at* https://www.irs.gov/pub/irs-wd/201619008.pdf.

[34] *Nacchio v. United States*, 824 F.3d 1370, 1378 (Fed. Cir. 2016), *cert. denied*, 582 U.S. ___ (2017).

[35] Fed. R. Civ. P. 60(b)(4), (5) and (6). For recently litigated cases, parties can file a motion to alter or amend the judgment under FRCP 59(e) "no later than 28 days after the entry of the judgment." Courts have discretion to grant such a motion due to changes in controlling law. *SEC. v. Bilzerian*, 729 F. Supp. 2d 9, 13 (D.D.C. 2010) (citing *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam)).

[36] *See SEC v. Holley*, 2015 WL 5554788, at *3 (D.N.J. Sept. 21, 2015) (internal citations and quotations omitted), *appeal dismissed sub nom. SEC v. Holley, et al* (3rd Cir. 2015).

[37] *Compare Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014) ("[I]ntervening changes in the law *rarely* justify relief from final judgments under 60(b)(6).") and *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) ("[C]hange in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment.").

[38] SEC Rule of Practice 410, 470, and 490. 17 CFR §§ 201.410, 470, and 490.

[39] SEC Rule of Practice 240 , 17 CFR § 201.240.

[40] *See Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 201 (3d Cir. 2012) ("[B]y signing a consent decree, signatories make a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment.") (internal quotations and citation omitted).

[41] *See Holley*, 2015 WL 5554788, at *5.

[42] *United States v. Newman*, 773 F.3d 438, 455 (2d Cir. 2014), *abrogated by Salman v. United States*, 130 S. Ct. 420 (2016) (imposing new limits on insider trading liability); Stewart Bishop, Diamondback Capital Gets $6M Refund Post-Newman, LAW360 (June 3, 2016), *available at* https://www.law360.com/articles/803681.

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