

SEC Signals Increased Penalties Post-*Liu*

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A speech by the Director of Enforcement and several recent insider trading cases signal that the SEC will seek increased penalties in some cases in response to the Supreme Court's disgorgement decision.

As we explained in our recent [Client Memorandum](#), the Supreme Court in *Liu v. Securities and Exchange Commission* recently upheld the SEC's authority to seek disgorgement in district court actions. The Court identified principles that act as limitations on that authority, such as a requirement that the SEC distribute disgorgement to victims. The decision left an open question as to whether the SEC may seek disgorgement when such a distribution is infeasible.

Director of Enforcement Stephanie Avakian suggested in a recent speech that the SEC would compensate for potential limitations on its disgorgement authority by seeking increased penalties:

Once again, we are dedicating resources to evaluating the impact of [the *Liu*] decision and how the questions the Court left open will affect us going forward. As a result, ***you should expect to see some changes in the balance between the penalties and disgorgement that we seek and recommend to the Commission. Penalties may be higher in some cases where the statutory scheme permits us to do so.*** We will make our recommendations consistent with the Court's decision. But we will also seek the relief necessary to achieve our mission of protecting investors and maintaining market integrity.¹

We noted in our prior Client Memorandum that insider trading cases may be impacted by *Liu* because the SEC historically has sought disgorgement in those cases without distributing funds to investors. For years, the SEC has settled insider trading cases with a "one-and-one" approach to remedies—disgorgement equal to the wrongful gains or avoided losses, plus a penalty equal to the disgorgement amount.

The SEC recently has taken a different approach, likely because of *Liu*. In recent weeks, the SEC has settled several insider trading cases without obtaining any disgorgement and, instead, imposed a penalty equivalent to *two-times* the wrongful gains/losses avoided. The SEC has taken this approach in both district court actions and administrative proceedings, even though the holding in *Liu* concerned only district court actions.² We note, however, that the SEC is still seeking disgorgement in some insider

¹ Stephanie Avakian, *Protecting Everyday Investors and Preserving Market Integrity: The SEC's Division of Enforcement*, Sept. 17, 2020, available at <https://www.sec.gov/news/speech/avakian-protecting-everyday-investors-091720> (emphasis added).

² See *SEC v. Kelly*, No. 20-cv-04476 (E.D.N.Y. Sept. 23, 2020) (alleging profit and avoided losses of more than \$85,000 and imposing penalty of \$170,228) (summary available [here](#)); *SEC v. Robert Hoddes Jacobs*, No. 20-cv-08604 (C.D. Cal. Sept. 21, 2020) (alleging total profits of more than \$79,000 and imposing penalty of \$157,095) (summary available [here](#)); *SEC vs Richard M. Kirsch and Adam Terris*, No. 20-cv-61830 (S.D. Fla. Sept. 10, 2020) (alleging \$727,400 in profits and imposing \$1,454,800 penalty) (summary available [here](#)); *In the Matter of Craig P. Moyes*, Admin. Proc. File No. 3-19980 (Sept. 10, 2020) (alleging gains of \$58,096 and imposing penalty of \$116,192) (summary available [here](#)); *In the Matter of Yue Li*, Admin. Proc. File No. 3-19959 (Sept. 3, 2020) (alleging profits of \$21,609 and imposing penalty of \$43,218) (summary available [here](#)).

trading actions filed post-*Liu*, most notably in *U.S. v. Bohra*, a district court action in which the SEC is seeking disgorgement of ill-gotten gains and civil penalties in a case concerning alleged trading in advance of earnings releases.³

It will take time and possibly litigation to understand the full consequences of the *Liu* decision. Director Avakian's comments, along with these recent insider trading settlements, suggest that the SEC will forgo disgorgement and instead seek greater penalties when distribution of disgorgement proceeds is impractical and the SEC's disgorgement authority is less certain.

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³ See *SEC v. Bohra*, No 20-cv-01434 (W.D. Wa. Sept. 28, 2020).