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Disgorgement in SEC Enforcement Actions After Liu

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Joseph Gallagher

October 14, 2020

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Outline

- Disgorgement: A Brief but Necessary History
- *Kokesh* and Administrative Overreach
- *Liu* Answers the Open Question from *Kokesh*
- Functional Impacts of *Liu*

Disgorgement:
A Brief But Necessary History

Disgorgement Defined

- It is “the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.” *Black’s Law Dictionary*.
- Disgorgement is “one of the cornerstones of the law of restitution and unjust enrichment.” *Restatement (Third) of Restitution and Unjust Enrichment* §3 cmt. *a* (Am. Law Inst. 2011).
- “[T]he unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called “disgorgement” or “accounting.” *Id.* §51(4)

Statutory Basis for SEC Disgorgement – the '34 Act

- In enforcement actions prosecuted through the SEC's administrative tribunals, it can seek civil penalties plus "**an order requiring accounting and disgorgement**." 15 U.S.C. §§ 77h-1(e), (g).
- In civil actions in federal courts, the SEC can seek **"[m]oney penalties**" and "**any equitable relief that may be appropriate or necessary for the benefit of investors**." 15 U.S.C. §§ 78u(d)(3), (5).
- The Supreme Court has stated that a statutory reference to "equitable relief" points to "the kinds of relief 'typically available in equity' in the days of 'the divided bench,' before law and equity merged." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 94-95 (2013).

Liu: Two views of history

Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts.

Opinion of the Court
(Sotomayor, J.)

Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.

Dissent
(Thomas, J.)

Disgorgement: Rooted in Equity

- Functionally resembles classic equitable remedies.

Restitution

Equity compels the return of victim's stolen goods

Accounting for Profits

A victim recovers profits taken in breach of a fiduciary relationship

Rescission

A tainted agreement is unwound to restore the parties to the *status quo ante*

Equitable Lien

Gives a victim a claim on misappropriated property, or on property improved via misappropriated funds

Disgorgement: Rooted in Equity

- Early US developments of what came to be known as disgorgement were in patent and copyright cases.

- Foundational Supreme Court case: *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), involving profits from a movie infringing on a copyrighted play.

- "[R]elief had been given according to the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim that which, *ex aequo et bono*, is theirs, and nothing beyond this." *Sheldon*, 309 U.S. at 399.

Disgorgement: SEC Remedy?

- Prior cases established that the victim of wrongdoing could recover what was taken, plus gains thereon, from wrongdoer.
- In the 1970s, federal appellate courts agreed for the first time that the SEC could invoke this remedy under the ‘34 Act as well.
- “The Supreme Court has upheld the power of the Government without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief. . . . Thus we hold that the SEC may seek other than injunctive relief in order to effectuate the purposes of the Act, so long as such relief is remedial relief and is not a penalty assessment. . . . It would severely defeat the purposes of the Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation.” *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307–08 (2d Cir. 1971)

Disgorgement: SEC Remedy?

- The Second Circuit identified this remedy as disgorgement the following year.
- “The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.” *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

Kokesh and Administrative Overreach

The Supreme Court takes on SEC Disgorgement

QUESTION PRESENTED

Whether the Securities and Exchange Commission's equitable claims for disgorgement are subject to the five-year statute of limitations in 28 U.S.C. 2462, which applies to claims for "any civil fine, penalty, or forfeiture."

SEC's Principal Brief, *Kokesh v. SEC*, March 2017

Material Facts in *Kokesh*

- In 2009, the SEC brought an enforcement action against Charles Kokesh for securities law violations from 1995-2006.
- A jury found him liable, and he was ordered to pay $2.4 million in penalties, $34.9 million in disgorgement (for conduct stretching back to 1995), and $18 million in pre-judgment interest.
- Under federal law, any action "for the enforcement of any civil fine, penalty, or forfeiture" is subject to a five-year statute of limitations. 28 U.S.C. § 2462.

The Court is Skeptical

JUSTICE GORSUCH: And sometimes the money goes to the victim and sometimes it doesn't. Just like here.

MS. GOLDENBERG: Well, as I say, that's in the government's discretion, and that is not like here. Here, it's --

JUSTICE GORSUCH: Well, here we don't know, because there's no statute governing it. We're just making it up.

MS. GOLDENBERG: Well, I wouldn't say that, Your Honor. There are almost 50 years of precedents on how this should work, and I think the way it worked is --

JUSTICE GORSUCH: Not in this Court.

Problem 1: The SEC sometimes keeps the money it disgorges.

SOURCE: *Kokesh* Oral Argument Transcript, at 52

The Court is Skeptical

CHIEF JUSTICE ROBERTS: So not only is it one thing in one context, but something else in the other context. Sometimes it's remedial and sometimes it's punitive in each context.

Problem 2: Since the SEC keeps the money, disgorgement seems punitive, not equitable.

SOURCE: *Kokesh* Oral Argument Transcript, at 47

The Court is Skeptical

JUSTICE ALITO: Are there any time -- are there any time limits, and if so, where do they come from?

MS. GOLDENBERG: The courts that have ruled that there's no statute of limitations for disgorgement have said that the district court can take into account, as part of this exercise of equitable discretion that I'm describing, the passage of time, and how much time has passed and -- in deciding whether to order disgorgement. And in deciding whether or not to --

JUSTICE ALITO: Well, I -- the courts say that, but where -- what is the basis for it? Is this by analogy to some traditional equitable remedy? Where -- where does that come from? Is it like laches? But laches, you say, doesn't apply to the government?

Problem 3: The SEC argues there is no limit on its ability to disgorge ill-gotten gains.

SOURCE: *Kokesh* Oral Argument Transcript, at 53

The Court Puts SEC Disgorgement in Jeopardy

- The Court rules in 2017 that SEC disgorgement is subject to the five-year statute of limitations because "it bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and is intended to deter, not to compensate." Opinion at 9.
- It explicitly reserved the question it wound up answering in *Liu*:

[3]Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to §2462's limitations period.

Liu Answers the

Open Question from *Kokesh*

The Impact of *Kokesh*

- After *Kokesh*, defendants argued in virtually every SEC enforcement action in federal court that SEC disgorgement was a penalty, not an equitable remedy, and was thus not allowed because it was not listed as a punishment under the ‘34 Act.

- This argument did not get much traction in light of *Kokesh*’s footnote 3, but that did not deter litigants.

Enter Charles Liu

- In 2016, the SEC sued Charles Liu, his wife, and several entities they were affiliated with for defrauding investors who participated in the EB-5 Immigrant Investor Program.
- The program allowed noncitizens to apply for permanent residency in the US by investing in approved commercial enterprises focused on economic growth.
- According to the SEC, Liu solicited foreign investment under this program for a cancer treatment center in California, and then took millions of dollars of those investment proceeds for his personal use.
- Liu was found liable under the securities laws, and was ordered to disgorge the "full amount" he raised from investors.

The Court's Ruling

- The Supreme Court granted certiorari in November 2019 to address the question it left open in *Kokesh*.
- It sided, interestingly enough, both with Mr. Liu and against the defense bar, and found that disgorgement was an equitable remedy so long as it was applied like one.

First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

The Court's Ruling

- The Court plainly did not want to remove a profits-based remedy from the SEC's toolbox, as such remedies were grounded in centuries of equity jurisprudence.
- At the same time, it recognized that the SEC often treated disgorgement as punitive instead of restorative, in no small part because it could keep disgorged assets instead of returning them to the victims.
- It thus vacated the judgment and remanded the case back to the Ninth Circuit for further proceedings.

Guardrails on SEC Disgorgement

The heart of the opinion is its “discuss[ion of] principles that may guide the lower courts’ assessment” of challenges to disgorgement:

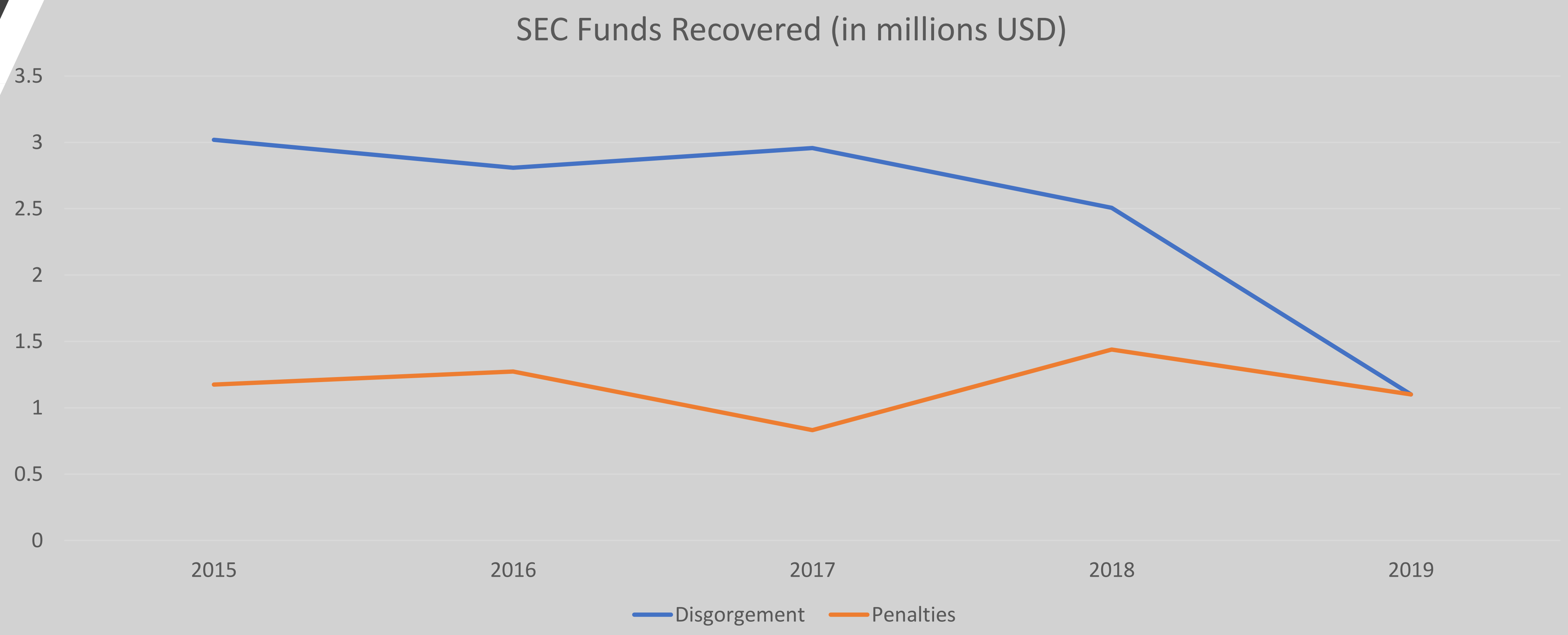
1. Any order ”directing any proceeds [of disgorgement] to the Treasury”—which may allow the SEC to keep some or all of the funds—must be “for the benefit of investors”
2. Whether disgorgement is appropriate for benefits that accrue to affiliates of a wrongdoer is a question of fact
3. Courts should deduct “legitimate expenses” from the disgorgement amount

Functional Impacts of *Liu*

Point 1: More Civil Penalties

- By statute, civil penalties are capped at $100,000 per violation (for a person), $500,000 per violation (for an entity), or at the ”gross amount of pecuniary gain” – in other words, penalties may equal disgorgement. *See* 15 U.S.C. § 78u(d)(3)(b).
- In each of 2015 and 2016, the SEC transferred more than ***half a billion dollars*** of penalties and unreturned disgorgement proceeds to the US Treasury. (SEC 2016 Annual Report, at 106)
- "During my time as Chairman, the Enforcement Division . . . has brought over 2,500 enforcement actions, obtained over $11 billion in disgorgement and penalties, and returned over $3 billion to harmed investors." – SEC Chairman Jay Clayton, Sept. 17, 2020.
- This leaves ***$8 billion*** for the SEC since May 2017.

Point 1: More Civil Penalties



Point 1: More Civil Penalties

The SEC has made clear that it will likely be seeking increased penalties to cover the shortfall in disgorgement revenue in light of *Liu*:

> Once again, we are dedicating resources to evaluating the impact of this 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.

Stephanie Avakian, Director, Division of Enforcement, "Protecting Everyday Investors and Preserving Market Integrity: The SEC's Division of Enforcement" (dated Sept. 17, 2020)

Point 2: Cost-Benefit Analysis

- Given the requirement that disgorgement be "for the benefit of investors," there will be increased pressure to return any disgorged funds to fraud victims.
- Thus, it will likely be harder for the SEC to justify seeking disgorgement in (i) "victimless" cases and (ii) cases where the administrative costs of actually disbursing money to victims outstrips the recovery.
- *Liu* leaves open the chance for lower courts to craft disgorgement orders even in those cases that could benefit investors.

Point 3: Joint and Several Liability

- *Liu* heightens the burden on the SEC to prove, via a fact-intensive showing, that a wrongdoer's affiliates may be held liable under a theory of joint and several liability.
- It also creates an incentive for the SEC to pursue family members, related entities, and affiliates as co-conspirators that can be subject to penalties, not just as relief defendants.
- Will be a challenge for courts to set the appropriate standards for reviewing affiliate claims.

Point 4: Role of Plaintiffs’ Bar

- Liu contemplates disgorged funds being returned to victims.
- This sets up a three-way standoff between the government, the primary wrongdoer, and the victims over who gets to keep how much of the disgorged money. This may discourage private securities suits if the SEC has already collected on its judgment, since the expectation would be that recoverable damages should have been distributed by the SEC to begin with.
- Conversely, plaintiffs’ lawyers may see an opportunity to take up the “uneconomical” cases that the SEC may overlook, or seek to intervene in SEC enforcement actions. Open question whether private litigants could sue the SEC for not distributing disgorged funds.

Point 5: Role of Defense Bar

- Defendants have already advanced several types of theories regarding *Liu*.
  - Where defendant claimed she was a “passive recipient of profits” and did not enjoy “fruits of the scheme,” SEC must show that the amount they seek disgorged was actually a “benefit” to the defendant. (*DeMaison*)
  - Benefit must be tied to a “specific securities law violation,” and “entirely fraudulent enterprise” theory not available retrospectively. (*Goulding*)
  - Whether a FINRA bar and disgorgement order is impermissibly punitive (*Springsteen-Abbot*)
- SEC has generally taken the “nothing to see here” position.

Point 5: Role of Defense Bar

Likely strongest arguments to make going forward:

- More than before, SEC has burden to tie every dollar disgorged to an actual benefit defendant received from activity that violated the securities laws.
- Imposing affiliate liability on primary wrongdoer will often lack factual support.
- Penalties that are just designed to make up SEC revenue shortfalls, not actually punish proportional to the alleged wrongdoing, are improper.
- “Double dipping” if victims already made whole through separate litigation or settlement.

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Compendium of Exhibits

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Exhibit 2	*Liu et al. v. SEC* Supreme Court Decision
Exhibit 3	*Kokesh v. SEC* Supreme Court Decision
Exhibit 4	*"Investor-Focused, Nimble and Vigorous Enforcement at the SEC"* Speech by Chairman Jay Clayton
Exhibit 5	*SEC Agency Financial Report – Fiscal Year 2016*
Exhibit 6	*SEC Division of Enforcement – 2019 Annual Report*
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EXHIBIT 1

In '*Liu v. SEC*', Disgorgement Survives, But With Conditions

By **Joseph Gallagher**

Originally published in the New York Law Journal on July 28, 2020.

On June 22, 2020, the Supreme Court saved the disgorgement remedy it called into question in Kokesh v. SEC*, but put the brakes on the SEC's more zealous applications that risked transforming it into an unauthorized penalty.*

The June 22, 2020 decision in *Liu v. SEC* saw the Supreme Court answer a question that has been front-and-center for securities litigators since 2017: Can federal courts order disgorgement in SEC enforcement proceedings despite lacking explicit statutory authority to do so? In an 8-1 opinion, the Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" the securities laws. 591 U.S. __, at *1. In other words, disgorgement is equitable, so long as it is done the right way. Otherwise, it would constitute a penalty, and fall outside the scope of remedies Congress authorized the SEC to seek. This has meaningful repercussions for securities defendants facing the prospect of multi-million-dollar disgorgement orders.

For decades, this distinction between a penalty and an equitable remedy did not particularly vex practitioners. Congress authorized the SEC to enforce the securities laws both through administrative proceedings and civil actions brought in federal court. In administrative proceedings, the SEC can seek civil penalties and the disgorgement of a violator's ill-gotten gains. *See* 15 U.S.C. § 78u-2(a), (e). In civil actions, it can pursue "civil penalt[ies]" and "any equitable relief that may be appropriate and necessary for the benefit of investors." *See* 15 U.S.C. § 78u(d)(3), (5). Since the 1970s, federal courts interpreted "equitable relief" to include disgorgement, which has its roots in the classical equitable remedy of restitution and was designed to "depriv[e]" a wrongdoer of "the gains of . . . wrongful conduct." *See Liu*, at *4 (quoting SEC *v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1307-08 (2d Cir. 1971)).

In 2017, however, the Supreme Court heard *Kokesh v. SEC*, 137 S. Ct. 1365, which asked whether disgorgement was bound by a five-year statute of limitations that binds other penalties the U.S. government may impose. At oral argument, several justices were clearly troubled by the way lower courts and the SEC had constructed the law of disgorgement without guidance from Congress or the Supreme Court. They appeared particularly skeptical of the SEC's practice of paying disgorged sums into the U.S. Treasury, as the agency had no obligation to return those funds to fraud victims—which is the heart of equitable restitution. Ultimately, the Court held that disgorgement in SEC enforcement actions "bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." 137 S. Ct. at 1644. While it then held that "[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty" for purposes of the federal statute of limitations provision, *id*. at 1645, it expressly declined to decide whether it was a penalty for all purposes. This, in effect, invited the securities defense bar to argue in every case that came after *Kokesh* that the SEC was not entitled to disgorgement because the remedy had been unmoored from its equitable foundations.

Enter Charles Liu. In 2016, the SEC brought an enforcement action against Mr. Liu, his wife, and several related entities for defrauding investors who participated in the EB-5 Immigrant Investor Program.

This program allows "noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises" focused on economic growth. *Liu*, at *4. Liu distributed an offering memorandum under the EB-5 program seeking investors to help build a cancer treatment center. According to the SEC's allegations, however, Liu misappropriated millions of dollars from the funds raised, diverted them to personal bank accounts and used them to pay impermissibly high salaries. The district court in California entered judgment for the SEC, including for disgorgement of the "full amount [Liu] raised from investors," less sums remaining in the corporate accounts, as a "reasonable approximation of the profits causally connected" to the violation. It also held each of the defendants jointly and severally liable for the award. *Id*. at 5. The Ninth Circuit affirmed, and the Supreme Court granted certiorari on November 1, 2019 to address the question it had left open in *Kokesh*.

