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PRACTICAL IMPLICATIONS OF SUPREME COURT'S DECISION RELATED TO SEC'S DISGORGEMENT REMEDY

In this article on the Supreme Court's recent decision in the Liu v. SEC *case, the authors find significant potential limitations of the SEC's disgorgement remedy and a roadmap for parties to argue for a reduced disgorgement amount. They conclude with discussions of a possible growing role for SEC civil penalties and the implications of the decision for FCPA actions.*

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Disgorgement is the remedy the SEC has traditionally used to obtain alleged illicit gains in enforcement actions against public companies, registered investment advisers, broker dealers, and other market participants. In June 2020, in *Liu v. S.E.C.*, the Supreme Court held that the SEC may continue to seek disgorgement, but only where it does not exceed the defendant's net profits and where it qualifies as equitable relief. The decision answered a question explicitly left open in 2017, in *Kokesh v. S.E.C.*, and preserved the SEC's ability to use disgorgement to obtain alleged illicit gains in enforcement actions. In doing so, the majority discussed the possibility that disgorgement awards may not be an equitable remedy (and thus not allowed under the relevant statute) where courts decline to deduct expenses from the award, impose joint-and-several liability, or fail to return money to investors.[1] Rather than resolve these issues, though, the Court in *Liu* provided some guidance and remanded to the lower court to determine how these principles apply in this case. The precise scope of the limitations to the disgorgement remedy thus remains to be seen and likely will be further defined in future litigation.

Still, *Liu* has immediate practical impact for parties negotiating resolutions with the SEC. In essence, the Court's decision outlines the potential limitations of the disgorgement remedy and provides a roadmap to parties to argue for a reduced disgorgement amount. As detailed below, while these limitations are significant to be sure and provide a sound basis for arguments to reduce disgorgement, parties must recognize that the SEC could respond by simply relying more heavily on its separate power to obtain statutory civil penalties to attempt to obtain financial relief in a different way. This article details the Court's decision in *Liu* and discusses these practical implications for parties attempting to

[1] *Liu v. S.E.C.*, No. 18-1501, 2020 WL 3405845, at *1 (U.S. June 22, 2020).

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