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The Supreme Court Limits the SEC's Disgorgement Power
美最高法院限制美证交会没收非法所得的权力

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On Monday, in *Kokesh v. SEC*,[1] the Supreme Court handed a major loss to the Securities and Exchange Commission, unanimously holding that SEC claims for disgorgement of ill-gotten gains are subject to a five-year statute of limitations. For decades, the SEC had taken the position that its disgorgement claims could reach back *indefinitely*, and recently obtained a judgment in another case ordering disgorgement based on conduct going back 18 years before the agency filed suit.[2] The *Kokesh* decision also calls into question the proper measure of disgorgement (e.g., gross versus net profits) and even whether the SEC and potentially other federal government agencies have authority to seek disgorgement at all.

周一，就 *Kokesh 诉证交会*一案[3]，在美国最高法院（下称“最高法院”）作出的裁定中，美国证交会（下称“证交会”）遭受重大败诉。最高法院一致认定，证交会没收非法所得的主张受限于五年的诉讼时效。数十年来，证交会一直认为其没收非法所得的主张可以*无限期地*溯及以往，而且最近还在另一案件中获得一项判决，该判决基于证交会提起该诉讼前 18 年的行为命令没收非法所得。[4]*Kokesh* 案的裁定还对非法所得的适当衡量（如毛利润和净利润之对比），以及证交会及可能涉及的其他联邦政府机构是否具有没收非法所得的权限提出质疑。

Justice Sonia Sotomayor, writing for the full Court, quickly dispatched the SEC's position on the statute of limitations. The statute in question, 28 U.S.C. § 2462, establishes a five-year limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." The Court, resolving a circuit split,[5] held that

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

[2] *See SEC v. Wyly*, 56 F. Supp. 3d 394 (S.D.N.Y. 2014).

[3] *Kokesh 诉证交会*案，16–529, 2017 WL 2407471 （美国，2017 年 6 月 5 日）

[4] 参见*证交会诉 Wyly* 案，56 F. Supp. 3d 394（纽约南区，2014 年）

[5] *Compare SEC v. Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) (holding that § 2462 applies to SEC disgorgement claims), *with Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010)

"[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462," because the sanction redresses a wrong to the public, as opposed to an individual, and because its purpose is to punish and deter, rather than to compensate a victim for a loss.[6] Justice Sotomayor noted that in many cases, SEC disgorgements are not compensatory because they are not paid to the victims. She also squarely rejected the SEC's argument that disgorgement is merely remedial, since SEC disgorgements sometimes exceed the defendant's ill-gotten gains and do not take into account the defendant's expenses. In such cases, the Court ruled, disgorgement is punitive instead of remedial because it "does not simply restore the status quo," but rather "leaves the defendant worse off."[7]

Sonia Sotomayor 法官在写给合议庭的书面说明中迅速地驳斥了证交会关于诉讼时效的立场。相关法规，即《美国法典》第 28 篇第 2462 条为"执行任何金钱或其他性质的民事罚金、处罚或没收"规定了五年的诉讼时效。最高法院解决了一项巡回区分歧[8]，并认为，"证券执法背景下的没收非法所得是第 2462 条所指的'处罚'，因为该制裁弥补了对公众（而非对个人）的伤害，且其目的是惩罚和威慑，而不是补偿受害者的损失。[9]Sotomayo 法官指出，在许多情形下，证交会没收非法所得并不是补偿性的，因为这些款项不是付给受害者的。她还坚决驳斥了证交会关于没收非法所得仅仅是补救性措施的论点，因为证交会没收的非法所得有时超过了被告的实际非法所得，而且没有考虑到被告的开支。在此等情形下，最高法院裁定，没收非法所得为惩罚性而非补救性措施，因为"其并非仅仅恢复现状"，而是"令被告情况变得更糟。"[10]

In pending SEC actions with facts more than five years old, *Kokesh* will not affect the outcome if the SEC staff has obtained tolling agreements from the defendants before the conduct at issue hit the five-year mark. SEC tolling agreements apply to claims for disgorgement as well as statutory civil penalties, officer-and-director bars, and securities industry bars and suspensions. Without a tolling agreement, however, the SEC can no longer seek any financial remedy for conduct that occurred more than five years before the enforcement action is commenced. As a result of *Kokesh*, companies and individuals under investigation may be less likely to agree to toll the limitations period where disgorgement is a significant component of the relief sought. This issue will most commonly arise when conduct is difficult to detect, such as in complex fraud

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(holding the contrary); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (same); *SEC v. Kokesh*, 834 F.3d 1158, 1167 (10th Cir. 2016) (same).

