

THE REVIEW OF  
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## SUPREME COURT IMPOSES A FIVE-YEAR STATUTE OF LIMITATIONS ON SEC DISGORGEMENT CLAIMS

*Rejecting the SEC's position, the Supreme Court unanimously holds that disgorgement sought by the Commission is a penalty subject to the federal five-year statute of limitations. The author discusses the background to the case and points to some open issues. He then considers the decision's effect on tolling agreements, the speed of filing, scope of disgorgement, tax treatment, and indemnification/insurance claims.*

By Richard Marshall \*

On June 5, 2017, in a unanimous decision without concurring opinions in which Justice Gorsuch participated, the Supreme Court held that a five-year statute of limitations applies to claims by the SEC for disgorgement. This important decision is the latest in a series of defeats for the SEC on the applicability of the statute of limitations to its enforcement actions. The process began almost 21 years ago and now appears finally to have resolved all of the SEC's efforts to avoid the application of statutes of limitations to its actions.

### BACKGROUND

The first significant development in the application of statute of limitations to SEC actions occurred on June 21, 1996, when the D.C. Circuit unanimously held (with a panel including Justice Ginsburg) that a five-year statute of limitations applies to SEC actions seeking

suspensions or censures.<sup>1</sup> In the *Patricia Johnson* case, the SEC sought to sanction a branch manager for failure to supervise a registered representative in her branch. The SEC filed the action more than five years after the conduct at issue had ceased. Johnson argued that the action was barred by the following statute of limitations:

Except as otherwise provided by an Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.<sup>2</sup>

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<sup>1</sup> *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996).

<sup>2</sup> 28 U.S.C. § 2462.

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