

SEC Disgorgement Limits Should Apply To FERC And CFTC

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On June 5, 2017, the U.S. Supreme Court ruled that the five-year statute of limitations in 28 U.S.C. § 2462 applies to the disgorgement remedy in U.S. Securities and Exchange Commission enforcement actions.[1] This decision reverses the prior line of judicial precedent that held that the statute of limitations did not apply to orders requiring the disgorgement of ill-gotten gains.

The same principles limiting SEC disgorgement claims to the five-year period appear to apply with equal force to the disgorgement claims of the Federal Energy Regulatory Commission and the U.S. Commodity Futures Trading Commission. The statute of limitations in § 2462 generally covers all enforcement actions by federal agencies seeking a “penalty” unless another statute expressly provides a different limitations period.

The five-year period under § 2462 cuts off the right of the government to obtain penalties for wrongdoing that occurred more than five years before the government commences its action.[2] In *Kokesh*, the SEC brought an enforcement action in 2009 seeking fines and disgorgement of ill-gotten gains for alleged wrongdoing between 1995 and 2006.

After finding liability, the court concluded that the five-year statute of limitations in 28 U.S.C. § 2462 limited the liability for fines to misconduct occurring subsequent to 2004 (which amounted to \$2.4 million), but ordered disgorgement to cover the entire period of misconduct (over \$30 million) based on prior precedent that § 2462 does not apply to disgorgement because it is not a “penalty.”

The Supreme Court reversed this determination, finding that the limitation in § 2462 applied because disgorgement is a form of penalty within the meaning of the statute. It therefore concluded that only ill-gotten gains obtained within five years of the date on which the SEC commences its action are subject to disgorgement. The court found that disgorgement is a form of penalty because:

1. SEC enforcement actions redress wrongs to the public, they are not brought on behalf of individual victims;



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2. the disgorgement remedy is punitive because its objective is — even if also sometimes intended as restitution for those harmed — deterrence of wrongful acts by others and it can require a wrongdoer to pay to the government benefits received by others from the wrongs not just those the wrongdoer received; and
3. the proceeds from disgorgements do not always — and are not statutorily compelled to — compensate victims, but, rather, may be retained by the government or be fashioned by courts into various equitable relief.

Much of this logic appears to apply to disgorgement remedies sought by the CFTC and FERC as well. The CFTC's statutory arsenal of enforcement remedies also includes disgorgement,[3] and the five-year limitations period in § 2462 governs CFTC enforcement actions.[4]

All of the high court's principles for applying § 2462 to the SEC's power to obtain disgorgement apply with equal force to the CFTC's power. The CFTC's enforcement actions are brought to redress public wrongs, the objective of disgorgement in that context is deterrence, and the CFTC takes the position a wrongdoer's liability for disgorgement can reach to ill-gotten gains beyond those the wrongdoer personally received. Accordingly, in light of the *Kokesh*, prior cases holding that the CFTC's disgorgement remedy is not subject to the five-year limitation period might no longer be good law.[5]

With respect to FERC, both the Federal Power Act (FPA) and the Natural Gas Act (NGA) grant FERC significant civil penalty authority.

Neither statute expressly authorizes FERC to obtain or order disgorgement. But the agency has inferred and exercised such power based on the broad grant of authority to it in Section 309 of the FPA,[6] and its counterpart Section 16 of the NGA,[7] to “perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the relevant] chapter.”[8]

FERC's penalty guidelines thus provide that in addition to civil penalties, “[i]n the case of pecuniary gain as a result of the violation, the Commission [will] enter[] a disgorgement order for the full amount of the gain plus interest.”[9]

FERC has held that the five-year limitation period in § 2462 applies to its enforcement actions,[10] but not to its disgorgement remedy.[11] At least one court similarly has ruled that “no time limits apply to remedial actions filed pursuant to § 309 [i.e. disgorgement actions].”[12] However, the same factors for finding that the SEC's disgorgement remedy is a penalty would seem to apply to FERC's use of disgorgement as a remedy.

The Supreme Court's admonition in *Kokesh* that its ruling addresses only the SEC's disgorgement remedy does not preclude the application of the *Kokesh* principles to the similar disgorgement powers of other agencies if no other statute of limitations applies. The court's ruling in *Kokesh* thus would appear to cast substantial doubt on FERC's or the CFTC's ability to obtain disgorgement for violations that occur outside § 2462's five-year statutory limit.

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[1] *Kokesh v. Securities and Exchange Commission*, No. 16-529 (June 5, 2017), available at https://www.supremecourt.gov/opinions/16pdf/16-529_i426.pdf (“Kokesh”).

[2] *Gabelli v. Securities and Exchange Commission*, 133 S. Ct. 1216 (2013).

[3] 7 U.S.C. § 13a-1(d)(3)(A).

[4] See, e.g., *CFTC v. Tunney & Assocs.*, 2013 WL 4565690 at *2-4 (N.D. Ill. Aug. 21, 2013).

[5] See, e.g., *U.S. Commodity Futures Trading Comm'n v. Reisinger*, 2013 WL 3791691 at *8 (N.D. Ill. July 18, 2013).

[6] 16 U.S.C. § 825(h). See, e.g., *Coaltrain Energy LP et al.*, 155 FERC ¶ 61,204 at P 1 (2016) (“The Commission further directs Coaltrain, Mr. Peter Jones, and Mr. Sheehan to disgorge, jointly and severally, unjust profits, plus applicable interest, pursuant to section 309 of the FPA. ...”); *Barclays Bank Plc et al.*, 144 FERC ¶ 61,041 at P 147 (2013) (“We find that disgorgement of unjust profits stemming from Barclays' manipulative scheme is necessary and appropriate under section 309 of the FPA.”).

[7] 15 U.S.C. § 717o.

[8] 16 U.S.C. § 825(h).

[9] FERC Penalty Guidelines § 1B.1(a). While FERC's view is that its powers are “at zenith” when fashioning remedies, see Order No. 670 at P 72 n. 137 (quoting *Niagara Mohawk Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)), *Kokesh* undercuts this view with respect to time limits of the exercise of FERC's powers.

[10] See, e.g., Order No. 670 at PP 62-63 (noting that the Commission will adhere to the five-year statute of limitations when seeking penalties for market manipulation claims under section 4A of the NGA or section 222 of the FPA); Order No. 672 at P 487 (noting that the Commission will adhere to the five-year statute of limitations when seeking penalties for reliability violations under Section 215 of the FPA).

[11] See, e.g., *Barclays*, 144 FERC ¶ 61,041 at P 127 n. 365 (noting that “the Supreme Court recently held that the SEC's civil penalty provisions are subject to the general federal statute of limitations, leaving intact the lower court holding that disgorgement is not so limited.”) (citing *Gabelli*, 133 S. Ct. 1216); *Cal. ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178 at P 101 (2011) (stating that “[d]isgorgement of profits typically is not viewed as a punishment [i.e. not subject to § 2462] for purposes of the federal statute of limitations. ...”).

[12] *Pub. Utilities Comm'n of State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006).