[6] *See Kokesh*, 2017 WL 2407471, at *1, 7–8.

[7] *Id.* at *10.

[8] 比较*证交会诉 Graham* 案，823 F.3d 1357, 1364（11 巡回上诉，2016 年）（认定第 2462 条适用于证交会没收非法所得主张），以及 *Riordan 诉证交会*案，627 F.3d 1230, 1234（哥伦比亚特区巡回，2010 年）（作出相反认定）；*证交会诉 Tambone* 案，550 F.3d 106, 148（第一巡回，2008 年）（同上）；*证交会诉 Kokesh* 案，834 F.3d 1158, 1167（第十巡回，2016 年）（同上）。

[9] 参见 *Kokesh* 案，2017 WL 2407471，*1, 第 7–8 页。

[10] 同上，第 10 页

or foreign payments cases, and the SEC staff does not begin investigating until well after the conduct occurs or the staff takes a long time to unravel it.

对于案情超过五年的证交会未决诉讼，如果证交会人员在相关行为到达五年时效之前向被告取得时效中止协议，则 *Kokesh* 案不会影响它们的结果。证交会时效中止协议适用于没收非法所得的主张以及法定民事处罚、高管和董事禁止令以及证券业禁止令和暂停令。但是，若没有时效中止协议，证交会则不再能够为发生在执法行动开始前五年以上的行为寻求任何财务救济。作为 *Kokesh* 案的结果，如果没收非法所得是所寻求救济的一个重要组成部分，受调查的企业和个人同意中止时效的可能性会降低。此问题往往产生于相关行为难以发现的情况下，如复杂的欺诈或外国付款案件，且证交会人员在相关行为发生后很久未启动调查或证交会人员花了很长时间才发现该行为。

Under *Kokesh*'s rationale, the five-year statute of limitations in 28 U.S.C. § 2462 will also likely apply to enforcement actions for disgorgement brought by other government agencies, such as the Commodity Futures Trading Commission and the Federal Trade Commission. The decision may also lead to litigation over whether this limitations period applies to actions seeking other remedies, such as bars, suspensions, and injunctions, that the SEC has historically characterized as remedial but are arguably punitive.

按照 *Kokesh* 案的解释，《美国法典》第 28 篇第 2462 条中的五年诉讼时效很可能将适用于其他政府机构（如美国商品期货交易委员会和联邦贸易委员会）采取的没收非法所得执法行动。该裁定还可能导致关于下列问题的诉讼：该时效是否适用于证交会过去定性为救济性措施而如今被认定为惩罚性措施的寻求其他救济（如禁止、中止和禁制令）的行动。

Beyond the statute of limitations, *Kokesh* will arm some defendants with a strong argument to reduce the amount of disgorgement awarded against them. Typically, in seeking disgorgement, the SEC and other federal agencies, such as the FTC, have refused to offset the amount of ill-gotten gains by the expenses incurred in obtaining them, which can be substantial.[11] Under *Kokesh*, however, such a measurement of disgorgement would not be equitable in nature, but rather punitive, and thus should not be available to agencies basing their disgorgement claims on a court's equitable powers.

除诉讼时效之外，*Kokesh* 案还给一些被告人提供了减少没收非法所得金额的强有力论据。通常，在申请没收非法所得时，证交会和其他联邦机构（如联邦贸易委员会）拒绝以获得非法所得

[11] *See, e.g., Kokesh*, 2017 WL 2407471, at *10 (noting that "SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit"); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006) (instructing district court to determine amount of total billings that defendants received "without deducting monies paid by the defendants-appellants to other parties"); *FTC v. Kuykendall*, 371 F.3d 745, 765–67 (10th Cir. 2004) (holding that unjust gains equal "gross receipts").