By an 8-1 majority opinion authored by Justice Sotomayor, the Court held that disgorgement was an equitable remedy so long as it was applied like one. In doing so, it relied on two fundamental principles of equity jurisprudence: "First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." *Id.* at *6. Applying these principles, the Court vacated the disgorgement award and remanded to the district court for another try.

The Court's guidance for remand is the real meat of the opinion. In over six pages of well-reasoned analysis, the court erected three guardrails to ensure that disgorgement awards do not veer into penalty territory.

First, since the securities laws require equitable remedies to be "for the benefit of investors," the lower courts must evaluate whether a disgorgement award—especially one that pays the disgorged funds into the U.S. Treasury to fund SEC operations—satisfies this standard. In general, "the equitable nature of the profits remedy . . . requires the SEC to return a defendant's gains to wronged investors for their benefit." *Id.* at *15.

Second, "impos[ing] disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability . . . could transform any equitable profits-focused remedy into a penalty." *Id.* at *17. Assessing whether a collective remedy is appropriate in a given case is a factual inquiry left to the lower courts. *Id.* at *18.

Third, "courts must deduct legitimate expenses before ordering disgorgement under" the securities laws, such as for items—in this case, cancer treatment equipment—that "arguably have value independent of fueling a fraudulent scheme." *Id.* at *18-19.

What do these guardrails mean in practice? Several things seem evident at this early juncture.

It will likely be harder for the SEC to obtain disgorgement in so-called "victimless" cases, where the wrongdoer reaped a benefit but investors were not harmed by the misconduct. Any disgorgement award in such cases would likely violate the requirement that it be "for the benefit of investors."

Since courts have now been cautioned against freely imposing collective or joint-and-several liability, the SEC will likely increase its efforts to show that affiliates or family members of alleged wrongdoers were co-conspirators (at the very least), or held funds as nominees of defendants. If these issues are litigated correctly, they require very fact-intensive investigations tying either third parties to the wrongdoing itself or the defendant to the funds those third parties are holding. The challenge for district and circuit courts will be to define the standards of proof required to reach assets under each theory.

Liu also sets up a three-way standoff between the government, defendants, and victims over the disposition of disgorged funds. Typically, both the SEC and the victims sue a securities defendant to recover their losses. If the SEC gets to judgment first, victims would still have a damages case if the disgorged funds were not returned and instead found their way to the U.S. Treasury. Now, however, the Court was clear that disgorged funds, wherever possible, must be returned to victims. Defendants now have a better chance of mooting claims brought by victims in parallel proceedings since the SEC should be returning all disgorged funds and any additional civil award levied against a defendant in favor of the victim would be double-dipping. *Liu* thus may have the practical impact of deterring piggy-back investor lawsuits for violations of the securities laws.

Conversely, victims may be forced to seek to intervene in SEC proceedings if they are to have a say in the disposition of disgorged funds. If investor lawsuits would be prohibitively expensive because most of the ill-gotten gains will be returned to investors via disgorgement, this may be investors' lone opportunity to contest how those illicitly obtained funds are to be distributed.

Finally, civil penalties may become much more important to the SEC. These are capped by statute at $100,000 per violation for a natural person, $500,000 per violation for entities, or the "gross amount of pecuniary gain to [a] defendant." 15 U.S.C. § 78u(d)(3)(B). Since *Liu* limits the SEC's ability to use disgorged assets to, for example, pay whistleblower awards or fund the agency's operations, *Liu,* at *15, but puts no limits on the use of civil penalties, the SEC may face difficult budgetary decisions on which activities to prioritize and fund.

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EXHIBIT 2

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LIU ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–1501. Argued March 3, 2020—Decided June 22, 2020

To punish securities fraud, the Securities and Exchange Commission is authorized to seek "equitable relief" in civil proceedings, 15 U. S. C. §78u(d)(5). In *Kokesh* v. *SEC*, 581 U. S. ___, this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action constitutes a "penalty" for purposes of the applicable statute of limitations. The Court did not, however, address whether disgorgement can qualify as "equitable relief" under §78u(d)(5), given that equity historically excludes punitive sanctions.

Petitioners Charles Liu and Xin Wang solicited foreign nationals to invest in the construction of a cancer-treatment center, but, an SEC investigation revealed, misappropriated much of the funds in violation of the terms of a private offering memorandum. The SEC brought a civil action against petitioners, seeking, as relevant here, disgorgement equal to the full amount petitioners had raised from investors. Petitioners argued that the disgorgement remedy failed to account for their legitimate business expenses, but the District Court disagreed and ordered petitioners jointly and severally liable for the full amount. The Ninth Circuit affirmed.

Held: A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). Pp. 5–20.

(a) In interpreting statutes that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256. Relevant here are two principles of equity jurisprudence. Equity practice has long authorized courts to strip wrongdoers of their ill-gotten gains. And to avoid transforming that remedy into a punitive sanction, courts restricted it to an individual wrongdoer's net profits to be awarded for victims. Pp. 5–14.

(1) Whether it is called restitution, an accounting, or disgorgement, the equitable remedy that deprives wrongdoers of their net profits from unlawful activity reflects both the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207, and the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged," *Tilghman* v. *Proctor,* 125 U. S. 136, 145–146. The remedy has been a mainstay of equity courts, and is not limited to cases involving a breach of trust or fiduciary duty, see *Root,* 105 U. S., at 214. Pp. 6–9.

(2) To avoid transforming a profits award into a penalty, equity courts restricted the remedy in various ways. A constructive trust was often imposed on wrongful gains for wronged victims. See, *e.g.*, *Burdell* v. *Denig,* 92 U. S. 716, 720. Courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See, *e.g.*, *Ambler* v. *Whipple*, 20 Wall. 546, 559. Finally, courts limited awards to the net profits from wrongdoing after deducting legitimate expenses. See, *e.g.*, *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. Pp. 9–12.

(3) Congress incorporated these longstanding equitable principles into §78u(d)(5), but courts have occasionally awarded disgorgement in ways that test the bounds of equity practice. Petitioners claim that disgorgement is necessarily a penalty under *Kokesh*, and thus not available at equity. But *Kokesh* expressly declined to reach that question. The Government contends that the SEC's interpretation has Congress' tacit support. But Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. Pp. 12–14.

(b) Petitioners briefly claim that their disgorgement award crosses the bounds of traditional equity practice by failing to return funds to victims, imposing joint-and-several liability, and declining to deduct business expenses from the award. Because the parties did not fully brief these narrower questions, the Court does not decide them here. But certain principles may guide the lower courts' assessment of these arguments on remand. Pp. 14–20.

(1) Section 78u(d)(5) provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies its command that any remedy be "appropriate or necessary for the benefit of investors," and the equitable nature of the profits remedy gen-

erally requires the SEC to return a defendant's gains to wronged investors. The parties, however, do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would be for the benefit of investors and consistent with equitable principles. Pp. 14–17.

(2) Imposing disgorgement liability on a wrongdoer for benefits that accrue to his affiliates through joint-and-several liability runs against the rule in favor of holding defendants individually liable. See *Belknap* v. *Schild*, 161 U. S. 10, 25–26. The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. On remand, the Ninth Circuit may determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required. Pp. 17–18.

(3) Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804. When the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions." *Root*, 105 U. S., at 203. Accordingly, courts must deduct legitimate expenses before awarding disgorgement under §78u(d)(5). The District Court below did not ascertain whether any of petitioners' expenses were legitimate. On remand, the lower courts should examine whether including such expenses in a profits-based remedy is consistent with the equitable principles underlying §78u(d)(5). Pp. 18–20.

754 Fed. Appx. 505, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Kokesh* v. *SEC*, 581 U. S. ___ (2017), this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action imposes a "penalty" for the purposes of 28 U. S. C. §2462, the applicable statute of limitations. In so deciding, the Court reserved an antecedent question: whether, and to what extent, the SEC may seek "disgorgement" in the first instance through its power to award "equitable relief" under 15 U. S. C. §78u(d)(5), a power that historically excludes punitive sanctions. The Court holds today that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). The judgment is vacated, and the case is remanded for the courts below to ensure the award was so limited.

I

A

Congress authorized the SEC to enforce the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. §77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. §78a *et seq*., and to punish securities fraud through administrative and civil proceedings. In administrative proceedings, the SEC can seek limited civil penalties and "disgorgement." See §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"); see also §77h–1(g) ("Authority to impose money penalties"). In civil actions, the SEC can seek civil penalties and "equitable relief." See, *e.g.*, §78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors"); see also §78u(d)(3) ("Money penalties in civil actions" (quotation modified)).

Congress did not define what falls under the umbrella of "equitable relief." Thus, courts have had to consider which remedies the SEC may impose as part of its §78u(d)(5) powers.

Starting with *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (CA2 1971), courts determined that the SEC had authority to obtain what it called "restitution," and what in substance amounted to "profits" that "merely depriv[e]" a defendant of "the gains of . . . wrongful conduct." *Id.*, at 1307–1308. Over the years, the SEC has continued to request this remedy, later referred to as "disgorgement,"[1] and

[1] Courts have noted the relatively recent vintage of the term "disgorgement." See, *e.g.*, *SEC* v. *Cavanaugh*, 445 F. 3d 105, 116, n. 24 (CA2 2006). The dissent contends that this recency in terminology alone removes disgorgement from the class of traditional equitable remedies, *post*, at 4 (opinion of THOMAS, J.), despite seeming to recognize disgorgement's parallels to restitution-based awards well within that class, *post*, at 4–5. It is no surprise that the dissent notes such parallels, given this Court's acknowledgment that "disgorgement of improper profits" is "a remedy only for restitution" that is "traditionally considered . . . equitable." *Tull* v. *United States*, 481 U. S. 412, 424 (1987); see also *infra*, at 7.

courts have continued to award it. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 95 (CA2 1978) (explaining that, when a court awards "[d]isgorgement of profits in an action brought by the SEC," it is "exercising the chancellor's discretion to prevent unjust enrichment"); see also *SEC* v. *Blatt*, 583 F. 2d 1325, 1335 (CA5 1978); *SEC* v. *Washington Cty. Util. Dist.*, 676 F. 2d 218, 227 (CA6 1982).

In *Kokesh*, this Court determined that disgorgement constituted a "penalty" for the purposes of 28 U. S. C. §2462, which establishes a 5-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." The Court reached this conclusion based on several considerations, namely, that disgorgement is imposed as a consequence of violating public laws, it is assessed in part for punitive purposes, and in many cases, the award is not compensatory. 581 U. S., at ___–___ (slip op., at 7–9). But the Court did not address whether a §2462 penalty can nevertheless qualify as "equitable relief" under §78u(d)(5), given that equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 15 Wall. 146, 149 (1873). The Court cautioned, moreover, that its decision should not be interpreted "as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). This question is now squarely before the Court.

The dissent also observes the solid equitable roots of an accounting for profits, *post*, at 3; accord, *infra*, at 6 (discussing the equitable origins of the accounting remedy), a remedy closely resembling disgorgement, see *infra*, at 8–9. In any event, casting aside a form of relief solely "based on the particular label affixed to [it] would 'elevate form over substance,'" *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 214 (2004), leaving unresolved the question before us: whether the underlying profits-based award conforms to equity practice.

B

The SEC action and disgorgement award at issue here arise from a scheme to defraud foreign nationals. Petitioners Charles Liu and his wife, Xin (Lisa) Wang, solicited nearly $27 million from foreign investors under the EB–5 Immigrant Investor Program (EB–5 Program). 754 Fed. Appx. 505, 506 (CA9 2018) (case below). The EB–5 Program, administered by the U. S. Citizenship and Immigration Services, permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises that are based on "proposals for promoting economic growth." See USCIS, EB–5 Immigrant Investor Program, https://www.uscis.gov/eb-5. Investments in EB–5 projects are subject to the federal securities laws.

Liu sent a private offering memorandum to prospective investors, pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center. The memorandum specified that only amounts collected from a small administrative fee would fund "'legal, accounting and administration expenses.'" 754 Fed. Appx., at 507. An SEC investigation revealed, however, that Liu spent nearly $20 million of investor money on ostensible marketing expenses and salaries, an amount far more than what the offering memorandum permitted and far in excess of the administrative fees collected. 262 F. Supp. 3d 957, 960–964 (CD Cal. 2017). The investigation also revealed that Liu diverted a sizable portion of those funds to personal accounts and to a company under Wang's control. *Id.*, at 961, 964. Only a fraction of the funds were put toward a lease, property improvements, and a proton-therapy machine for cancer treatment. *Id.*, at 964–965.

The SEC brought a civil action against petitioners, alleging that they violated the terms of the offering documents by misappropriating millions of dollars. The District Court found for the SEC, granting an injunction barring petitioners from participating in the EB–5 Program and imposing a civil penalty at the highest tier authorized. *Id.*, at 975, 976. It also ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project. *Id.*, at 975–976.

Petitioners objected that the disgorgement award failed to account for their business expenses. The District Court disagreed, concluding that the sum was a "reasonable approximation of the profits causally connected to [their] violation." *Ibid.* The court ordered petitioners jointly and severally liable for the full amount that the SEC sought. App. to Pet. for Cert. 62a.

The Ninth Circuit affirmed. It acknowledged that *Kokesh* "expressly refused to reach" the issue whether the District Court had the authority to order disgorgement. 754 Fed. Appx., at 509. The court relied on Circuit precedent to conclude that the "proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors." *Ibid.*; see also *SEC* v. *JT Wallenbrock & Assocs.*, 440 F. 3d 1109, 1113, 1114 (CA9 2006) (reasoning that it would be "unjust to permit the defendants to offset . . . the expenses of running the very business they created to defraud . . . investors").

We granted certiorari to determine whether §78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant's net profits from wrongdoing. 589 U. S. ___ (2019).

II

Our task is a familiar one. In interpreting statutes like §78u(d)(5) that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993); see also *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 439 (2011);

Montanile v. *Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U. S. 136, 142 (2016). The "basic contours of the term are well known" and can be discerned by consulting works on equity jurisprudence. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 217 (2002).

These works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

A

Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names. Compare, *e.g.*, 1 D. Dobbs, Law of Remedies §4.3(5), p. 611 (1993) ("Accounting holds the defendant liable for his profits"), with *id.*, §4.1(1), at 555 (referring to "restitution" as the relief that "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain"); see also Restatement (Third) of Restitution and Unjust Enrichment §51, Comment *a*, p. 204 (2010) (Restatement (Third)) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.' Other cases refer to an 'accounting' or an 'accounting for profits'"); 1 J. Pomeroy, Equity Jurisprudence §101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy for the violation of strictly legal primary rights).

No matter the label, this "profit-based measure of unjust enrichment," Restatement (Third) §51, Comment *a*, at 204, reflected a foundational principle: "[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207 (1882). At the same time courts recognized that the wrongdoer should not profit "by his own wrong," they also recognized the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged." *Tilghman* v. *Proctor*, 125 U. S. 136, 145–146 (1888).

Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts. In *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that encompassed a "comprehensiv[e]" grant of "equitable jurisdiction." *Id.*, at 398. "[O]nce [a District Court's] equity jurisdiction has been invoked" under that provision, the Court concluded, "a decree compelling one to disgorge profits . . . may properly be entered." *Id.*, at 398–399.

Subsequent cases confirm the "'protean character' of the profits-recovery remedy." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 668, n. 1 (2014). In *Tull* v. *United States*, 481 U. S. 412 (1987), the Court described "disgorgement of improper profits" as "traditionally considered an equitable remedy." *Id.*, at 424. While the Court acknowledged that disgorgement was a "limited form of penalty" insofar as it takes money out of the wrongdoer's hands, it nevertheless compared disgorgement to restitution that simply "'restor[es] the status quo,'" thus situating the remedy squarely within the heartland of equity. *Ibid.*[2]

[2] The dissent acknowledges that this Court has "referred to disgorgement as an equitable remedy in some of its prior decisions." *Post*, at 6 (citing *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 352 (1998)). While the dissent attempts to discount those cases for having "merely referred to the term" only "in passing," *post*, at 6, those cases expressly "characterized as equitable . . . actions for disgorgement of improper profits" in analyzing whether certain remedies were traditionally available in equity, *Feltner*, 523 U. S., at 352 (citing *Teamsters* v. *Terry*, 494 U. S. 558, 570 (1990) ("characteriz[ing] damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper

In *Great-West*, the Court noted that an "accounting for profits" was historically a "form of equitable restitution." 534 U. S., at 214, n. 2. And in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), a "'basically equitable'" original jurisdiction proceeding, the Court ordered disgorgement of Nebraska's gains from exceeding its allocation under an interstate water compact. *Id.*, at 453, 475.

Most recently, in *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 580 U. S. ___ (2017), the Court canvassed pre-1938 patent cases invoking equity jurisdiction. It noted that many cases sought an "accounting," which it described as an equitable remedy requiring disgorgement of ill-gotten profits. *Id.*, at ___ (slip op., at 11). This Court's "transsubstantive guidance on broad and fundamental" equitable principles, *Romag Fasteners, Inc.* v. *Fossil Group, Inc.*, 590 U. S. ___, ___ (2020) (slip op., at 5), thus reflects the teachings of equity treatises that identify a defendant's net profits as a remedy for wrongdoing.

Contrary to petitioners' argument, equity courts did not limit this remedy to cases involving a breach of trust or of fiduciary duty. Brief for Petitioners 28–29. As petitioners acknowledge, courts authorized profits-based relief in patent-infringement actions where no such trust or special relationship existed. *Id.*, at 29; see also *Root*, 105 U. S., at 214 ("[I]t is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement").

Petitioners attempt to distinguish these patent cases by suggesting that an "accounting" was appropriate only because Congress explicitly conferred that remedy by statute in 1870. Brief for Petitioners 29 (citing the Act of July 8, 1870, §55, 16 Stat. 206). But patent law had not previously deviated from the general principles outlined above: This

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profits' "); *Tull*, 481 U. S., at 424).

Court had developed the rule that a plaintiff may "recover the amount of . . . profits that the defendants have made by the use of his invention" through "a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction . . . in cases arising under the patent laws." *Tilghman*, 125 U. S., at 144. The 1836 statute, in turn, incorporated the substance of an earlier statute from 1819 which granted courts the ability to "proceed according to the course and principles of courts of equity" to "prevent the violation of patent-rights." *Root*, 105 U. S., at 193. Thus, as these cases demonstrate, equity courts habitually awarded profits-based remedies in patent cases well before Congress explicitly authorized that form of relief.

B

While equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers. See *Marshall*, 15 Wall., at 149.

