

# Supreme Court will likely decide whether courts can order disgorgement in SEC enforcement proceedings

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The Supreme Court will hear arguments on March 3 in a case that will likely determine whether the SEC has statutory authority to seek disgorgement in enforcement actions, and whether the courts have authority to order it.

The SEC's authority to seek disgorgement was virtually unquestioned until the Supreme Court cast doubt on it during [oral arguments](#) in *Kokesh v. SEC*, in 2017. While evaluating whether SEC disgorgement was subject to a five-year statute of limitations, several justices expressed confusion over the SEC's disgorgement authority in the first place. Chief Justice Roberts concluded that the question about the statute of limitations arose in part because "the SEC devised this remedy or relied on this remedy without any support from Congress." Justice Kennedy questioned whether there was "specific statutory authority that makes it clear that the district court can entertain this [disgorgement] remedy."

The Supreme Court's resulting unanimous [decision](#) in *Kokesh* held that disgorgement in an SEC enforcement proceeding is in fact a "penalty" covered by the general five-year statute of limitations for civil penalty enforcement actions. But the court also made clear that "nothing in this opinion should be interpreted as an opinion on whether courts possess the authority to order disgorgement in SEC enforcement proceedings."

And just two years later, the Supreme Court [granted certiorari](#) in *Liu v. SEC*, which will likely decide the exact question it posed in *Kokesh*.

## ***Liu* Aims to Finish What *Kokesh* Started**

The SEC brought a securities enforcement action in May 2016 against Charles Liu and Xin Wang for an alleged fraudulent immigration scheme involving the EB-5 Immigrant Investor Program, which gives preference in obtaining visas to foreign nationals who invest in certain U.S. enterprises. The federal district court for the Central District of California granted summary judgment to the SEC on its claim that the defendants obtained money fraudulently in the offer or sale of securities. Among other remedies, the district court ordered the defendants to disgorge approximately \$26.7 million. On appeal to the U.S. Court of Appeals for the Ninth Circuit, the defendants argued that the district court lacked authority to order the disgorgement. The [Court of Appeals affirmed](#), rejecting the idea that the court should reconsider past precedent on disgorgement in light of *Kokesh*.

On appeal to the Supreme Court, the *Liu* defendants are [arguing](#) that Congress never specifically

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authorized the SEC to seek disgorgement in federal court enforcement cases. Rather, it only specifically authorized the SEC to seek disgorgement in administrative proceedings. They further argue that disgorgement is not permissible equitable relief in light of *Kokesh*, holding that disgorgement was a penalty for purposes of the five-year civil penalty statute of limitations, and equitable relief does not involve punishment.

The SEC [countered by arguing](#) that disgorgement does indeed qualify as equitable relief that is authorized by the general language of Section 21(d)(5) of the Securities Exchange Act of 1934, which states that in any action under the securities laws the SEC may seek and a federal court may grant “any equitable relief that may be appropriate or necessary for the benefit of investors.” The SEC also argues that disgorgement has previously been recognized as both an equitable remedy and a limited form of penalty.

### **The Ripple Effect of the SEC Disgorgement Controversy**

The Supreme Court’s ultimate decision in *Liu* has the potential to extend beyond the simple question of SEC disgorgement authority. Congress has already indicated that it might be willing to grant the specific disgorgement authority should the Supreme Court determine it is not currently statutorily authorized. The House of Representatives last fall passed H.R. 4344, which would give the SEC and the courts specific authority for disgorgement of unjust enrichment in securities enforcement actions. The Senate introduced S. 799 last March; it would clarify that the SEC “may seek disgorgement and restitution as a result of a violation of securities laws” and “establish the statute of limitations for disgorgement and equitable actions” brought by the SEC. (For further discussion of legislative fixes to *Kokesh*, [see here.](#))

Other federal agencies seek disgorgement or similar remedies under general equitable relief authorizations. Former Federal Trade Commission officials filed an [amicus brief](#) in *Liu* detailing the “profound impact” the resolution of the case could have on the FTC’s “ability to obtain compensatory redress for consumers.” They argued that the FTC’s ability to obtain compensation for the “return [of] ill-gotten gains to injured consumers” under the broad language in Section 13(b) of the FTC Act could be in jeopardy. The FTC and other agencies will certainly be watching to see whether their ability to seek ill-gotten gains gets caught in *Liu*’s line of fire — especially if the Supreme Court sets forth new standards for how specific Congress must be in authorizing specific enforcement remedies.