所发生的开支（这笔开支可能很大）抵销非法所得金额。[12]但在 *Kokesh* 案中，此衡量没收非法所得的方式可能本质上不是衡平法的，而是惩罚性的，因而不应当为那些基于法院的衡平法权力提出没收非法所得主张的机构所采用。

Most significant of all, *Kokesh* casts doubt on whether the SEC even has authority to seek disgorgement in federal court actions.[13] In reviewing the statutory history, Justice Sotomayor noted that, under the Securities Exchange Act of 1934, the SEC initially lacked any "statutory authorization for monetary remedies" and urged courts to order disgorgement as an exercise of their inherent equitable power.[14] In 1990, Congress authorized the SEC to seek civil penalties[15]—endowing it with what Justice Sotomayor called "a full panoply of enforcement tools"—yet the SEC "has continued its practice of seeking disgorgement in enforcement proceedings."[16] This pointed observation could be viewed as an invitation to challenge the SEC's power to request disgorgement in federal court actions generally. It may also invite challenges to the disgorgement power of other government enforcement agencies that lack express statutory authority to seek disgorgement.

最重要的是，*Kokesh* 案甚至令人怀疑证交会是否有权在联邦法院诉讼中申请没收非法所得。[17]在回顾立法史时，Sotomayor 法官指出，根据 1934 年《证券交易法》，证交会最初缺乏任何"金钱救济的法定权限"，于是敦促法院以行使其固有衡平法权力的方式命令没收非法所得。[18]1990

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[12] 参见 *Kokesh* 案, 2017 WL 2407471, 第 10 页（指出"证交会没收非法所得的命令有时没有考虑到减少非法利润额的被告开销）"；*FTC 诉 Verity Int'l, Ltd.*案, 443 F.3d 48, 68 (第二巡回， 2006 年)（指示地区法院确定被告收到的总账单金额，"不扣减被告上诉人向其他当事方支付的款项"；*FTC 诉 Kuykendall* 案, 371 F.3d 745, 765–67 (第十巡回，2004 年)（认定不当得利等于"总收入"。

[13] *Id.* at *5 n.3 (declining to opine on "whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context"). In 2002, as part of the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, Congress explicitly granted the SEC power to impose orders of disgorgement in administrative proceedings, *see* Section 21B(e) of the Securities Exchange Act of 1934, but not in enforcement actions brought in federal district court.

[14] *Kokesh*, 2017 WL 2407471, at *2.

[15] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931.

[16] *Id.* at *3.

[17] 同上，*5n.3（拒绝就 "法院是否有权在证交会执法程序中命令没收非法所得或法院在此情形中是否适当地运用了没收非法所得的原则"发表意见。2002 年，作为萨班斯 - 奥克斯利法案的一部分，Pub. L. No. 107-204, 116 Stat. 745，国会明确授予证交会在行政程序中执行没收非法所得命令的权力，参见 1934 年《证券交易法》第 21B(e)条，但不适用于在联邦地区法院提起的执法行动。

[18] *Kokesh* 案, 2017 WL 2407471，*2。

年，美国国会授予证交会收取民事罚金的权力[19]——给予其 Sotomayor 法官所称的“全套执法工具”——而证交会“在执法程序中继续了申请没收非法所得的做法。”[20]这一针对性的意见可视为鼓励对证交会在联邦法院诉讼中申请没收非法所得的权力提出一般性质疑。这也可能导致缺乏申请没收非法所得的明确法定权限的其他政府执法机构没收非法所得的权力受到质疑。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our White Collar Defense and Investigations practice:

如果您对本客户期刊中讨论的材料有任何疑问，请联系我们白领犯罪辩护和调查业务组的下列成员：

Eric Carlson	+86 21 6036 2503	ecarlson@cov.com
Tammy Albarrán	+1 415 591 7066	talbarran@cov.com
Bruce Baird	+1 202 662 5122	bbaird@cov.com
Lanny Breuer	+1 202 662 5674	lbreuer@cov.com
Arlo Devlin-Brown	+1 212 841 1046	adevlin-brown@cov.com
Steven Fagell	+1 202 662 5293	sfagell@cov.com
Nancy Kestenbaum	+1 212 841 1125	nkestenbaum@cov.com
David Kornblau	+1 212 841 1084	dkornblau@cov.com
Daniel Shallman	+1 424 332 4752	dshallman@cov.com
Andrew Smith	+1 202 662 5049	andrewsmith@cov.com
Doug Sprague	+1 415 591 7097	dsprague@cov.com
Anne Termine	+1 202 662 5827	atermine@cov.com
Alan Vinegrad	+1 212 841 1022	avinegrad@cov.com

[19] 1990 年《证券执法救济和小额证券改革法案》，Pub. L. No. 101-429, 104 Stat. 931

[20] 同上，*3。