For one, the profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, "into a trustee, as to those profits, for the owner of the patent which he infringes." *Burdell* v. *Denig,* 92 U. S. 716, 720 (1876). In "converting the infringer into a trustee for the patentee as regards the profits thus made," the chancellor "estimat[es] the compensation due from the infringer to the patentee." *Packet Co.* v. *Sickles*, 19 Wall. 611, 617–618 (1874); see also *Clews* v. *Jamieson*, 182 U. S. 461, 480 (1901) (describing an accounting as involving a "'distribution of the trust moneys among all the beneficiaries who are entitled to share therein'" in an action against the governing committee of a stock exchange).

Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See *Ambler* v. *Whipple*, 20 Wall. 546, 559 (1874) (ordering an accounting against a partner who had "knowingly connected himself with and aided in . . . fraud"). In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878), for example, a city engaged contractors to install pavement in a manner that infringed a third party's patent. The patent holder brought a suit in equity to recover profits from both the city and its contractors. The Court held that only the contractors (the only parties to make a profit) were responsible, even though the parties answered jointly. *Id.*, at 140; see also *ibid.* (rejecting liability for an individual officer who merely acted as an agent of the defendant and received a salary for his work). The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits. See, *e.g.*, *Belknap* v. *Schild*, 161 U. S. 10, 25–26 (1896) ("The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those which have accrued to another, and in which they have no participation"); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894) (reversing profits award that was based not on what defendant had made from infringement but on what third persons had made from the use of the invention); *Jennings* v. *Carson*, 4 Cranch 2, 21 (1807) (holding that an order requiring restitution could not apply to "those who were not in possession of the thing to be restored" and "had no power over it") (citing *Penhallow* v. *Doane's Administrators*, 3 Dall. 54 (1795) (reversing a restitution award in admiralty that ordered joint damages in excess of what each defendant received)).

Finally, courts limited awards to the net profits from wrongdoing, that is, "the gain made upon any business or investment, when both the receipts and payments are taken into the account." *Rubber Co.* v. *Goodyear*, 9 Wall.

788, 804 (1870); see also *Livingston* v. *Woodworth*, 15 How. 546, 559–560 (1854) (restricting an accounting remedy "to the actual gains and profits . . . during the time" the infringing machine "was in operation and during no other period" to avoid "convert[ing] a court of equity into an instrument for the punishment of simple torts"); *Seymour* v. *McCormick*, 16 How. 480, 490 (1854) (rejecting a blanket rule that infringing one component of a machine warranted a remedy measured by the full amounts of the profits earned from the machine); *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872) (vacating an accounting that exceeded the profits from infringement alone); *Wooden-Ware Co.* v. *United States,* 106 U. S. 432, 434–435 (1882) (explaining that an innocent trespasser is entitled to deduct labor costs from the gains obtained by wrongfully harvesting lumber).

The Court has carved out an exception when the "entire profit of a business or undertaking" results from the wrongful activity. *Root*, 105 U. S., at 203. In such cases, the Court has explained, the defendant "will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." *Ibid.* In *Goodyear*, for example, the Court affirmed an accounting order that refused to deduct expenses under this rule. The Court there found that materials for which expenses were claimed were bought for the purposes of the infringement and "extraordinary salaries" appeared merely to be "dividends of profit under another name." 9 Wall.*,* at 803; see also *Callaghan* v. *Myers*, 128 U. S. 617, 663–664 (1888) (declining to deduct a defendant's personal and living expenses from his profits from copyright violations, but distinguishing the expenses from salaries of officers in a corporation).

Setting aside that circumstance, however, courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses. Such remedies, when assessed against only culpable actors and for victims, fall comfortably within "those categories of relief that were *typically* available in equity." *Mertens*, 508 U. S., at 256.

C

By incorporating these longstanding equitable principles into §78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing. To be sure, the SEC originally endeavored to conform its disgorgement remedy to the common-law limitations in §78u(d)(5). Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud.[3] The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices.

Petitioners go further. They claim that this Court effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity. Brief for Petitioners 19–20, 22–26. Not so. *Kokesh* expressly declined to pass on the question. 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). To be sure, the *Kokesh* Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability

[3] See, *e.g.*, *SEC* v. *Clark*, 915 F. 2d 439, 441, 454 (CA9 1990) (requiring defendant to disgorge the profits that his stockbroker made from unlawful trades); *SEC* v. *Brown*, 658 F. 3d 858, 860–861 (CA8 2011) (*per curiam*) (ordering joint-and-several disgorgement of funds collected from investors and concluding that "'the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses'"); *SEC* v. *Contorinis*, 743 F. 3d 296, 304–306 (CA2 2014) (requiring defendant to disgorge benefits conferred on close associates).

to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.

The Government, for its part, contends that the SEC's interpretation of the equitable disgorgement remedy has Congress' tacit support, even if it exceeds the bounds of equity practice. Brief for Respondent 13–21. It points to the fact that Congress has enacted a number of other statutes referring to "disgorgement."

That argument attaches undue significance to Congress' use of the term. It is true that Congress has authorized the SEC to seek "disgorgement" in administrative actions. 15 U. S. C. §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"). But it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings. After all, agencies are unlike federal courts where, "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U. S., at 398.

Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. The Government argues that under the prior-construction principle, Congress should be presumed to have been aware of the scope of "disgorgement" as interpreted by lower courts and as having incorporated the (purportedly) prevailing meaning of the term into its subsequent enactments. Brief for Respondent 24. But "that canon has no application" where, among other things, the scope of disgorgement was "far from 'settled.'" *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 330 (2015).

At bottom, even if Congress employed "disgorgement" as a shorthand to cross-reference the relief permitted by §78u(d)(5), it did not silently rewrite the scope of what the

SEC could recover in a way that would contravene limitations embedded in the statute. After all, such "statutory reference[s]" to a remedy grounded in equity "must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Great-West*, 534 U. S., at 211, n. 1. Accordingly, Congress' own use of the term "disgorgement" in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity.

III

Applying the principles discussed above to the facts of this case, petitioners briefly argue that their disgorgement award is unlawful because it crosses the bounds of traditional equity practice in three ways: It fails to return funds to victims, it imposes joint-and-several liability, and it declines to deduct business expenses from the award. Because the parties focused on the broad question whether any form of disgorgement may be ordered and did not fully brief these narrower questions, we do not decide them here. We nevertheless discuss principles that may guide the lower courts' assessment of these arguments on remand.

A

Section 78u(d)(5) restricts equitable relief to that which "may be appropriate or necessary for the benefit of investors." The SEC, however, does not always return the entirety of disgorgement proceeds to investors, instead depositing a portion of its collections in a fund in the Treasury. See SEC, Division of Enforcement, 2019 Ann. Rep. 16–17, https://www.sec.gov/files/enforcement-annual-report-2019.pdf. Congress established that fund in the Dodd-Frank Wall Street Reform and Consumer Protection Act for disgorgement awards that are not deposited in "disgorgement fund[s]" or otherwise "distributed to victims." 124

Stat. 1844. The statute provides that these sums may be used to pay whistleblowers reporting securities fraud and to fund the activities of the Inspector General. *Ibid.* Here, the SEC has not returned the bulk of funds to victims, largely, it contends, because the Government has been unable to collect them.[4]

The statute provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies the statute's command that any remedy be "appropriate or necessary for the benefit of investors." The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit. After all, the Government has pointed to no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being disbursed to known victims. Cf. *Root*, 105 U. S., at 214–215 (comparing the accounting remedy to a breach-of-trust action, where a court would require the defendant to "refund the amount of profit which they have actually realized").

The Government maintains, however, that the primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains, not to return the funds to victims as a kind of restitution. See, *e.g.*, SEC, Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002, p. 3, n. 2 (2003) (taking the position that disgorgement is not intended to make investors whole, but rather to deprive wrongdoers of ill-gotten gains); see also 6 T. Hazen, Law of Securities Regulation §16.18, p. 8 (rev. 7th ed. 2016) (concluding that the remedial nature of the disgorgement remedy does not mean that it is essentially compensatory and

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[4] According to the Government, petitioners "transferred the bulk of their misappropriated funds to China, defied the district court's order to repatriate those funds, and fled the United States." Brief for Respondent 36.

concluding that the "primary function of the remedy is to deny the wrongdoer the fruits of ill-gotten gains"). Under the Government's theory, the very fact that it conducted an enforcement action satisfies the requirement that it is "appropriate or necessary for the benefit of investors."

But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of §78u(d)(5). Indeed, this Court concluded similarly in *Mertens* when analyzing statutory language accompanying the term "equitable remedy." 508 U. S., at 253 (interpreting the term "appropriate equitable relief"). There, the Court found that the additional statutory language must be given effect since the section "does not, after all, authorize . . . 'equitable relief' *at large*." *Ibid.* As in *Mertens*, the phrase "appropriate or necessary for the benefit of investors" must mean something more than depriving a wrongdoer of his net profits alone, else the Court would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U. S. ___, ___ (2019) (slip op., at 9) (internal quotation marks omitted).

The Government additionally suggests that the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors.[5] Brief for Respondent 37. It is an open question whether, and to what extent, that practice nevertheless satisfies the SEC's obligation to award relief

[5] We express no view as to whether the SEC has offered adequate proof of failed attempts to return funds to investors here. To the extent that feasibility is relevant at all to equitable principles, we observe that lower courts are well equipped to evaluate the feasibility of returning funds to victims of fraud. See, *e.g.*, *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (CD Cal. 1983) (appointing a magistrate judge to determine whether it was feasible to locate victims of financial wrongdoing).

"for the benefit of investors" and is consistent with the limitations of §78u(d)(5). The parties have not identified authorities revealing what traditional equitable principles govern when, for instance, the wrongdoer's profits cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would indeed be for the benefit of investors as required by §78u(d)(5) and consistent with equitable principles.

B

The SEC additionally has sought to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability, in a manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits. See, *e.g.*, *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (CA2 2014) (holding that a defendant could be forced to disgorge not only what he "personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that he channeled to friends, family, or clients"); *SEC* v. *Clark*, 915 F. 2d 439, 454 (CA9 1990) ("It is well settled that a tipper can be required to disgorge his tippee's profits"); *SEC* v. *Whittemore*, 659 F. 3d 1, 10 (CADC 2011) (approving joint-and-several disgorgement liability where there is a close relationship between the defendants and collaboration in executing the wrongdoing).

That practice could transform any equitable profits-focused remedy into a penalty. Cf. *Marshall*, 15 Wall., at 149. And it runs against the rule to not impose joint liability in favor of holding defendants "liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation." *Belknap*, 161 U. S., at 25–26; see also *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878).

The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. The historic profits remedy thus allows some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.

Here, petitioners were married. 754 Fed. Appx. 505; 262 F. Supp. 3d, at 960–961. The Government introduced evidence that Liu formed business entities and solicited investments, which he misappropriated. *Id.*, at 961. It also presented evidence that Wang held herself out as the president, and a member of the management team, of an entity to which Liu directed misappropriated funds. *Id.*, at 964. Petitioners did not introduce evidence to suggest that one spouse was a mere passive recipient of profits. Nor did they suggest that their finances were not commingled, or that one spouse did not enjoy the fruits of the scheme, or that other circumstances would render a joint-and-several disgorgement order unjust. Cf. *SEC* v. *Hughes Capital Corp.*, 124 F. 3d 449, 456 (CA3 1997) (finding that codefendant spouse was liable for unlawful proceeds where they funded her "lavish lifestyle"). We leave it to the Ninth Circuit on remand to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required.

C

Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804; see also Restatement (Third) §51, Comment *h*, at 216 (reciting the general rule that a defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement). Accordingly, courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5). A rule to the contrary that "make[s] no allowance for the cost and expense of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery." *Tilghman*, 125 U. S., at 145–146; cf. *SEC* v. *Brown*, 658 F. 3d 858, 861 (CA8 2011) (declining to deduct even legitimate expenses like payments to innocent third-party employees and vendors).

The District Court below declined to deduct expenses on the theory that they were incurred for the purposes of furthering an entirely fraudulent scheme. It is true that when the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions" such as for personal services. *Root*, 105 U. S., at 203. But that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains "under another name." *Goodyear*, 9 Wall., at 803. Doing so will ensure that any disgorgement award falls within the limits of equity practice while preventing defendants from profiting from their own wrong. *Root*, 105 U. S., at 207.

Although it is not necessary to set forth more guidance addressing the various circumstances where a defendant's expenses might be considered wholly fraudulent, it suffices to note that some expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme. We leave it to the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying §78u(d)(5).

* * *

For the foregoing reasons, we vacate the judgment below and remand the case to the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE THOMAS, dissenting.

The Court correctly declines to affirm the Ninth Circuit's decision upholding the District Court's disgorgement order, but I disagree with the Court's decision to vacate and remand for the lower courts to "limi[t]" the disgorgement award. *Ante,* at 1. Disgorgement can never be awarded under 15 U. S. C. §78u(d)(5). That statute authorizes the Securities and Exchange Commission (SEC) to seek only "equitable relief that may be appropriate or necessary for the benefit of investors," and disgorgement is not a traditional equitable remedy. Thus, I would reverse the judgment of the Court of Appeals.

I

The Securities Exchange Act of 1934, as amended in 2005, allows the SEC to request "equitable relief" in federal district court against those who violate federal securities laws. §78u(d)(5). According to our usual interpretive convention, "equitable relief" refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as "equitable relief," and, hence, the District Court was not authorized to award it under §78u(d)(5).

A

"This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 3). "Rather, it has read such statutes as constrained by 'the body of law which had been transplanted to this country from the English Court of Chancery' in 1789." *Ibid.* (quoting *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945)). As Justice Story put it, "the settled doctrine of this court is, that the remedies in equity are to be administered . . . according to the practice of courts of equity in [England], as contradistinguished from that of courts of law; subject, of course to the provisions of the acts of congress." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 654 (1832).

We have interpreted other statutes according to this "settled doctrine." For example, we have read the term "equitable relief" in the Employee Retirement Income Security Act of 1974 to refer to "those categories of relief that were typically available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993) (emphasis deleted). We have done the same for the Judiciary Act of 1789, see, *e.g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund*, *Inc.*, 527 U. S. 308, 318–319 (1999), and for provisions in the Bankruptcy Code, see *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5). There is nothing about §78u(d)(5) that counsels departing from this approach.

B

Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.

As an initial matter, it is not even clear what "disgorgement" means. The majority frankly acknowledges its "'"protean character."'" *Ante*, at 7 (quoting *Petrella* v.

Metro-Goldwyn-Mayer, Inc., 572 U. S. 663, 688, n. 1 (2014)). The difficulty of defining this supposedly traditional remedy is the first sign that it is not a historically recognized equitable remedy. In contrast, an accounting for profits, or accounting—a distinct form of relief that the majority groups with disgorgement—has a well-accepted definition: It compels a defendant to account for, and repay to a plaintiff, those profits that belong to the plaintiff in equity. Bray, Fiduciary Remedies, in The Oxford Handbook of Fiduciary Law 449 (E. Criddle, P. Miller, & R. Sitkoff eds. 2019). The definition of disgorgement, after today's decision, is a remedy that compels each defendant to pay his profits (and sometimes, though it is not clear when, all of his codefendants' profits) to a third-party Government agency (which sometimes, though it is not clear when, passes the money on to victims). This remedy has no basis in historical practice.

No published case appears to have used the term "disgorgement" to refer to equitable relief until the 20th century. Even then, the earliest cases use the word in a "nontechnical" sense, Brief for Law Professors as *Amici Curiae* 22, to describe the action a defendant must take when a party is awarded a traditional equitable remedy such as an accounting for profits or an equitable lien.[1] For example, in *Byrd* v. *Mullinix*, 159 Ark. 310, 251 S. W. 871 (1923), the Supreme Court of Arkansas affirmed the imposition of an equitable lien to prevent a debtor from "put[ting] the money in property which was itself beyond the reach of creditors, and to compel its disgorgement," *id.,* at 316–317, 251 S. W., at 872. Likewise, in *Armstrong* v. *Richards*, 128 Fla. 561, 175 So. 340 (1937), the Supreme Court of Florida referred to "the right of the taxpayer to require an accounting from

[1] An equitable lien is imposed on a defendant's property "as security for a claim on the ground that otherwise the former would be unjustly enriched." Restatement of Restitution §161, p. 650 (1936).

and disgorgement by public officers and those in collusion with them," *id.*, at 564, 175 So., at 341. In these cases, the term "disgorgement" colloquially described what a defendant was ordered to do, not the remedy itself.

By the 1960s, published opinions began to use "disgorgement" to refer to a remedy in the administrative context. In *NLRB* v. *Local 176*, 276 F. 2d 583 (CA1 1960), the agency had "applied its . . . remedy of disgorgement of dues, requiring the union to refund to every member who had obtained employment on the Company project the dues which he had paid," *id.*, at 586 (footnote omitted). The court declined to enforce this part of the agency's order, but not because disgorgement was an impermissible form of relief. Instead, it found that, in the circumstances of the case, disgorgement "seem[ed] . . . to be an *ex post facto* penalty." *Ibid.*; see also *NLRB* v. *Local 111*, 278 F. 2d 823, 825 (CA1 1960) (enforcing a disgorgement order from the agency).

By the 1970s, courts started using the term "disgorgement" to describe a judicial remedy in its own right. When the SEC initially sought this kind of relief under the Securities Exchange Act in *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (SDNY 1970), the District Court called it "restitution," *id.,* at 93, and the Court of Appeals called it "[r]estitution of [p]rofits," *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1307 (CA2 1971) (emphasis deleted). Courts soon substituted the label "disgorgement." *SEC* v. *Manor Nursing Centers*, *Inc.*, 458 F. 2d 1082, 1105 (CA2 1972); *SEC* v. *Shapiro*, 349 F. Supp. 46, 55 (SDNY 1972).

The late date of these cases is sufficient reason to reject the argument that disgorgement is a traditional equitable remedy. But it is also telling that, when the SEC began seeking this relief, it did so without any statutory authority. Prior to 2005, the SEC lacked the power even to seek "equitable relief" in cases like this one. See §305(b), 116 Stat. 779 (amending the Securities Exchange Act). The District Court in *Texas Gulf Sulphur* purported to "imply [a] new remed[y]," based on its "inherent equity power" and a belief that "the congressional purpose is effectuated by so doing." 312 F. Supp., at 91. But the sources it cited are dubious. The court relied on *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), a case about implied causes of action that we have since abrogated. See *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001). It also relied on a securities law treatise that advocated for what it called "restitution" but admitted that district courts had no express authority to grant the remedy and that the SEC had never sought this remedy in the past. 3 L. Loss, Securities Regulation 1827–1828 (1961). It is functionally this same unauthorized remedy that the SEC and courts now call "disgorgement." The details have varied over time, but the lineage is clear: Disgorgement is "a relic of the heady days" of courts inserting judicially created relief into statutes. *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring).

