

Securities Enforcement Update: Supreme Court Hints at Statute of Limitations for Disgorgement Actions, Justices Question SEC's Authority to Seek Disgorgement Altogether

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On April 18, 2017, the Supreme Court heard oral argument in *Kokesh v. SEC* to resolve a circuit split on the issue of whether the five-year statute of limitations in 28 U.S.C. § 2462—which governs any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture”—applies to SEC enforcement actions for disgorgement. As discussed in a [prior alert](#), the question turns on whether disgorgement, which requires a defendant to give up ill-gotten gains, constitutes a “forfeiture” or “penalty” under § 2462. If, as the Tenth Circuit held, § 2462 does not apply, then there is no time limit on when the SEC can bring disgorgement actions. At oral argument, the Court appeared skeptical of that interpretation and seems poised to side with the Eleventh Circuit, which held that § 2462’s five-year limit does apply to disgorgement actions. Perhaps more surprising, however, was the Court’s discomfort at oral argument with the SEC’s lack of express statutory authority to seek disgorgement at all. Justice Gorsuch noted that, “because there’s no statute governing” disgorgement, “[w]e’re just making it up.” Although the question of the SEC’s authority to seek disgorgement is not squarely presented in *Kokesh*, that multiple Justices expressed frustration on this point suggests that the Court may be open to considering the issue in a future case.

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