US Supreme Court Imposes Limitations on Disgorgement

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Earlier this month, the US Supreme Court issued a ruling that imposed a five-year statute of limitations period in which disgorgement could be ordered by an administrative agency penalizing regulatory violations. Although the Court's decision in *Kokesh v. SEC* arose in the context of an enforcement action initiated by the Securities and Exchange Commission (SEC), the Court's decision may well be applied to disgorgement orders issued by either the Federal Energy Regulatory Commission (FERC) or the Commodity Futures Trading Commission (CFTC). However, additional litigation may be required to ensure that the disgorgement boundaries set forth by the Court in *Kokesh* are equally applied to FERC and CFTC enforcement actions seeking disgorgement from an energy market participant.

In *Kokesh*, the Supreme Court found that disgorgement is a form of penalty under 28 U.S.C. § 2462, which requires the SEC to initiate enforcement actions no later than five years from the date the claim accrued. In the underlying proceeding, the SEC initiated an enforcement action alleging violations of various securities laws from 1995 to 2009 and seeking civil monetary penalties, disgorgement, and an injunction barring the defendant from future violations. The district court held that the five-year limitations period under Section 2462 applied to the monetary penalties but not to disgorgement because disgorgement is not a penalty. The Tenth Circuit affirmed.

In holding that disgorgement operates as a penalty, the Supreme Court explained that (1) disgorgement is imposed to redress a wrong to the public, rather than a wrong to an individual; (2) disgorgement is imposed for punitive purposes, and often is not imposed for compensatory purposes; and (3) in many cases, disgorgement does not simply restore the status quo and instead leaves the defendant in a worse position than the defendant would have been in had it not violated the law. The Court held that the five-year limitations period under Section 2462 applies to disgorgements and requires that any claim for disgorgement in an SEC enforcement action be commenced within five years of the date the claim accrued.

At this time, it is entirely reasonable to interpret the Court's decision as equally applicable to enforcement proceedings initiated by FERC or the CFTC. However, because *Kokesh* arose in the context of an SEC action, FERC and CFTC enforcement staff may attempt to narrowly interpret the ruling as limited to SEC matters unless or until a court specifically holds that the *Kokesh* ruling applies to FERC and CFTC proceedings. If applicable to FERC and CFTC proceedings, the precedent may impact the manner in which agency staff conduct investigations and pursue resolution of cases. For example, FERC and CFTC staff may explore ways to streamline the procedures they follow in conducting investigations and discovery. They may also request that the company and/or individuals who are the subject of an investigation enter into a tolling agreement to allow the staff more time to complete their investigation—a request that practitioners before FERC and the CFTC have come to expect in protracted investigative proceedings.

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