Disgorgement as a remedy in its own right is also absent from legal publications until the 20th century. Leading legal dictionaries did not define the term until the turn of the 20th century. See, *e.g.*, Merriam-Webster's Dictionary of Law 143 (1996); Black's Law Dictionary 480 (7th ed. 1999). Nor was disgorgement included in the first Restatement of Restitution, adopted in 1936. The remedy does not appear until the Third Restatement, adopted in 2010, which states that "[r]estitution remedies" that seek "to eliminate profit from wrongdoing . . . are often called 'disgorgement' or 'accounting.'" 2 Restatement (Third) of Restitution and Unjust Enrichment §51(4), p. 203. But "Restatement" is an inapt title for this edition of the treatise. Like many of the modern Restatements, its "authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part). The inclusion of "disgorgement" in the Third Restatement, which the majority cites in support of its holding, *ante*, at 6, represents a "'novel extension'" of equity. *Kansas*, *supra*, at 483 (THOMAS, J., concurring in part and dissenting in part) (quoting Roberts, Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages, 42 Loyola (LA) L. Rev. 131, 134 (2008)).

I acknowledge that this Court has referred to disgorgement as an equitable remedy in some of its prior decisions. See, *e.g.*, *Feltner* v. *Columbia Pictures Television*, *Inc.*, 523 U. S. 340, 352 (1998). But these opinions merely referred to the term in passing without considering the question in depth. The history is clear: Disgorgement is not a form of relief that was available in the English Court of Chancery at the time of the founding.

C

The majority's treatment of disgorgement as an equitable remedy threatens great mischief. The term disgorgement itself invites abuse because it is a word with no fixed meaning. The majority sees "parallels" between accounting and disgorgement, *ante,* at 2, n. 1, but parallels are by definition not the same. Even if they were, the traditional remedy of an accounting—which compels a party to repay profits that belong to a plaintiff—has important conceptual limitations that disgorgement does not. An accounting connotes the relationship between a plaintiff and a defendant. In the words of one scholar, "it is an accounting by A to B." Bray, Fiduciary Remedies, at 454. But disgorgement connotes no relationship and so is not naturally limited to net profits and compensation of victims. It simply "is A disgorging." *Ibid.* Further, the traditional remedy of a constructive trust[2] or an equitable lien requires that the "money or prop-

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[2] A constructive trust compels a defendant "holding title to property . . . to convey it to another on the ground that he would be unjustly enriched

erty identified as belonging in good conscience to the plaintiff . . . clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 213 (2002). Disgorgement reaches further because it has no tracing requirement. By using a word with no history in equity jurisprudence, the SEC and courts have made it possible to circumvent the careful limitations imposed on other equitable remedies.

One need look no further than the SEC's use of disgorgement to see the pitfalls of the majority's acquiescence in its continued use as a remedy. The order in *Texas Gulf Sulphur* did not depart too far from equitable principles. The award was limited to the defendants' net profits and the funds were held in escrow and were at least partly available to compensate victims, 446 F. 2d, at 1307. It did not take long, however, for a district court to order a defendant to turn over both his profits and the investment "income earned on the proceeds." *Manor Nursing Centers*, 458 F. 2d, at 1105. And in the case before us today, just a half century later, disgorgement has expanded even further. The award is not limited to net profits or even money possessed by an individual defendant when it is imposed jointly and severally. See *ante*, at 5. And not only is it not guaranteed to be used to compensate victims, but the imposition of over $26 million in disgorgement and approximately $8 million in civil monetary penalties in this case seems to ensure that victims will be unable to recover anything in their own actions. As long as courts continue to award "disgorgement," both courts and the SEC will continue to have license to expand their own power.

The majority's decision to tame, rather than reject, disgorgement will also cause confusion in administrative prac-

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if he were permitted to retain it." Restatement of Restitution §160, at 640–641.

tice. As the majority explains, the SEC is expressly authorized to impose "'disgorgement'" in its in-house tribunals. *Ante*, at 13 (quoting 15 U. S. C. §77h–1(e)). It is unclear whether the majority's new restrictions on disgorgement will apply to these proceedings as well. If they do not, the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.

More fundamentally, by failing to recognize that the problem is disgorgement itself, the majority undermines our entire system of equity. The majority believes that insistence on the traditional rules of equity is unnecessarily formalistic, *ante,* at 3, n. 1, but the Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was "a precise legal system" with "specific equitable remed[ies]." *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring). "Although courts of equity exercised remedial 'discretion,' that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope." *Trump*, 585 U. S., at ___ (THOMAS, J., concurring) (slip op., at 5). The majority, while imposing some limits, ultimately permits courts to continue expanding equitable remedies. I would simply hold that the phrase "equitable relief" in §78u(d)(5) does not authorize disgorgement.

II

After holding that disgorgement is equitable relief, the majority remands for the lower courts to reconsider the disgorgement order in this case. If the majority is going to accept "disgorgement" as an available remedy, it should at least limit the order to be consistent with the traditional rules of equity. First, the order should be limited to each petitioner's profits. Second, the order should not be imposed jointly and severally. Third, the money paid by petitioners should be used to compensate petitioners' victims.

A

First, the disgorgement order should be limited to "the profits actually made" by each petitioner. *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872); see also *ante*, at 11, 18–20. Defendants in equity traditionally may deduct "allowances . . . for the cost and expense of the business" from the amount of the award. *Root* v. *Railway Co.*, 105 U. S. 189, 215 (1882); see also *Callaghan* v. *Myers*, 128 U. S. 617, 665 (1888); *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139 (1878); *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804 (1870). The rationale behind this rule is that "it is not the function of courts of equity to administer punishment." *Bangor Punta Operations*, *Inc.* v. *Bangor & Aroostook R. Co.*, 417 U. S. 703, 717–718, n. 14 (1974) (internal quotation marks omitted); see also 2 J. Story, Commentaries on Equity Jurisprudence §1494, p. 819 (13th ed. 1886). Here, however, the District Court reasoned that "it would be 'unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place.'" 754 Fed. Appx. 505, 509 (CA9 2018) (quoting *SEC* v. *J. T. Wallenbrock & Assocs.*, 440 F. 3d 1109, 1114 (CA9 2006)). On remand, the lower courts should limit the award to each petitioner's profits.

B

Second, and relatedly, the disgorgement order should not be imposed jointly and severally. The majority analogizes disgorgement to accounting, *ante*, at 6, but this Court has rejected joint and several liability in actions for an accounting. *Elizabeth*, *supra,* at 139–140; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894); *Belknap* v. *Schild*, 161 U. S.

10, 25–26 (1896). The majority instructs the lower courts to determine whether petitioners were "partners in wrongdoing," apparently based on a case about the liability of partners. *Ante,* at 10, 18 (citing *Ambler* v. *Whipple*, 20 Wall. 546 (1874)). But the liability in that case was premised on the law of partnership, and nothing indicates that petitioners here were legal partners. The joint and several order in this case is thus at odds with traditional equitable rules.[3]

C

Finally, the award should be used to compensate victims, not to enrich the Government. Plaintiffs in equity may claim "that which, *ex aequo et bono* [according to what is equitable and good], is theirs, and nothing beyond this." *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854). The money ordered to be paid as disgorgement in no sense belongs to the Government, and the majority cites no authority allowing a Government agency to keep equitable relief for a wrong done to a third party. Requiring the SEC to only "generally" compensate victims, *ante,* at 15, is inconsistent with traditional equitable principles.

Worse still from a practical standpoint, the majority provides almost no guidance to the lower courts about how to resolve this question on remand. Even assuming that disgorgement is "equitable relief" for purposes of §78u(d)(5) and that the Government may sometimes keep the money,

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[3] For its part, respondent cites the joint and several liability in *Jackson* v. *Smith,* 254 U. S. 586, 589 (1921), but the remedy in that case was a constructive trust, see *Smith* v. *Jackson*, 48 App. D. C. 565, 576 (1919). As explained above, there is no tracing requirement in the District Court's order as would be required in a case of constructive trust. *Supra*, at 6–7. The Court also allowed joint and several liability in *Belford* v. *Scribner*, 144 U. S. 488 (1892), a copyright case. But it based its holding on the fact that, under the relevant copyright statute, "both the printer and the publisher are equally liable to the owner of the copyright for an infringement." *Id.*, at 507; see also *Washingtonian Publishing Co.* v. *Pearson*, 140 F. 2d 465, 467 (CADC 1944).

the Court should at least do more to identify the circumstances in which the Government may keep the money. Instead, the Court asks lower courts to improvise a solution. If past is prologue, this uncertainty is sure to create opportunities for the SEC to continue exercising unlawful power.

* * *

I would reverse for the straightforward reason that disgorgement is not "equitable relief" within the meaning of §78u(d)(5). Because the majority acquiesces in the continued use of disgorgement under that statute, I respectfully dissent.

EXHIBIT 3

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

KOKESH *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16–529. Argued April 18, 2017—Decided June 5, 2017

The Securities and Exchange Commission (SEC or Commission) possesses authority to investigate violations of federal securities laws and to commence enforcement actions in federal district court if its investigations uncover evidence of wrongdoing. Initially, the Commission's statutory authority in enforcement actions was limited to seeking an injunction barring future violations. Beginning in the 1970's, federal district courts, at the request of the Commission, began ordering disgorgement in SEC enforcement proceedings. Although Congress has since authorized the Commission to seek monetary civil penalties, the Commission has continued to seek disgorgement. This Court has held that 28 U. S. C. §2462, which establishes a 5-year limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture," applies when the Commission seeks monetary civil penalties. See *Gabelli* v. *SEC*, 568 U. S. 442, 454.

In 2009, the Commission brought an enforcement action, alleging that petitioner Charles Kokesh violated various securities laws by concealing the misappropriation of $34.9 million from four business-development companies from 1995 to 2009. The Commission sought monetary civil penalties, disgorgement, and an injunction barring Kokesh from future violations. After a jury found that Kokesh's actions violated several securities laws, the District Court determined that §2462's 5-year limitations period applied to the monetary civil penalties. With respect to the $34.9 million disgorgement judgment, however, the court concluded that §2462 did not apply because disgorgement is not a "penalty" within the meaning of the statute. The Tenth Circuit affirmed, holding that disgorgement was neither a penalty nor a forfeiture.

Held: Because SEC disgorgement operates as a penalty under §2462, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued. Pp. 5–11.

(a) The definition of "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws," *Huntington* v. *Attrill*, 146 U. S. 657, 667, gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.*, at 668. Second, a pecuniary sanction operates as a penalty if it is sought "for the purpose of punishment, and to deter others from offending in like manner" rather than to compensate victims. *Ibid.* This Court has applied these principles in construing the term "penalty," holding, *e.g.*, that a statute providing a compensatory remedy for a private wrong did not impose a "penalty," *Brady* v. *Daly*, 175 U. S. 148, 154. Pp. 5–7.

(b) The application of these principles here readily demonstrates that SEC disgorgement constitutes a penalty within the meaning of §2462. First, SEC disgorgement is imposed by the courts as a consequence for violating public laws, *i.e.*, a violation committed against the United States rather than an aggrieved individual. Second, SEC disgorgement is imposed for punitive purposes. Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because "deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e]." *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20. Finally, SEC disgorgement is often not compensatory. Disgorged profits are paid to the district courts, which have discretion to determine how the money will be distributed. They may distribute the funds to victims, but no statute commands them to do so. When an individual is made to pay a noncompensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 402. Pp. 7–9.

(c) The Government responds that SEC disgorgement is not punitive but a remedial sanction that operates to restore the status quo. It is not clear, however, that disgorgement simply returns the defendant to the place he would have occupied had he not broken the law. It sometimes exceeds the profits gained as a result of the violation. And, as demonstrated here, SEC disgorgement may be ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off and is therefore punitive. Although disgorgement may serve compensatory goals in some cases, "sanctions frequently serve more than one purpose."

Austin v. *United States*, 509 U. S. 602, 610. Because they "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, *Gabelli*, 568 U. S., at 451–452, disgorgement orders represent a penalty and fall within §2462's 5-year limitations period. Pp. 9–11.

834 F. 3d 1158, reversed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 16–529

CHARLES R. KOKESH, PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 5, 2017]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

A 5-year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U. S. C. §2462. This case presents the question whether §2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. Disgorgement in the securities-enforcement context is a "penalty" within the meaning of §2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.

I

A

After rampant abuses in the securities industry led to the 1929 stock market crash and the Great Depression, Congress enacted a series of laws to ensure that "the highest ethical standards prevail in every facet of the securities industry."[1] *SEC* v. *Capital Gains Research*

[1] Each of these statutes—the Securities Act of 1933, 15 U. S. C. §77a *et seq*.; the Securities Exchange Act of 1934, 15 U. S. C. §78a *et seq*.; the

Bureau, Inc., 375 U. S. 180, 186–187 (1963) (internal quotation marks omitted). The second in the series—the Securities Exchange Act of 1934—established the Securities and Exchange Commission (SEC or Commission) to enforce federal securities laws. Congress granted the Commission power to prescribe "'rules and regulations . . . as necessary or appropriate in the public interest or for the protection of investors.'" *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 728 (1975). In addition to rulemaking, Congress vested the Commission with "broad authority to conduct investigations into possible violations of the federal securities laws." *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U. S. 735, 741 (1984). If an investigation uncovers evidence of wrongdoing, the Commission may initiate enforcement actions in federal district court.

Initially, the only statutory remedy available to the SEC in an enforcement action was an injunction barring future violations of securities laws. See 1 T. Hazen, Law of Securities Regulation §1:37 (7th ed., rev. 2016). In the absence of statutory authorization for monetary remedies, the Commission urged courts to order disgorgement as an exercise of their "inherent equity power to grant relief ancillary to an injunction." *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (SDNY 1970), aff'd in part and rev'd in part, 446 F. 2d 1301 (CA2 1971). Generally, disgorgement is a form of "[r]estitution measured by the defendant's wrongful gain." Restatement (Third) of Restitution and Unjust Enrichment §51, Comment *a*, p. 204

Public Utility Holding Company Act of 1935, 15 U. S. C. §79 *et seq.*; the Trust Indenture Act of 1939, 15 U. S. C. §77aaa *et seq.*; the Investment Company Act of 1940, 15 U. S. C. §80a–1 *et seq.*; and the Investment Advisers Act of 1940, 15 U. S. C. §80b–1 *et seq.*—serves the "fundamental purpose" of "substitut[ing] a philosophy of full disclosure for the philosophy of *caveat emptor* and thus . . . achiev[ing] a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963).

(2010) (Restatement (Third)). Disgorgement requires that the defendant give up "those gains . . . properly attributable to the defendant's interference with the claimant's legally protected rights." *Ibid.* Beginning in the 1970's, courts ordered disgorgement in SEC enforcement proceedings in order to "deprive . . . defendants of their profits in order to remove any monetary reward for violating" securities laws and to "protect the investing public by providing an effective deterrent to future violations." *Texas Gulf*, 312 F. Supp., at 92.

In 1990, as part of the Securities Enforcement Remedies and Penny Stock Reform Act, Congress authorized the Commission to seek monetary civil penalties. 104 Stat. 932, codified at 15 U. S. C. §77t(d). The Act left the Commission with a full panoply of enforcement tools: It may promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and injunctive relief for those violations. In the years since the Act, however, the Commission has continued its practice of seeking disgorgement in enforcement proceedings.

This Court has already held that the 5-year statute of limitations set forth in 28 U. S. C. §2462 applies when the Commission seeks statutory monetary penalties. See *Gabelli* v. *SEC*, 568 U. S. 442, 454 (2013). The question here is whether §2462, which applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," also applies when the SEC seeks disgorgement.

B

Charles Kokesh owned two investment-adviser firms that provided investment advice to business-development companies. In late 2009, the Commission commenced an enforcement action in Federal District Court alleging that between 1995 and 2009, Kokesh, through his firms, misappropriated $34.9 million from four of those development companies. The Commission further alleged that, in order to conceal the misappropriation, Kokesh caused the filing of false and misleading SEC reports and proxy statements. The Commission sought civil monetary penalties, disgorgement, and an injunction barring Kokesh from violating securities laws in the future.

After a 5-day trial, a jury found that Kokesh's actions violated the Investment Company Act of 1940, 15 U. S. C. §80a–36; the Investment Advisers Act of 1940, 15 U. S. C. §§80b–5, 80b–6; and the Securities Exchange Act of 1934, 15 U. S. C. §§78m, 78n. The District Court then turned to the task of imposing penalties sought by the Commission. As to the civil monetary penalties, the District Court determined that §2462's 5-year limitations period precluded any penalties for misappropriation occurring prior to October 27, 2004—that is, five years prior to the date the Commission filed the complaint. App. to Pet. for Cert. 26a. The court ordered Kokesh to pay a civil penalty of $2,354,593, which represented "the amount of funds that [Kokesh] himself received during the limitations period." *Id.*, at 31a–32a. Regarding the Commission's request for a $34.9 million disgorgement judgment—$29.9 million of which resulted from violations outside the limitations period—the court agreed with the Commission that because disgorgement is not a "penalty" within the meaning of §2462, no limitations period applied. The court therefore entered a disgorgement judgment in the amount of $34.9 million and ordered Kokesh to pay an additional $18.1 million in prejudgment interest.

The Court of Appeals for the Tenth Circuit affirmed. 834 F. 3d 1158 (2016). It agreed with the District Court that disgorgement is not a penalty, and further found that disgorgement is not a forfeiture. *Id.*, at 1164–1167. The court thus concluded that the statute of limitations in §2462 does not apply to SEC disgorgement claims.

This Court granted certiorari, 580 U. S. ___ (2017), to resolve disagreement among the Circuits over whether disgorgement claims in SEC proceedings are subject to the 5-year limitations period of §2462.[2]

II

Statutes of limitations "se[t] a fixed date when exposure to the specified Government enforcement efforts en[d]." *Gabelli*, 568 U. S., at 448. Such limits are "'vital to the welfare of society'" and rest on the principle that "'even wrongdoers are entitled to assume that their sins may be forgotten.'" *Id.,* at 449. The statute of limitations at issue here—28 U. S. C. §2462—finds its roots in a law enacted nearly two centuries ago. 568 U. S., at 445. In its current form, §2462 establishes a 5-year limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." This limitations period applies here if SEC disgorgement qualifies as either a fine, penalty, or forfeiture. We hold that SEC disgorgement constitutes a penalty.[3]

A

A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Huntington* v. *Attrill*, 146 U. S. 657, 667 (1892). This definition gives rise to two principles. First, whether a sanction represents a penalty turns

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[2] Compare *SEC* v. *Graham*, 823 F. 3d 1357, 1363 (CA11 2016) (holding that §2462 applies to SEC disgorgement claims), with *Riordan* v. *SEC*, 627 F. 3d 1230, 1234 (CADC 2010) (holding that §2462 does not apply to SEC disgorgement claims).

[3] Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to §2462's limitations period.

in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.*, at 668. Although statutes creating private causes of action against wrongdoers may appear—or even be labeled—penal, in many cases "neither the liability imposed nor the remedy given is strictly penal." *Id.*, at 667. This is because "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Ibid.* Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss. *Id.*, at 668.

The Court has applied these principles in construing the term "penalty." In *Brady* v. *Daly*, 175 U. S. 148 (1899), for example, a playwright sued a defendant in Federal Circuit Court under a statute providing that copyright infringers "'shall be liable for damages . . . not less than one hundred dollars for the first [act of infringement], and fifty dollars for every subsequent performance, as to the court shall appear to be just.'" *Id.,* at 153. The defendant argued that the Circuit Court lacked jurisdiction on the ground that a separate statute vested district courts with exclusive jurisdiction over actions "to recover a penalty." *Id.*, at 152. To determine whether the statutory damages represented a penalty, this Court noted first that the statute provided "for a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him" rather than the public generally, and second, that "the whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person." *Id.*, at 154, 156. By providing a compensatory remedy for a private wrong, the Court held, the statute did not impose a "penalty." *Id.,* at 154.

Similarly, in construing the statutory ancestor of §2462, the Court utilized the same principles. In *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 421–422 (1915), the

Interstate Commerce Commission, a now-defunct federal agency charged with regulating railroads, ordered a railroad company to refund and pay damages to a shipping company for excessive shipping rates. The railroad company argued that the action was barred by Rev. Stat. §1047, Comp. Stat. 1913, §1712 (now 28 U. S. C. §2462), which imposed a 5-year limitations period upon any "'suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.'" 236 U. S., at 423. The Court rejected that argument, reasoning that "the words 'penalty or forfeiture' in [the statute] refer to something imposed in a punitive way for an infraction of a public law." *Ibid*. A penalty, the Court held, does "not include a liability imposed [solely] for the purpose of redressing a private injury." *Ibid*. Because the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a "penalty" within the meaning of the statute of limitations. *Ibid.*; see also *Gabelli*, 568 U. S., at 451–452 ("[P]enalties" in the context of §2462 "go beyond compensation, are intended to punish, and label defendants wrongdoers").

B

Application of the foregoing principles readily demonstrates that SEC disgorgement constitutes a penalty within the meaning of §2462.

First, SEC disgorgement is imposed by the courts as a consequence for violating what we described in *Meeker* as public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution. As the Government concedes, "[w]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." Brief for United States 22. Courts agree. See, *e.g., SEC* v. *Rind*, 991 F. 2d 1486, 1491 (CA9 1993) ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets"); *SEC* v. *Teo*, 746 F. 3d 90, 102 (CA3 2014) ("[T]he SEC pursues [disgorgement] 'independent of the claims of individual investors'" in order to "'promot[e] economic and social policies'").

Second, SEC disgorgement is imposed for punitive purposes. In *Texas Gulf*—one of the first cases requiring disgorgement in SEC proceedings—the court emphasized the need "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations." 312 F. Supp., at 92. In the years since, it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather, courts have consistently held that "[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *SEC* v. *Fischbach Corp.*, 133 F. 3d 170, 175 (CA2 1997); see also *SEC* v. *First Jersey Securities, Inc.*, 101 F. 3d 1450, 1474 (CA2 1996) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws"); *Rind*, 991 F. 2d, at 1491 ("'The deterrent effect of [an SEC] enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits'"). Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because "deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e]." *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979); see also *United States* v. *Bajakajian*, 524 U. S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment").

Finally, in many cases, SEC disgorgement is not compensatory. As courts and the Government have employed the remedy, disgorged profits are paid to the district court, and it is "within the court's discretion to determine how and to whom the money will be distributed." *Fischbach Corp.*, 133 F. 3d, at 175. Courts have required disgorgement "regardless of whether the disgorged funds will be paid to such investors as restitution." *Id.*, at 176; see *id.*, at 175 ("Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal"). Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury. See, *e.g.*, *id.,* at 171 (affirming distribution of disgorged funds to Treasury where "no party before the court was entitled to the funds and . . . the persons who might have equitable claims were too dispersed for feasible identification and payment"); *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (CD Cal. 1983) (ordering disgorgement and directing trustee to disperse funds to victims if "feasible" and to disperse any remaining money to the Treasury). Even though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so. When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 402 (1946) (distinguishing between restitution paid to an aggrieved party and penalties paid to the Government).

SEC disgorgement thus bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate. The 5-year statute of limitations in §2462 therefore applies when the SEC seeks disgorgement.

C

The Government's primary response to all of this is that

SEC disgorgement is not punitive but "remedial" in that it "lessen[s] the effects of a violation" by "'restor[ing] the status quo.'" Brief for Respondent 17. As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation. Thus, for example, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (CA2 2014). Individuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits. *Ibid*; see also *SEC* v. *Warde*, 151 F. 3d 42, 49 (CA2 1998) ("A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper"); *SEC* v. *Clark*, 915 F. 2d 439, 454 (CA9 1990) ("[I]t is well settled that a tipper can be required to disgorge his tippees' profits"). And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. App. to Pet. for Cert. 43a; see Restatement (Third) §51, Comment *h*, at 216 ("As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid"). In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to "prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws." App. to Pet. for Cert. 43a.

True, disgorgement serves compensatory goals in some cases; however, we have emphasized "the fact that sanctions frequently serve more than one purpose." *Austin* v. *United States*, 509 U. S. 602, 610 (1993). "'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.,* at 621; cf. *Bajakajian*, 524 U. S., at 331, n. 6 ("[A] modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part"). Because disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, *Gabelli*, 568 U. S., at 451–452, they represent a penalty and thus fall within the 5-year statute of limitations of §2462.

III

Disgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under §2462. Accordingly, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.

The judgment of the Court of Appeals for the Tenth Circuit is reversed.

It is so ordered.

EXHIBIT 4

Speech

Investor-Focused, Nimble and Vigorous Enforcement at the SEC

Chairman Jay Clayton

Sept. 17, 2020

Perspectives on Oversight, Management and Performance

Introduction

Good afternoon and welcome to a discussion of how we oversee, manage and measure the performance of the SEC's Enforcement program. I will begin with some important acknowledgements.

First, a big thank you to Jill Fisch for her kind introduction. Turning to the Penn community more broadly, a thank you to the Institute for Law & Economics for being our host. Your programming is second to none in the way it synthesizes the analysis of laws, markets and, importantly, outcomes. The ILE is just one of many fine examples of what I think is Penn's greatest strength – pursuing rigorous academic study always with an eye toward societal impact and improvement; just as Penn's founder, Ben Franklin, would have wanted it.

Second, a thank you to our four panelists and a specific shout out to Steve Cutler, who I first met fifteen or so years ago when he was the SEC's Director of Enforcement. When I agreed to take on the role of SEC Chairman, the question of how best to oversee the Enforcement Division became front of mind. While I was fortunate to have more litigation and investigative experience than you would expect from a corporate lawyer, I had not managed an enforcement program of any size, much yet one of over 1400 professionals distributed across 12 offices. Steve set me straight. Speaking my language, he noted that the Division was an established, well-functioning subsidiary with products (i.e., cases) that had a long production cycle and assets (i.e., people) that were fixed and valuable — in other words, attorneys who enjoyed their jobs, knew each other well and were committed to the mission.

Third, a thank you to Stephanie Avakian, who you will hear from in a few moments.[1] Stephanie was the Acting Director of Enforcement when I arrived. I had not previously met her. Many people expressed interest in the Director position. Well, to make a long story short, it was quickly apparent to me that Steve Cutler's description of the Division was correct and, importantly, the well-functioning subsidiary already had an effective and well-respected leader in Stephanie. Here, I'll share an anecdote. A friend who knew Stephanie professionally said to me, "do not interview her if you don't want to hire her." That was unassailably correct advice, but, as a practical matter, unnecessary because, in reality, it was the other way around. Stephanie was interviewing me, on behalf of herself and the career staff of the Division. And, Stephanie, I thank you and your colleagues, for continuing your invaluable service and, in a sense, hiring me.

With that context, I will provide some reflections on the oversight, management and performance of the Enforcement Division and highlight a few examples where the work of the Division has yielded significant, long-term benefits to U.S. investors, including shaping our regulatory agenda and informing our rulemaking.

Establish Broad Principles for Both Action and Evaluation

In managing an organization, there are some fundamental questions. Two of the most important are: (1) What are we trying to accomplish?, and (2) How are we going to measure our performance? Starting with the second question, while the Enforcement Division's traditional statistics were – and continue to be – impressive,[2] it is my view that we should take care not to fall into the mode of managing to the available data. Or, said another way, as in any endeavor, we should guard against allowing the data that is readily available to drive objectives, rather than measures that reflect our core principles. Ultimately, objectives and related metrics should be grounded in an organization's foundational principles.

So, where to start when defining principles? We started by asking, how would a long-term, retail investor want us to allocate our resources? With that lens, we settled on: (1) getting harmed retail investors their money back as promptly as practicable; (2) pursuing matters that will have a lasting, positive impact for investors broadly – e.g., deterring or eliminating widespread inappropriate practices; and (3) instilling confidence in the integrity and fairness of our markets. In each case, with an eye toward our 50 million household-strong retail investor base.

I am pleased to say – through the leadership of Stephanie, Steve Peikin and many of their colleagues – these principles have shaped Division objectives and, to the extent practicable, our performance metrics to the benefit of investors.[3]

Execution – Establish an Environment of Deference, Cooperation and Support

Another fundamental managerial question for organizations is method of execution. Here, I will start by returning to the observation that the Enforcement Division is a people-driven organization – akin to a high-end professional services business.

In my experience, well-functioning professional services organizations have both (1) talented, experienced, and diverse personnel with strong character, as well as a commitment to each other and to a shared mission and (2) an environment where those professionals have a combination of guidance, freedom, and support that enables them to take action and maximize their effectiveness.

Our front line enforcement personnel, by necessity, make tens of thousands of judgments each year. They need to know those judgments will be supported and, if they reach out for advice, it will be freely given and mission-oriented. I committed to Stephanie and Steve that I would defer to, and support them on, how best to promote that type of culture, and they succeeded beyond any reasonable expectation.

Impactful Initiatives

Turning to some specifics in the area of execution, I will note just a few of the Enforcement Division's initiatives and how their work has led to real, lasting impacts for Main Street investors.

First, I want to highlight the work of the Retail Strategy Task Force,[4] including our Teachers and Veterans Initiatives,[5] and our Share Class Selection Disclosure Initiative.[6] One of the questions I always encourage Main Street investors to ask is, "how much of my money is going to work for me, and how much is being used to pay fees and expenses"? Just think for a moment about the cost to a single investor of paying an extra 150 basis points in fees over twenty-five (25) years on $100,000 invested in a retirement account.[7] By one reporter's account, some back of the envelope math gives a difference of over $100,000 in lost gains over that time period for that single investor.[8] Time and again, our teams in our Office of Compliance Inspections and Examinations and our Enforcement Division have worked hard to save investors from paying fees that they did not know about and should not have been charged. For example, our Share Class Selection Disclosure Initiative alone will result in nearly $140 million going back to investors, and it can be expected to save investors that amount many times over going forward.[9]

Second, I am proud of our work in the area of ICOs. To call the ICO activity of late 2016 and 2017 a mess would be kind. I look back on that time as a stark, present day reminder that the behavior identified by the Pecora Commission in the early 1930s — in other words, the combination of fraud, speculation and widespread harm that drove the enactment of the Securities Act and the Exchange Act — can easily return in the absence of a culture of compliance and regulatory vigilance. One study has estimated that the amount raised in token offerings was $7 billion in 2017 and nearly $20 billion in 2018, and that it dropped to $4.1 billion in the first ten months of 2019.[10] Another study estimated that as of mid-2018, 86% of the prior year's leading ICOs were trading below their offering price, with nearly a third of those ICOs having lost substantially all their value.[11] Apparently at the time, intoxicated or distracted by an admittedly powerful technology, many market participants — both investors and, much more concerning, certain market professionals — accepted form over substance and pursued profit over responsibility.

The Commission and the Enforcement Division responded quickly, including through issuing an investigative report confirming the application of the securities laws to the use of blockchain or distributed ledger technology to facilitate capital raising and to offers and sales of digital assets that are securities,[12] followed by the creation of the Cyber Unit.[13] Through a series of measured yet timely actions, the Enforcement Division, working closely with the Division of Corporation Finance, the Division of Investment Management and the Division of Trading and Markets, restored order, while leaving room for distributed ledger and other technologies to drive cost savings and innovation. This would not have been possible but for a culture that supports proactive decision-making and encourages principles-based flexibility. Or as I like to say, being nimble.

Third, and more recently, the Division again demonstrated its nimble nature in response to the effects of COVID-19. Our various Divisions and Offices took an array of prompt, investor- and market function-oriented actions,[14] and the Enforcement Division was no exception. The Division's actions included trading suspensions for three dozen companies. In these cases, immediate action was necessary in light of questions regarding the accuracy and adequacy of information in the marketplace. In a number of these circumstances, the Division followed with enforcement actions against issuers and individuals allegedly engaged in fraud based on COVID-19-related claims, such as preferred access to caches of personal protective equipment and the development of effective COVID-19 tests. Stephanie and Steve also released a statement reminding market participants of the importance of maintaining market integrity and following corporate controls and procedures, especially during times such as these.[15] Good corporate hygiene cannot be overstated, nor can the importance of related controls designed to prevent not only insider trading, but also the appearance of impropriety or misalignment of interests. Just this week I sent Chairman Brad Sherman and Ranking Member Bill Huizenga of the House Financial Services Committee's Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets a letter at Chairman Sherman's request, in which I discussed some specific measures that public companies and their insiders should consider to promote compliance, market integrity and investor confidence, including through a demonstrated commitment to good corporate governance.

As I mentioned at the outset, the impact of the work in these areas and the many other initiatives is not readily apparent in traditional metrics such as number of actions and total monetary relief. Ironically, the faster and more effectively we act, the lower some of these numbers should be. That is one reason, in the area of metrics, I am generally most interested in the combination of money returned to investors (i.e., harm remedied) and money saved by investors (i.e., harm prevented).

A final point on initiatives. We require our registrants to disclose both the good and the bad news and, in that vein, it is appropriate for me to note that not every initiative has been as successful as I would like. Early in my tenure, I took up the personal initiative of focusing on the victims of the R. Allen Stanford fraud. These Main Street investors were defrauded brazenly, in circumstances with multiple indicia of regulatory and institutional protection. Yet, over a decade later, recoveries have been virtually non-existent and lawsuits drag on. I recognize that recoveries have been slowed by the international nature of the fraud – as I often have said, once money leaves our jurisdiction it is very hard to get it back[16] – as well as the complexity of the claims process and other legal proceedings. But by any measure that is way too little and way too long. It is my sincere hope that we both continue to work on behalf of these victims to return as much of their defrauded money as possible and, more generally, evaluate our oversight, inspection and recovery efforts to bolster our ability to combat wrongdoing and act quickly to return funds to harmed investors.[17]

Integration of Enforcement with Our Policy Divisions

The last execution-related matter I will discuss involves the integration of the Enforcement program into the work of our policy Divisions and Offices. Our markets are ever changing, and the financial markets of today are substantially different from those of the early 2000s. This dynamic requires us to retrospectively review and update the implementation of our regulatory framework. Our policy Divisions and Offices have been extremely busy in this regard. During my tenure as Chairman, these Divisions and Offices have advanced over 100 proposed and final rules.[18] Enforcement has been involved in — and improved — many of the key investor-protection initiatives.

For example, with the interests of Main Street investors front of mind, we adopted Regulation Best Interest and Form CRS, which established (1) a new, heightened standard of conduct for broker-dealers when dealing with retail customers and (2) an investor-oriented uniform disclosure form for broker-dealers and investment advisers.[19] The views and experience of Enforcement played an important role in these groundbreaking developments.

In the over-the-counter (OTC) market, where the majority of enforcement cases have involved delinquent filings, the Commission adopted amendments to Rule 15c2-11 to facilitate more current information from OTC issuers and to better protect investors from fraudulent and manipulative schemes using OTC issuers with stale information,[20] again with substantial input from Enforcement.[21]

Soon we will consider amendments to our whistleblower rules designed to make the program more efficient and effective. The program has already benefitted greatly from Stephanie's guidance and I expect the program will continue to do so as we move forward.

The Work of the Commission Continues; Exemplary Leadership is Critical

Human nature being what it is, there is still, as there will always be, work to be done. When I turn over the leadership of the Commission, my goal for the Enforcement Division is that it continues to bring meaningful cases that have a substantial impact on investors and the integrity of our markets.

I am grateful to my predecessor, Chair Mary Jo White, for providing us with that strong, well-functioning, and professional subsidiary that I referenced at the outset. Stephanie and Steve built on this foundation, and the achievements of the Enforcement Division have been impactful and long lasting because of their exemplary leadership. Only leaders with such skills, experiences and steadfast dedication to their staff — with the added bonus of competitive drive and commitment to continued improvement — could have achieved such impressive and meaningful results for investors, particularly in the face of judicial limitations on our authority, a government shutdown and a pandemic.[22]

I will not dwell on those challenges other than to return to the issue of metrics and note that one of the most reliable measures of performance is "how did you handle yourself, and how did you perform, in the face of adversity?" On this metric Steph and Steve, and the Enforcement Division, scored a 12 on a scale of 1 to 10.

I will close with some advice that I hope has similar value to the advice I received almost four years ago: if and when Stephanie departs, I encourage my successor to seek out a Director who will lead, as Stephanie and Steve did for us, by example and through that powerful combination of deference, cooperation and support.

And, with that, I will turn it over to our Director of Enforcement, Stephanie Avakian.

[1] My views are my own, Stephanie's views are hers. Stephanie's remarks are *available* at https://www.sec.gov/news/speech/avakian-protecting-everyday-investors-091720

[2] During my time as Chairman, the Enforcement Division under Stephanie and Steve's leadership has brought over 2,500 enforcement actions, obtained over $11 billion in disgorgement and penalties, and returned over $3 billion to harmed investors.

[3] *See* U.S. Sec. & Exch. Comm'n, Div. of Enforcement, Annual Reports for Fiscal Years 2017, 2018, 2019, *available at* https://www.sec.gov/files/enforcement-annual-report-2017.pdf; https://www.sec.gov/files/enforcement-annual-report-2018.pdf; https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

[4]*See* https://www.sec.gov/news/press-release/2017-176.

[5]*See* https://www.sec.gov/news/press-release/2019-85.

[6] *See* https://www.sec.gov/news/press-release/2019-28; https://www.sec.gov/news/press-release/2019-200; https://www.sec.gov/news/press-release/2020-90.

[7] *See* https://www.wsj.com/articles/teachers-pay-high-fees-for-retirement-funds-unions-are-partly-to-blame-11576684664.

[8] *Id.*

[9] *See* https://www.sec.gov/news/press-release/2020-90.

[10] *See* https://www.pwc.com/ee/et/publications/pub/Strategy&_ICO_STO_Study_Version_Spring_2020.pdf.

[11] *See* https://www.ey.com/Publication/vwLUAssets/ey-study-ico-research/$FILE/ey-study-ico-research.pdf.

[12] *See* https://www.sec.gov/news/press-release/2017-131.

[13] *See* https://www.sec.gov/news/press-release/2017-176.

[14] *See* https://www.sec.gov/sec-coronavirus-covid-19-response for a discussion of the Commission's efforts in response to the effects of COVID-19.

[15] *See* https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity.

[16] *See* https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting.

[17] Under Stephanie and Steve's leadership, our collection efforts have improved, and I have asked staff to examine the claims, collection and distributions processes more generally, including the use of receivers and other third parties, to make our remedial efforts more effective.

[18] Because transparency is central to the effectiveness of an administrative agency, we take great care at the Commission to provide insight to investors, issuers, other market participants, Congress, fellow financial regulators and our staff regarding the Commission's rulemaking activities and priorities. One way we do this is through the semi-annual publication of the Regulatory Flexibility Agenda, which includes rulemakings expected to be accomplished in the near-term (one year) and in the long-term (more than one year). During my tenure, in addition to long-term and other rulemakings, we advanced 23 rulemakings in the 2018 near-term portion of the agenda by the end of that calendar year, or 88% of the items; 35 rulemakings in the 2019 near-term agenda, or nearly 90% of the items; and 35 items to date in the 2020 agenda, or 73% of the items - with more to come this year.

[19] *See* https://www.sec.gov/news/press-release/2019-89. Along with Regulation Best Interest and Form CRS, the Commission also issued related interpretations collectively addressing the quality and transparency of retail investors' relationships with broker-dealers and investment advisers.

[20] *See* https://www.sec.gov/news/press-release/2020-212. I have also directed the staff to evaluate the risks associated with certain broker-dealer activity in connection with omnibus accounts, particularly transactions in low-priced securities with offshore beneficiaries.

[21] And as another example, the Commission, with regular input from the Division of Enforcement, has been working towards the continued goal of implementing a secure Consolidated Audit Trail, which will provide important transparency to our equity and options markets. The implementation of the CAT has been difficult due to a variety of factors, including its initial design and vendor challenges. I am pleased to say that the CAT is now on a much better track and the Commission recently proposed amendments that are intended to ensure a more secure CAT that will operate without the need for sensitive personally identifiable information. *See* https://www.sec.gov/news/public-statement/clayton-kimmel-redfearn-nms-cat-2020-08-21.

[22] *See, e.g.*, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

EXHIBIT 5

U.S. SECURITIES AND
EXCHANGE COMMISSION

Agency Financial Report

FISCAL YEAR 2016

Financial Highlights

This section provides an analysis of the financial position, results of operations, and the underlying causes for significant changes in balances presented in the Securities and Exchange Commission's (SEC) Fiscal Year (FY) 2016 financial statements.

As described further below, the SEC's finances have several main components:

- An annual appropriation from Congress;
- Securities transaction fees, charged in accordance with Section 31 of the Securities Exchange Act, which offset the agency's annual appropriation;
- Securities registration, tender offer, and merger fees (also called filing fees), of which $50 million is deposited into the Reserve Fund each year. The Reserve Fund may provide resources up to $100 million to pay for SEC expenses, and are not subject to annual appropriation or apportionment;
- Disgorgement and penalties ordered and collected from violators of the securities laws, some of which are then returned to harmed investors and the balances are transferred to the Treasury;
- The SEC Investor Protection Fund, which is funded through disgorgement and penalties not distributed to harmed investors, and which is used to make payments to whistleblowers who give tips to aid the SEC's enforcement efforts in certain circumstances, as well as to cover the expenses of the SEC Office of Inspector General's (OIG) Employee Suggestion Program.

Sequestration Order for FY 2016

On March 1, 2013, the President issued the Sequestration Order for FY 2013 which reduced FY 2013 budget authority. As determined by the Office of Management and Budget (OMB), for FY 2016, the sequestration order was applicable to mandatory appropriations, which included the Reserve Fund and the Investor Protection Fund, of the SEC as follows:

RESERVE FUND

The budget authority of $75 million was reduced by 6.8 percent, or $5.1 million.

Rescission for FY 2016

On December 18, 2015, Congress passed the Consolidated Appropriations Act, 2016. Within the appropriation language, a $25 million rescission was applied to the unobligated balance of the Reserve Fund.

Overview of Financial Position

Assets. At September 30, 2016, the SEC's total assets were $11.6 billion, an increase of $196 million, or two percent, over FY 2015.

Fund Balance with Treasury increased slightly at $11 million between October 1, 2015 and September 30, 2016. The maturity of investments in the Investor Protection Fund contributed to the increase.

Accounts Receivable, Net increased by $168 million as a result of increased custodial Disgorgement and Penalty receivables.

Property and Equipment, Net increased by $22 million due to software modernization efforts including the Electronic Data Gathering, Analysis, and Retrieval (EDGAR); the National Examination Program; and the Tips, Complaints, and Referral intake redesign.

Chart 1.3 | FY 2016 Assets by Type

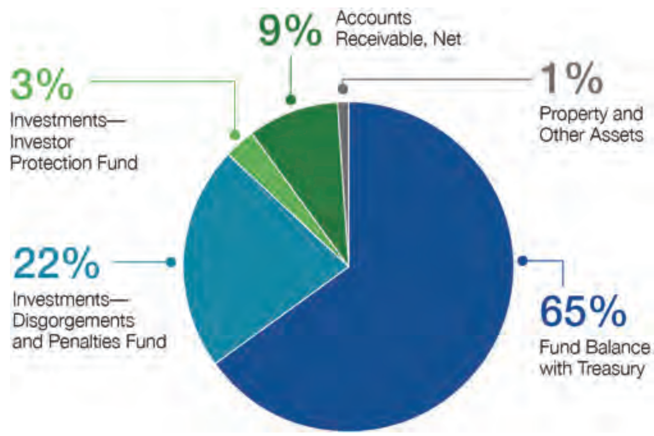


Table 1.2 | Assets as of September 30, 2016 and 2015

(DOLLARS IN MILLIONS)	2016	2015
Fund Balance with Treasury	$ 7,630	$ 7,619
Investments – Disgorgement and Penalty Fund	2,506	2,469
Investments – Investor Protection Fund	350	398
Accounts Receivable, Net	1,028	860
Property and Equipment, Net	126	104
Other Assets	12	6
Total Assets	**$ 11,652**	**$ 11,456**

Liabilities. The SEC's total liabilities were $4 billion as of September 30, 2016, an increase of $242 million or six percent from FY 2015.

For the assets received resulting from enforcement judgments, the SEC recognizes a corresponding liability, which is either custodial if the collections are transferred to the U.S. Treasury General Fund or the Investor Protection Fund, or governmental if the collections are held pending distribution to harmed investors.

The increase of $61 million in Liability for Disgorgement and Penalties is due to an increase in penalties recorded between October 1, 2015 and September 30, 2016.

This increase in Liability for Disgorgement and Penalties was partly offset by a reduction in distributions to harmed investors totaling $34 million and a decrease of accounts receivables deemed collectible, leading to a reduction to its corresponding liability.

The increase in Accounts Payable is partly due to a $23 million accrual recorded for a whistleblower award. There was no material whistleblower award payable recorded at the end of FY 2015.

Liabilities related to business support services and information technology (IT) contracts also increased the Accounts Payable balance in FY 2016.

Ending Net Position. The SEC's net position, comprised of both unexpended appropriations and the cumulative results of operations, decreased by $46 million between September 30, 2016 and 2015.

Chart 1.4 | FY 2016 Liabilities by Type

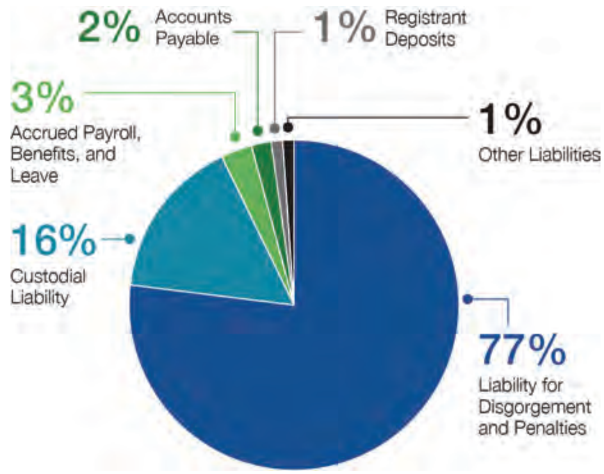


Table 1.3 | Liabilities as of September 30, 2016

(DOLLARS IN MILLIONS)	2016	2015
Liability for Disgorgement and Penalties	$ 3,090	$ 3,029
Custodial Liability	666	500
Accrued Payroll, Benefits, and Leave	115	131
Accounts Payable	81	48
Registrant Deposits	37	35
Other Liabilities	26	30
Total Liabilities	**$ 4,015**	**$ 3,773**

Results of Operations

Earned Revenues. Total earned revenues for the year ended September 30, 2016 decreased by $95 million, or five percent from FY 2015.

The decrease is primarily due to a filing fee rate decrease from $116.20 per million dollars to $100.70 per million dollars.

The Section 31 fee rate was reduced from $22.10 per million to $18.40 per million dollars transacted in February 2015. In February 2016, the Section 31 fee rate increased to $21.80 per million.

Beginning in FY 2012, the majority of the SEC's filing fees is no longer used to partially fund the SEC's operations and are now deposited to the U.S. Treasury General Fund upon collection.

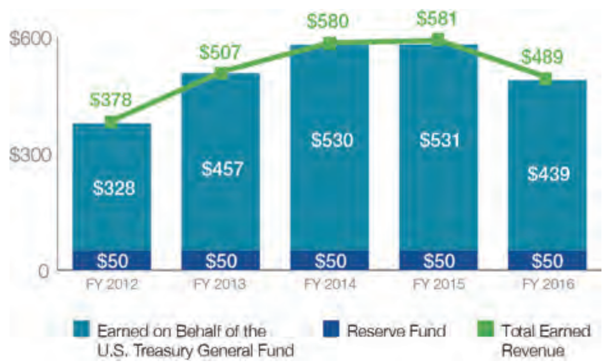
Reserve Fund. Section 991(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) authorized the creation of a Securities and Exchange Commission Reserve Fund (Reserve Fund). Funded from filing fee collections, the SEC can deposit up to $50 million per fiscal year, and the fund cannot hold more than $100 million in total. Excess filing fees are deposited to the U.S. Treasury General Fund.

For the year ended September 30, 2016, filing fee revenues totaled $489 million. Fifty million dollars was deposited into the Reserve Fund, of which $5 million was sequestered. The remainder of $439 million was earned on behalf of the U.S. Treasury General Fund.

Table 1.4 | Earned Revenues
For the years ended September 30, 2016 and 2015

(DOLLARS IN MILLIONS)	2016	2015
Section 31 Securities Transaction Fees	$ 1,486	$ 1,489
Securities Registration, Tender Offer, and Merger Fees (Filing Fees)	489	581
Total Earned Revenues	**$ 1,975**	**$ 2,070**

Chart 1.5 | Reserve Fund Earned Revenue
(DOLLARS IN MILLIONS)



Filing fees deposited to the Reserve Fund can be used to fund the SEC's operations, create budgetary authority, and are reported as a component of Appropriations (Discretionary and Mandatory) on the SEC's Statement of Budgetary Resources. Filing fees deposited to the U.S. Treasury General Fund cannot be used to fund the SEC's operations. These amounts do not create budgetary authority, and are reported as a component of Other Financing Sources: Other on the SEC's Statement of Changes in Net Position.

Reserve Fund resources totaling $53 million were obligated, for the year ended September 30, 2016, for both capitalized and non-capitalized IT related hardware, software, and contracting, leaving a remaining amount of $2 million of available resources.

Program Costs. Total Program Costs were $1.7 billion for the period ended September 30, 2016, an increase of $152 million, or 10 percent, compared to FY 2015. Salary and Benefit Expenses increased more than $115 million, as the result of increased staffing, compensation, and benefits. Other Expenses increased more than $37 million, which includes $27 million in accrued expenses for Whistleblower payments from the SEC's Investor Protection Fund, and $29 million in additional expenses for contractual services.

The SEC had increased expenses in the areas of personnel compensation and benefits which correlates to an increase in the hiring of full-time equivalent employees; IT service contracts and licensing; capitalized and non-capitalized information systems software and hardware; and whistleblower award payments.

Chart 1.6 | FY 2016 Filing Fee Revenue

(DOLLARS IN MILLIONS)

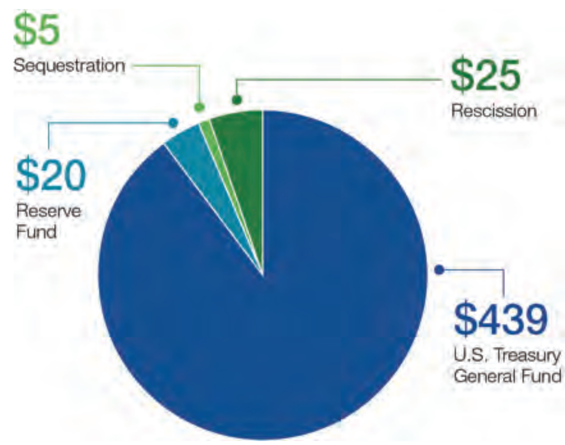
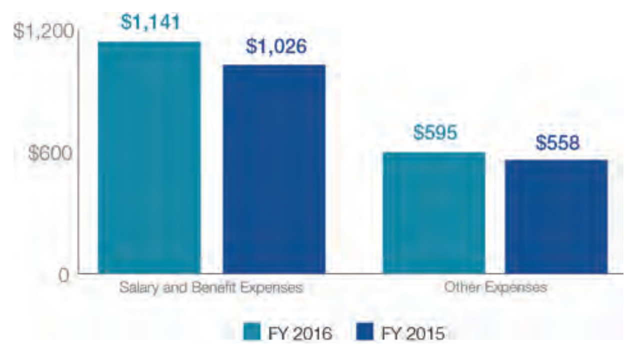


Chart 1.7 | Program Costs

(DOLLARS IN MILLIONS)



Budgetary Resources

In FY 2016, the SEC's total budgetary resources equaled $1.9 billion, a 10 percent increase above FY 2015 of $1.7 billion. Significant components of the SEC's Total Budgetary Resources are described below.

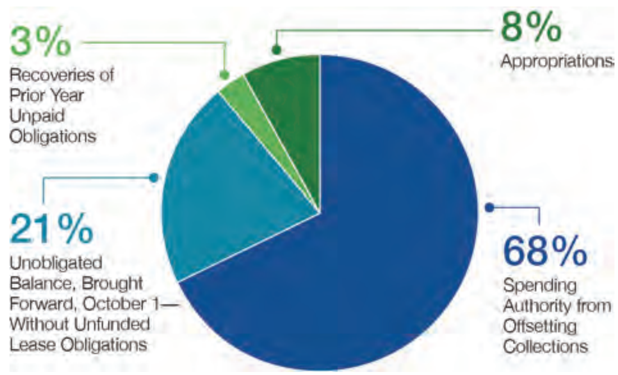
Unobligated Balance Brought Forward—Unfunded Lease Obligations. Unfunded lease obligations totaled $286 million at the beginning of FY 2016. The balance through the year ended September 30, 2016 is $213 million.

Recoveries of Prior Year Obligations. Between September 30, 2016 and 2015, Recoveries of Prior Year Obligations increased $23 million.

In FY 2016, the SEC recovered $19 million from five contracts over $1 million in value, compared to recovering $14 million from five contracts over $1 million in FY 2015.

For obligations ranging between $100 thousand and $1 million in value, the SEC recorded deobligations of $27 million in FY 2016, compared to $15 million in FY 2015.

Chart 1.8 | FY 2016 Sources of Funds



Percentages do not include the Unobligated Balance Brought Forward, October 1—Interpretation for Lease Obligations

Table 1.5 | Total Budgetary Resources
For the years ended September 30, 2016 and 2015

(DOLLARS IN MILLIONS)	2016	2015
Unobligated Balance, Brought Forward, October 1:		
Salaries and Expenses Fund—Without Unfunded Lease Obligations	$ 51	$ 74
Salaries and Expenses Fund—Effect of Change in Legal Interpretation for Lease Obligations	(286)	(358)
Investor Protection Fund	398	408
Total Unobligated Balance, Brought Forward, October 1	163	124
Recoveries of Prior Year Unpaid Obligations	57	34
Other Changes in Unobligated Balance (+ or -)	2	1
Appropriations (Discretionary and Mandatory)		
Salaries and Expenses Fund	129	6
Reserve Fund	50	50
Investor Protection Fund	1	4
Spending Authority from Offsetting Collections	1,477	1,494
Total Budgetary Resources	**$ 1,879**	**$ 1,713**

Spending Authority from Offsetting Collections and Appropriations

During the fiscal year, the SEC receives an appropriation to fund its operations. This appropriation establishes the SEC's new budget authority in its Salaries and Expenses Fund for the fiscal year. The SEC's new budget authority of $1.6 billion was for FY 2016.

The SEC's Section 31 fee collections are used to offset the appropriation, and as the collections come in, the appropriated authority is returned to the U.S. Treasury General Fund.

For the year ended September 30, 2016, appropriations was $129 million. This increase over the FY 2015 balance of $8 million is the result of a larger variance between appropriations legislated and offsetting collections.

In FY 2015, the SEC received a $1.5 billion appropriation, offset by collections of $1.492 billion. In FY 2016, the SEC's appropriation was $1.6 billion, which was offset by $1.476 billion in collections.

Chart 1.9 | Offsetting Collections vs. New Budgetary Authority
Section 31 Exchange and Filing Fees
(DOLLARS IN MILLIONS)

FY 2004 – FY 2011 Offsetting Collections includes transaction fees and filing fees. FY 2012 and beyond, Offsetting Collections includes transaction fees and $50 million of filing fees.

Schedule of Spending

The Schedule of Spending presents more detail about the "Obligations Incurred" line in the Statement of Budgetary Resources. The SEC's obligations are categorized by major program and object class.

To confirm the quality of data reported on USASpending.gov for public transparency, the SEC reconciled obligations reported on the financial statements and spending reported on the website. The majority of obligations included on the financial statements that are not included on USASpending.gov consists of the following: personnel compensation and benefits, leases, interagency agreements, travel, and training. Differences also exist due to the timing of obligations reported in SEC's financial reporting system, as compared to the timing of data transmissions to USASpending.gov from the Federal Procurement Data System.

Chart 1.10 presents the SEC Total Obligations Incurred by Cost Category for FY 2016.

Chart 1.10 | FY 2016 Total Obligations Incurred by Cost Category

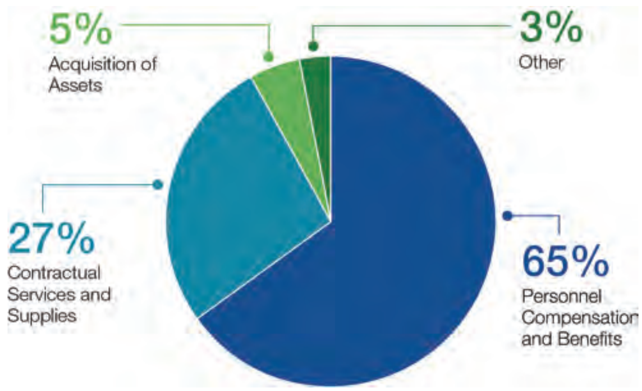


Table 1.6 | Schedule of Spending:
Obligations Incurred by Cost Category
For the years ended September 30, 2016 and 2015

(DOLLARS IN THOUSANDS)	2016	2015
Personnel Compensation and Benefits	$ 1,116	$ 996
Contractual Services and Supplies	461	444
Acquisition of Assets	89	95
Other	58	15
Total Obligations Incurred by Cost Category	**$ 1,724**	**$ 1,550**

ary resources in the future fiscal year when it is either used or paid out to separating employees. In the reconciliation above, it is reported as a component of net cost that will not require resources in the current period.

Another example is depreciation expense. In budgetary reporting, the entire cost of a depreciable asset is recognized in the period when the asset is purchased. However, in financial statement reporting, accrual accounting requires the cost of such assets to be allocated among the reporting periods that represent the estimated useful life of the asset. In the reconciliation above, depreciation is recognized as a "component not requiring or generating resources."

An example of a revenue that does not generate budgetary resources is Non-Entity Filing Fee Revenue, Net. "Non-entity" filing fee revenue is not available to the SEC for use in its operations; accordingly, this revenue does not generate budgetary resources for the SEC.

Note 16. Disgorgement and Penalties

The SEC's non-entity assets include disgorgement, penalties, and interest assessed against securities law violators by the Commission or a federal court. The SEC also recognizes an equal and offsetting liability for these non-entity assets, as discussed in *Note 1.L, Liabilities*.

When the Commission or court issues an order for the SEC to collect disgorgement, penalties, and interest from securities law violators, the SEC establishes an account receivable due to the SEC. Upon collection, the SEC may (a) hold receipts in the Disgorgement and Penalty Deposit Fund as FBWT or Treasury investments pending distribution to harmed investors, (b) deposit receipts in the U.S. Treasury General Fund or, (c) transfer amounts to the Investor Protection Fund. The situations where funds would not be held for distribution to harmed investors arise when the SEC either determines it is not practical to return funds to investors or when court orders expressly state that funds are to be remitted to the U.S. Treasury. The determination as to whether funds not held for distribution to harmed investors will be deposited in the U.S. Treasury or transferred to the Investor Protection Fund is made in accordance with the provisions of the Dodd-Frank Act, and is dependent on the balance in the Investor Protection Fund on the day the amounts are collected. See *Note 1.S, Investor Protection Fund*.

Disbursements related to disgorgements and penalties include distributions to harmed investors, payments to tax authorities, and fees paid to plan administrators and the Bureau of the Fiscal Service. The SEC does not record accounts receivable on its financial statements for any amounts ordered to another government entity such as a court, or a non-governmental entity such as a receiver. See *Note 1.R, Disgorgement and Penalties*, and *Note 2, Entity and Non-Entity Assets*.

In FY 2016, total Disgorgement and Penalties assets of $3.8 billion include $3.1 billion held for distribution to harmed investors and $665 million to be transferred to the U.S. Treasury General Fund. In FY 2015, total Disgorgement and Penalties assets of $3.5 billion included $3.0 billion held for distribution to harmed investors and $500 million to be transferred to the U.S. Treasury General Fund.

At September 30, the net inflows and outflows for FBWT, Investments, and Accounts Receivable related to disgorgement and penalties consisted of the following:

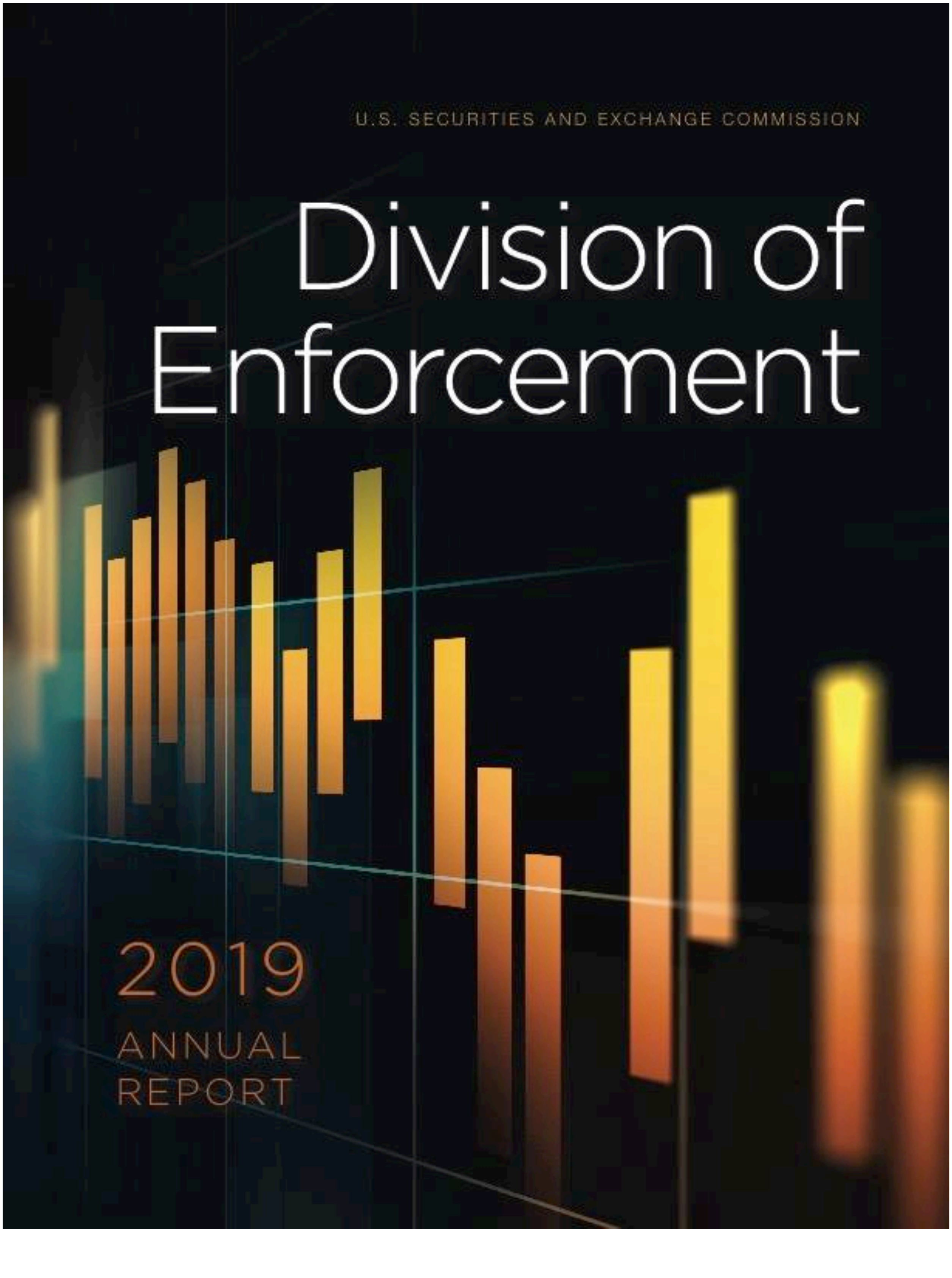
(DOLLARS IN THOUSANDS)	2016	2015
Fund Balance with Treasury:		
Beginning Balance	$ 321,000	$ 933,447
Collections	1,710,192	1,314,854
Purchases and Redemptions of Treasury Securities	(30,204)	(1,107,064)
Disbursements	(37,964)	(56,185)
Transfers and Deposits to the U.S. Treasury General Fund	(1,611,289)	(764,052)
Total Fund Balance with Treasury (Note 2)	351,735	321,000
Cash and Other Monetary Assets:		
Beginning Balance	13	710
Net Activity	14	(697)
Total Cash and Other Monetary Assets (Notes 2 and 4)	27	13
Investments, Net:		
Beginning Balance	2,468,813	1,360,520
Net Activity	37,504	1,108,293
Total Investments, Net (Notes 2 and 5)	2,506,317	2,468,813
Accounts Receivable, Net:		
Beginning Balance	738,705	380,583
Net Activity	157,623	358,122
Total Accounts Receivable, Net (Notes 2 and 6)	896,328	738,705
Total Disgorgement and Penalties	$ 3,754,407	$ 3,528,531

Note 17. Statement of Changes in Net Position

In FY 2016, the negative $450,269 thousand in "Other" Financing Sources reported in the Statement of Changes in Net Position consists of $450,214 thousand in securities registration, tender offer, merger, and other fees from registrants ("filing fees") and $55 thousand in Freedom of Information Act (FOIA) fees collected, or to be collected, for deposit into the U.S. Treasury General Fund.

In FY 2015, the negative $531,222 thousand consists $531,192 thousand in filing fees and $30 thousand in FOIA revenues collected, or to be collected, for deposit into the U.S. Treasury General Fund.

EXHIBIT 6


U.S. SECURITIES AND EXCHANGE COMMISSION
Division of Enforcement
2019
ANNUAL
REPORT

Disgorgement and Penalties Ordered

In Fiscal Year 2019, the Commission obtained significant monetary remedies in enforcement actions. All told, parties in the Commission's actions and proceedings were ordered to pay a total of $3.248 billion in disgorgement of ill-gotten gains. Penalties imposed totaled $1.101 billion. Total monetary relief ordered in Fiscal Year 2019 was $404 million higher than in Fiscal Year 2018, an approximately 10% increase.

Total Money Ordered (in millions)					
	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
Penalties	**$1,101**	$1,439	$832	$1,273	$1,175
Disgorgement	**$3,248**	$2,506	$2,957	$2,809	$3,019
Total	**$4,349**	**$3,945**	**$3,789**	**$4,083**	**$4,194**

Money ordered is also high when viewed in terms of the median case: the median amount of total money ordered in Fiscal Year 2019 was over $550,000.

Median Money Ordered by Action Among Actions with Money Ordered			
Fiscal Year	Total Money Ordered	Penalties Ordered	Disgorgement Ordered
2015	$270,663	$150,000	$532,592
2016	$500,000	$200,000	$574,117
2017	$481,223	$165,000	$641,070
2018	$362,858	$160,000	$454,177
2019	**$554,033**	**$200,000**	**$694,663**

In Fiscal Year 2019, the 5% of cases that involve the largest financial remedies again accounted for the majority of all financial remedies the Commission obtained. The remaining 95% of cases, which constitute the bulk of the Enforcement Division's overall activity, accounted for roughly 30% of monetary remedies. As the below chart demonstrates, this proportion has remained fairly consistent over time.

Total Money Ordered (in millions)										
	FY 2019		FY 2018		FY 2017		FY 2016		FY 2015	
	Total	Pct	Total	Pct	Total	Pct	Total	Pct	Total	Pct
Top 5% Largest Cases	**$3,063**	**70%**	$3,041	77%	$2,537	67%	$2,835	69%	$3,163	75%
Remaining 95% Cases	**$1,286**	**30%**	$904	23%	$1,252	33%	$1,248	31%	$1,032	25%
Total	**$4,349**	**100%**	**$3,945**	**100%**	**$3,789**	**100%**	**$4,083**	**100%**	**$4,195**	**100%**

The Commission returned a substantial amount of money to harmed investors. In Fiscal Year 2019, the Commission returned nearly $1.2 billion to harmed investors.

Money Distributed to Harmed Investors (in millions)				
FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
$1,197	$794	$1,073	$140	$158

A significant portion of the total funds distributed in Fiscal Year 2019 ($902 million) came from four funds, of which three were Fair Funds ($717 million) and one was a disgorgement fund ($185 million). The balance of the funds distributed in Fiscal Year 2019 ($295 million) came from 71 other distribution funds comprised of 28 Fair Funds ($233 million) and 43 Disgorgement Funds ($62 million).

Individual Accountability

Holding individuals accountable is the Commission's most effective method of achieving deterrence. Experience teaches that individual accountability drives behavior and can also broadly impact corporate culture. In Fiscal Year 2019, 69% of the Commission's standalone actions, excluding actions brought as part of the Share Class Initiative (which applied only to entities), involved charges against one or more individuals. This percentage is in line with the results of the last several fiscal years. If the Share Class Initiative actions are included, the percentage of actions involving charges against one or more individuals was 57%. The individuals charged in our actions include those at the top of the corporate hierarchy—such as chief executive officers, chief financial officers, and chief operating officers—as well as gatekeepers such as accountants, auditors, and attorneys.

EXHIBIT 7

Speech

Protecting Everyday Investors and Preserving Market Integrity: The SEC's Division of Enforcement

Stephanie Avakian
Director, Division of Enforcement

Sept. 17, 2020

Remarks at the Institute for Law and Economics, University of Pennsylvania Carey Law School Virtual Program

Introduction

Good afternoon and thank you for inviting me to speak today. And thank you Jay for your kind remarks. Before I begin, I am required to tell you that the views I express here today are my own and do not necessarily represent the views of the Commission or its staff.[1]

So here we are in mid-September – just about two weeks from the end of our fiscal year. This is always a busy time for us and it is also a time when we start to reflect on our efforts over the prior year. Today I am going to look more broadly at the work of the Division of Enforcement since May 2017 when Chairman Clayton joined the agency and appointed Steve Peikin and me as Co-Directors of Enforcement. When we took the job, Chairman Clayton outlined his priorities for the Enforcement program – broadly speaking, to aggressively protect the everyday retail investor and preserve the integrity of our markets. And while he has been our strongest supporter, he left the overall direction and management of the program to us.

So what did we do?

Steve and I approached the job guided by a single, overarching principle – that vigorous enforcement of the federal securities laws is critical to combat wrongdoing, compensate harmed investors, and maintain confidence in the integrity and fairness of our markets. The overall direction of the enforcement program and the everyday decisions on individual cases reflect adherence to that principle throughout our tenure.

We had two main goals, which are two of the three areas I will cover today. First, investigating and recommending to the Commission impactful cases, in areas of importance to the protection of investors, that took into account and addressed new developments in the securities industry and markets. Second, identifying and making strategic changes in how we operate so that we could achieve those results more efficiently and effectively. And, finally, although we didn't realize it at the time, it turned out we would have to try to achieve those goals in the face of substantial, unexpected challenges. And those challenges are the third area I will discuss with you today.

Notwithstanding those challenges, through the mutual support and dedication of the more than 1400 professionals in the Division and the complementary efforts of our colleagues across the Commission, we succeeded in achieving our goals.

Part I – The Cases

From a macro perspective, so far during Chairman Clayton's tenure, the Commission has brought over 2,550 enforcement actions, obtained $14 billion in financial remedies, distributed more than $3.3 billion to harmed investors, and paid awards of more than $350 million to whistleblowers.

We continued to bring the types of cases that the Commission has historically brought against large public companies and financial institutions. This includes cases against Facebook, Tesla, Theranos, Valeant, Volkswagen, Fiat Chrysler, and Mylan, to name a few, as well as cases against many of the world's largest financial institutions – including Wells Fargo, Citigroup, JPMorgan Chase, Barclays, and Merrill Lynch.

The Commission has similarly continued to obtain substantial financial remedies in its enforcement actions. In fiscal year 2019, the Commission obtained financial remedies of $4.3 billion dollars. That is the highest the Commission has ever obtained in a single year – at least since 2002, which is as far back as we reliably track this metric. What's more, I can tell you now that we are going to surpass that amount this fiscal year.

These numbers provide some measurement, but they do not adequately convey the quality, nature, and effectiveness of our efforts. For that, we have to ask questions like: Did we focus on the most serious violations? Did we obtain meaningful punishments that deter unlawful conduct? Did we incapacitate wrongdoers? Did we recoup ill-gotten gains and return money to investors? I am not going to drag you through all of the cases we've brought – we provide this information in the annual report we have published each year. But I am going to discuss a few efforts I think answer those questions and merit highlighting.

Let me start with financial fraud. We put a sharp focus on financial fraud and issuer disclosure. Integrity and accuracy in financial statements and issuer disclosures are critical to the functioning of our capital markets. Over the past three years, the Commission has brought hundreds of enforcement actions involving virtually all aspects of the financial reporting process. These included actions charging entities and individuals with alleged:

- fraudulent accounting practices intended to misrepresent a company's underlying financial condition, as in the Commission's actions against Theranos,[2] Hertz,[3] and Penn West[4] and their former executives;
- intentionally distorted non-GAAP metrics and key performance indicators, as in the Commission's actions against Wells Fargo,[5] Fiat Chrysler,[6] Valeant,[7] and Walgreens;[8]
- misrepresentations or omissions in connection with risk factors, as in the Commission's actions against Facebook[9] and Mylan;[10]
- materially misleading and incomplete disclosures, as in the Commission's actions against Nissan[11] and Volkswagen[12] and their former executives; and
- failures by auditors to uphold their duties as gatekeepers, as in the action against KPMG for improperly obtaining information about PCAOB inspections,[13] as well as in dozens of actions brought against individuals and firms.

We are not the first to focus on financial fraud matters, but I believe our efforts in this space – including some of the important changes in strategy and approach that I'll discuss later – have made foundational changes that will reap benefits in the future.

A second area that merits discussion is our continued focus on misconduct by registrants that negatively impacts the integrity of our markets. These are often complex investigations that require substantial expertise. Some examples include:

- Charges the Commission brought against a number of the world's largest financial institutions, including JP Morgan Chase, Citibank, and Merrill Lynch, for engaging in improper conduct in connection with the "prerelease" of American Depository Receipts. In total, the Commission brought actions against 15 financial institutions and ordered more than $432 million in disgorgement and penalties in connection with this conduct.[14]

- Charges against broker-dealers and investment advisers involving the sale of unsuitable products, including an action against Wells Fargo for failing reasonably to supervise investment advisers and registered representatives who recommended single-inverse ETF investments to retail investors.[15]
- Complex market structure cases, including against Merrill Lynch for misleading customers about how it handled their orders.[16]
- And, cases against exchanges and similar market participants, including a case against the New York Stock Exchange and affiliates for regulatory failures in connection with several disruptive market events,[17] and a case against the Options Clearing Corp. for policy and procedure failures related to financial risk management, operational requirements, and information-systems security.[18]

A third core area has been insider trading. Over the last several years we have gotten even smarter and more sophisticated in how we analyze data to identify and pursue insider trading schemes. Examples range from allegations involving a large international insider trading scheme involving investment bankers and traders,[19] to then-Congressman Christopher Collins tipping his son after receiving confidential information about negative clinical drug trial results,[20] to a scheme by a hacker and multiple traders to hack into the SEC's EDGAR system.[21]

Fourth, is the Foreign Corrupt Practices Act, where we have continued to be very active. A few cases to note include actions against Novartis, after subsidiaries engaged in schemes to make improper payments or provide benefits to healthcare providers in South Korea, Vietnam, and Greece in exchange for prescribing or using certain products;[22] Ericsson for engaging in a large-scale bribery scheme involving the use of sham consultants to secretly funnel money to government officials in multiple countries;[23] and Telia – which is a good example of international cooperation – for offering and paying at least $330 million in bribes to win business in Uzbekistan.[24]

Another traditional enforcement focus is Ponzi schemes and offering frauds. One of the greatest threats to retail investors continues to be those who outright prey on people, including sometimes their own friends, family members, and those in their communities. Even now, having been back in the Division for more than six years, I continue to be shocked by how many and how widespread these schemes are. We aggressively pursue these schemes by filing emergency actions to stop conduct, freeze assets, and appoint receivers to manage the assets, as well as by litigating in bankruptcy court and with receivers to maximize the return to victims.

There are unfortunately way too many of these cases to name, but the largest in recent years was an emergency action against Robert Shapiro and the Woodbridge Group of Companies to halt misconduct and freeze assets in an alleged ongoing Ponzi scheme that raised more than $1.2 billion from more than 8,400 retail investors.[25] Due in part to the Commission's intervention and successful litigation in Bankruptcy Court, we expect that investors will ultimately recover 50% or more of their investments.[26] That is a very meaningful recovery in a case like this.

Let me pivot now for a moment to a new area of focus – initial coin offerings. At the start of our tenure, we found ourselves confronted with the sudden proliferation of these offerings.[27] I do not want to repeat what Chairman Clayton already said on this issue except to express my agreement with his characterization of the Division as nimble in its response to the ICO explosion. One of the more notable cases the Commission filed was an emergency action against Telegram alleging that its unregistered offering of digital tokens violated the federal securities laws. After the court granted the Commission's motion for a preliminary injunction halting the offering,[28] the Commission reached a settlement whereby Telegram agreed to return more than $1.2 billion to investors.[29]

Finally, a critical part of our program continues to be seeking to deter wrongdoing by holding individuals accountable – which we do in roughly 70% of cases over time. We have pursued charges against individuals for misconduct across the spectrum of the securities markets, including registered individuals, executives at all levels of the corporate hierarchy, including CEOs, CFOs and other high-ranking executives, as well as gatekeepers such as accountants, auditors, and attorneys. In many of the cases I mentioned earlier, the Commission acted against

C-suite executives and gatekeepers, including in the Tesla, Theranos, Valeant, Walgreens, and Volkswagen actions, as well as in many other cases.

Part II – New Approaches and Increasing Efficiency and Effectiveness

Next, I would like to discuss ways in which we identified and made changes within the Division. Among other things, we created initiatives to protect retail investors, made changes to increase efficiency, took steps to maximize our use of resources, messaged the benefits of cooperation, and in some cases designed tailored remedies.

Financial Fraud

Our focus on financial fraud and issuer disclosure cases resulted in some significant changes in how we approach identifying and investigating potential misconduct. Our proactive efforts to identify cases has employed a variety of research, approaches, internal and external tools, and other information sets. We routinely look at all public information about an issuer – statements made by a company or its officers, in filings, during investor presentations, in tweets or blogposts; related commentary by others including analysts, shorts, competitors, shareholders – to develop a deep understanding of the company's reporting environment and industry. This is not a low cost investment, but it has provided substantial value in identifying potential financial fraud.

Further, in appropriate cases, we are employing strategies to streamline these investigations in an effort to substantially accelerate the pace of our investigations. This has come through a purposeful effort by our investigative teams to efficiently triage issues, increase staffing, make more targeted requests at the outset, substantively engage early with relevant parties, and leverage cooperation. We have already seen some success in our acceleration efforts and expect to see those successes continue in the near and long term.

Retail Investors

Another area of innovation is our initiatives to protect retail investors. Consistent with the priorities outlined by Chairman Clayton, we focused closely on ways to protect retail investors and return money to those harmed by wrongdoers. We encouraged the staff to think strategically and creatively about areas in which retail investors could be taken advantage of. Folks came up with many ideas that we explored – some of our efforts addressed problems we knew about and others looked for problems we didn't know about. I'll give you two examples.

First is our Share Class Selection Disclosure Initiative. To take on a problem we knew about and had already brought several cases addressing, we created a self-reporting initiative focused on the recurring problem of advisers failing to disclose conflicts of interest associated with the selection of fee-paying mutual fund share classes when a lower- or no-cost share class of the same mutual fund was available. Under the initiative, we agreed to recommend standardized settlement terms for firms that self-reported these failures. Ultimately, this initiative resulted in the SEC ordering nearly 100 investment advisory firms that voluntarily self-reported to the Division to return nearly $140 million to investors.[30]

We also developed a number of targeted initiatives to address conduct affecting vulnerable investor groups. An example is our part of the Commission's Teachers' Initiative that Chairman Clayton referred to earlier. Here we looked for potential issues that we didn't know about in the administration of teacher retirement plans. As part of that effort, we have been examining how third-party administrators and their affiliates choose and recommend investment options. Flowing from that, the Commission recently charged Valic Financial Advisors for failing to disclose that its parent company paid a for-profit company owned by the Florida K-12 teachers' unions to promote Valic's products and services to those teachers.[31] As part of resolving this matter, Valic agreed to cap advisory fees for certain groups of teachers in Valic programs, which will result in significant ongoing savings for thousands of teachers.

Internal Processes

Next, what internal changes did we make to increase efficiency? Two areas of strategic focus where we have made significant improvements are in our Distributions Group and the Whistleblower Program.

Distributing money to harmed investors is a core component of achieving our investor protection mission. We have spent a great deal of resources and energy on supporting and continuing to build our Distributions Group, including by closely evaluating how to create and implement efficiencies in the process. We added resources, including by temporarily detailing staff from other parts of the Division and moving the group into our Trial Unit where it has access to the Unit's resources. Investors have reaped the benefit. Over the last three years, we have put $3.3 billion back into the hands of harmed investors. Indeed, last fiscal year alone, we distributed nearly $1.2 billion. We take great pride in the work of our Distributions team.

We are also very proud of the improvements we have made to Whistleblower Program. This program is critically important to the SEC and to the Enforcement Division. It is important to reward whistleblowers and to do it timely. Since the enactment of the program in 2011, whistleblower tips have resulted in numerous high-quality enforcement actions and whistleblowers have been awarded roughly $520 million. Given the success of this program, we have been flooded with increasing numbers of quality tips as well as with claims for awards. In an effort to further increase our timeliness, we re-evaluated the entire process for considering awards and then implemented changes to make the process substantially more efficient, including by leveraging other resources of the Division. We have already seen a substantial increase in the rate at which whistleblower claims are evaluated and awards are issued. So far this fiscal year, the Commission has made 25 awards totaling approximately $133 million. This represents a more than 100% increase in the number of awards issued in a single year as compared to the next-highest year.

Resource Allocation

Another important area of focus has been resource allocation. We start with the truism that, for every matter we are working on, there is something we are not working on. So we have to select cases that are likely to have the most meaningful impact for investors and the markets. We have tried to bring rigor and discipline to case selection, leaving to the Commission's Office of Compliance, Inspections and Examinations (OCIE) conduct that we felt was more appropriately handled through the exam process. This does not mean that misconduct is going unaddressed – to the contrary, OCIE addresses many problems through the deficiency letter and related process, which can be a more efficient use of the Commission's resources. This has enabled us – the Commission broadly – to cover more ground and more effectively address issues of investor protection and market integrity.

Second, we took steps to use our resources most efficiently and effectively. One example of this is the Share Class Initiative I discussed earlier. Share class cases had been taking us on average 22 ½ months to bring and we had dozens of investigations in the pipeline. The self-reporting approach we developed was designed to fix the problem and quickly get money back to investors. Another example was to issue public statements to the market about areas of concern to the Enforcement Division. Being transparent about our concerns can effectively impact behavior. For example, in 2017, together with OCIE, we issued a public statement urging caution about the potentially unlawful promotion of ICOs by celebrities and others. Almost immediately afterward, the anecdotal evidence we saw suggested a dramatic decline in the number of celebrity endorsements of ICOs. And as recently as six months ago, in response to the market volatility in the wake of COVID-19, we issued a statement emphasizing the importance of maintaining market integrity and following corporate controls and procedures.[32]

Finally, a third thing we did to maximize resource allocation was to try to shorten the amount of time it takes to complete investigations and bring cases. Earlier I mentioned some specific strategies we are using in financial fraud investigations. More broadly, we have been employing strategies to assess facts and make decisions sooner, and to take steps to achieve resolutions more quickly.

And we have achieved tangible success. The Commission brought its action against Elon Musk just seven weeks after the tweet that was the subject of the case.[33] More recently, the Commission charged the co-chair of the unsecured creditors committee in the Neiman Marcus bankruptcy proceedings, alleging that he abused his position on the committee to attempt to benefit a management firm that he founded.[34] The Commission filed its action within five weeks of the alleged misconduct. These are extraordinary examples of where we have moved quickly, but we have also made strides shortening our other investigations[35] and we expect to see more improvement in this regard going forward.

Credit for Cooperation

We have also focused on rewarding and messaging the benefits of cooperation. We recognize the value in providing greater transparency into how the Commission considers and weighs cooperation credit – meaningful cooperation can substantially accelerate an investigation, which is in everyone's interest. We have tried to message more clearly the benefits of cooperation and in a number of instances the Commission has provided that information in its orders. A good illustration of this is a case the Commission brought against PPG Industries. In a settled financial fraud action, the Commission chose not to impose a civil penalty against PPG in recognition of its prompt self-reporting, extensive cooperation, and implementation of remedial measures immediately upon learning of the improper conduct for which it was charged.[36] We recognize the value in communicating such examples of meaningful cooperation and we will continue to look for opportunities to improve our messaging in this area.

Remedies

Finally, I would like to mention our effort to think creatively about appropriate remedies. An example of this is the settlement with Tesla and Elon Musk. One part of the settlement imposed a set of comprehensive undertakings that required Mr. Musk to resign as Chairman and Tesla to add two new independent directors to its board and adopt mandatory controls and procedures to oversee Mr. Musk's public communications about the company.[37] These undertakings addressed the specific risks in the case – the potential harm to investors caused by Mr. Musk's communication practices and a lack of sufficient oversight and control of those communications.

There are a number of other cases with similarly tailored remedies, including the Commission's cases against former Theranos CEO Elizabeth Holmes,[38] the Options Clearing Corporation,[39] and KPMG.[40]

Part III – Success In The Face Of Challenge

So that gives a sense of some of what Steve and I set out to do, that is, investigate and recommend to the Commission impactful cases and second, make strategic changes to our structure and some of the ways we investigate. I am proud of how much we accomplished, and particularly proud of those accomplishments, as I will discuss in a moment, in light of the extraordinary challenges we faced. These include three Supreme Court decisions, a government shutdown, and, of course, a global pandemic. Each of these challenges has required us to adjust to the circumstances – to adapt quickly; to change our thinking; and to find a new path forward.

Lucia v. SEC

In *Lucia v. SEC*, the Supreme Court held that SEC administrative law judges were "officers" pursuant to Article II of the Constitution and needed to be appointed by the president or the head of department – in this case the Commission.[41] The Court also clarified that the appropriate remedy was a new hearing before a different ALJ or the Commission itself.[42] Accordingly, the Commission ordered that respondents in cases that were pending before an ALJ or the Commission on appeal from an ALJ initial decision be provided with the opportunity for a new hearing before an ALJ who had not participated in the matter previously. I cannot stress enough the impact this had on the Division. We had to make decisions about roughly 200 cases that were remanded – 200 returned cases that our investigators and litigators had to turn back to – and some of these cases were more than a decade old. We pulled together a team of experienced trial lawyers to evaluate, triage, and make recommendations regarding each case. Some cases needed to be re-tried by entirely new trial teams who were pulled from active investigations and litigations. As you might imagine, this required significant effort and resource allocation.

Kokesh v. SEC

Let me turn next to *Kokesh*. In *Kokesh v. SEC*, the Supreme Court held that the five-year statute of limitations in 28 USC Section 2462 applies to disgorgement orders sought by the Commission.[43] By our estimate, this caused the

Commission to forgo approximately $1.1 billion dollars in disgorgement in filed cases. It also required us to reevaluate how we addressed disgorgement in active investigations and in settlements and litigation. Again we put together a group from Enforcement and the Office of the General Counsel to consider our overall approach to disgorgement outside the context of a specific case and reevaluate those practices in light of the Supreme Court's discussion. We made a number of changes as a result of this effort across all of the Division's cases – regardless of whether they increased or decreased the amount of disgorgement. *Kokesh* also stated in a footnote that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[44] In the aftermath, we faced a lot of collateral attacks on the Commission's ability to seek disgorgement following *Kokesh.* Ultimately, not a single court ruled against us. The approach that we adopted following *Kokesh* anticipated many aspects of the decision the Court issued two years later, which brings me to the next big decision.

Liu v. SEC

Earlier this year the Supreme Court decided the *Liu* case. First, this was a great decision for us and it underscores what we've asserted from the beginning – that disgorgement is available to the Commission in its enforcement actions. But it also imposed limitations and left some open questions. While the Court held that disgorgement should reflect net profits, it also held that "legitimate" expenses should generally be backed out.[45] The Court also emphasized the importance of returning disgorged funds to harmed investors.[46]

Once again, we are dedicating resources to evaluating the impact of this 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.

Resources (again)

In other challenges, in 2019, after a multi-year hiring freeze, we faced a near complete cessation of activity resulting from the 35-day lapse in appropriations. Of course the effect of the government shutdown was not limited to those 35 days. There was a ripple effect that stalled investigations for much longer than the five weeks we were out of the office. But as soon as we were able, the Enforcement staff made up for lost time.

By the end of that fiscal year, the Commission had filed 862 enforcement actions and obtained $4.3 billion in financial remedies – record financial remedies and a near-record number of enforcement actions. In fact, the Commission was exactly 7 cases shy of filing its highest number of cases in a single year – a number previously reached in a year with a full 365 days and when the Division had roughly 150 more people.

Covid-19

Finally, this past year, we have faced the biggest and most unexpected challenge of all. Since mid-March, the entire Division has been working from home. Like everyone else, we have faced serious concerns about our health and safety and that of our families, and have had to balance our work against additional responsibilities at home. I could not be more impressed with how the staff responded.

We reacted promptly to threats presented by Covid-19, as well as the ensuing dynamic market conditions. Starting in February 2020, the Commission began suspending trading in the securities of companies that claimed to have developed treatments for the coronavirus where there were questions regarding the accuracy and adequacy of information in the marketplace. So far we have suspended trading in 36 issuers, with 24 of those in in March and April alone, followed shortly thereafter by five Covid-19 related fraud actions. In recent months, the suspicious conduct has dropped off dramatically, which can fairly be attributed to the speed with which we acted to address this conduct and which deterred others from repeating it and harming additional investors. Further, we have been inundated with more than 13,000 tips, complaints, and referrals since mid-March – this represents a 64% increase over the same period last year.

More broadly, the Coronavirus Steering Committee that we formed in March continues to coordinate scores of investigations relating to a wide variety of potential misconduct, including microcap fraud, insider trading, and financial fraud and issuer disclosure misconduct. Since mid-March, the Division has opened nearly 150 Covid-related inquiries or investigations.

And of course we have faced significant challenges to our regular portfolio of ongoing investigations and litigations. Many investigations required more time and attention for various reasons, including difficulties stemming from limitations on in-person activity, such as slowed document productions and delays in testimony. Even so, since mid-March, the Commission has filed more than 325 new enforcement actions.

But most impressive is how the staff continued to protect the securities markets from kitchens and living rooms while at the same time being caregivers and teachers and juggling video calls with all manner of chaos in the background. These are unprecedented circumstances and the staff acted in unprecedented ways to respond to all of the challenges we faced. I remain hopeful that all we have done during these most difficult of times will be viewed as a success – an example of what citizens and government should do in a crisis. I could not be more proud of the women and men of the Enforcement Division.

Conclusion

So, back to where I started. As we wrap up this fiscal year, I can say for sure that this year will not look like last year. Or the year before. It can't. We spent half the year enveloped by a pandemic. But what we accomplished was extraordinary. And, from my perspective, the Enforcement Division's response to this crisis is a stark illustration of why statistics can never present a real, full picture of the nature or effectiveness of an enforcement program.

So, as I look back upon these last 3 plus years since I was fortunate enough to be appointed to what I often call the best job in Washington, it is clear to me that we have been and continue to be committed to a strong, aggressive enforcement program that has overcome challenges to do its part to protect investors and maintain fair, orderly, and efficient markets.

Steve and I were fortunate to begin our tenure together on the back of a historically strong enforcement program. Our predecessors left the Division in a great place and we were able to build on their success. The changes Steve and I introduced improved on a good thing and they will leave the Division stronger. But I echo what Chairman Clayton said at the outset – the strength and effectiveness of this enforcement program is a function of the people in it – and I know that they will continue to work tirelessly to protect investors and preserve the integrity of our markets. The Division was strong before we got here and it will remain strong long after we've moved on.

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[1] The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

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[39] *See* Press Release 2019-171, *supra* note 18.

[40] *See* Press Release 2019-95, *supra* note 13.

[41] *See Lucia v. SEC*, 138 S.Ct. 2044, 2055 (2018).

[42] *See id.*

[43] *See Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017).

[44] *Id.* at 1642, n.3.

[45] *See Liu v. SEC*, 140 S.Ct. 1936, 1945-6 (2020).

[46] *See id.* at 1948.